

COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER

TRIAL COURT FILE NUMBER

2401-01422

COURT

COURT OF KING'S BENCH OF ALBERTA

REGISTRY OFFICE:

CALGARY

Clerk's Stamp

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF GRIFFON PARTNERS OPERATION CORPORATION, GRIFFON PARTNERS HOLDING CORPORATION, GRIFFON PARTNERS CAPITAL MANAGEMENT LTD., STELLION LIMITED, 2437801 ALBERTA LTD., 2437799 ALBERTA LTD., 2437815 ALBERTA LTD., and SPICELO LIMITED

APPLICANT

TAMARACK VALLEY ENERGY LTD.

RESPONDENTS

GRIFFON PARTNERS OPERATION CORPORATION, GRIFFON PARTNERS HOLDING CORPORATION, AND GRIFFON PARTNERS CAPITAL MANAGEMENT LTD., STELLION LIMITED, 2437801 ALBERTA LTD., 2437799 ALBERTA LTD., 2437815 ALBERTA LTD. AND SPICELO LIMITED

NOT PARTIES TO THE APPEAL (MONITOR)

ALVAREZ & MARSAL CANADA INC.

NOT PARTIES TO THE APPEAL (PRIMARY LENDERS)

TRAFIGURA CANADA LIMITED AND SIGNAL ALPHA C4 LIMITED

DOCUMENT

APPLICATION BY TAMARACK VALLEY ENERGY LTD. FOR PERMISSION TO APPEAL

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
4200 Bankers Hall West
888-3rd Street SW
Calgary, AB T2P 5C5

Matti Lemmens
Tel: (403) 266 9064
Fax: (403) 266 9034
Counsel for Tamarack Valley Energy Ltd.
File No.: 136603.1015

NOTICE TO THE RESPONDENTS

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Court.

To do so, you must be in Court when the application is heard as shown below:

Date	June __, 2024
Time	_____
Where	_____
Before Whom:	The Honourable Justice _____

Go to the end of this document to see what you can do and when you must do it.

Nature of Application and Relief Sought:

1. The Applicant, Tamarack Valley Energy Ltd. (“**TVE**”), respectfully applies for permission to appeal the decision of the Honourable Justice L.K. Harris dated May 14, 2024, pursuant to sections 13 and 14 of the *Companies’ Creditors Arrangement Act*, RSC 1985 c C-36 (the “**CCAA**”) and Rules 14.5(1)(f), 14.40 and 14.44 of the Alberta *Rules of Court*, Alta Reg 124/2010.
2. TVE notes that this Application for permission to appeal must be filed in order to preserve time, and therefore relies upon the exception established in Practice Direction 4(b) to file its memorandum of argument and other accompanying materials after the filing of this Application.

Grounds for making this Application

3. Tamarack Valley Energy Ltd. (“**TVE**”) is the second subordinate secured creditor of Griffon Partners Operation Corp. (“**GPOC**”) pursuant to a Subordinated Secured Promissory Note in the amount of \$20 million plus interest granted by GPOC in favour of TVE (the “**TVE Promissory Note**”).
4. Signal Alpha C4 Limited and Trafigura Canada Ltd. (collectively, the “**Lenders**”) are the senior secured creditors of GPOC pursuant to a Loan Agreement between the parties dated July 21, 2022, and amended as of August 31, 2022 (collectively, the “**Loan Agreement**”), whereby the Lenders agreed to advance USD\$35,869,565.21.
5. As security for payment of performance of GPOC’s obligations under the Loan Agreement, Spicelo Limited (“**Spicelo**”) and the Lenders entered into a Limited Recourse Guarantee and Securities Pledge Agreement dated July 21, 2022 (the “**Share Pledge**”), pursuant to which Spicelo pledged all of the common shares it holds in Greenfire Resources Ltd. as collateral (the “**Pledged Shares**”) and is absolutely and unconditionally liable to the Lenders for GPOC’s obligations under the Loan Agreement as primary obligor.

6. On August 16, 2023, the Lenders issued Demands for Payment and Notices of Intention to Enforce Security pursuant to section 244 of *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the “**BIA**”) to GPOC, Spicelo, and all other debtors and guarantors in these proceedings (Griffon Partners Holding Corporation, Griffon Partners Capital Management Ltd., Stellion Limited, 2437801 Alberta Ltd., 2437799 Alberta Ltd., 2437815 Alberta Ltd., collectively with GPOC and Spicelo, the “**Debtors**”), demanding payment for the full amount owing under the Loan Agreement by GPOC.
7. On August 25, 2023, the Debtors filed Notices of Intention to Make a Proposal under the BIA (the “**NOI Proceedings**”).
8. On October 18, 2023, an Order was granted by this Honourable Court approving a Sale and Investment Solicitation Process through which GPOC’s assets were to be marketed and sold (the “**SISP**”).
9. The SISP was extended on several occasions without a proposal being put to the Lenders and TVE prior to the expiry of the NOI Proceedings.
10. On February 7, 2024, the NOI Proceedings were continued in the within proceedings under the CCAA, with a view of concluding the SISP and presenting a proposal to the Lenders and TVE.
11. The proceeds from the SISP were insufficient to satisfy the amount owing to the Lenders. However, the Lenders also have recourse to recover the debt owing under the Loan Agreement by realizing upon Spicelo’s Pledged Shares.
12. TVE’s sole source of recovery of the amount owing by GPOC under the Promissory Note is from the proceeds of the SISP. TVE is not a party to any share pledge agreement with Spicelo and does not have any recourse for recovery of amounts owing by GPOC against Spicelo or any other of the Debtors.
13. On March 12, 2024, TVE filed an application seeking an order:
 - a. directing that pursuant to the equitable doctrine of marshalling, the Lenders are required to realize upon the Share Pledge provided by Spicelo in satisfaction of the debt owing by GPOC in priority to the proceeds from the SISP; and
 - b. under the terms of the Share Pledge and at equity, Spicelo does not have a right to subrogate to the Lenders’ security position as against GPOC in priority to TVE (the “**TVE Marshalling Application**”).

14. On March 15, 2024, the Debtors filed a cross-application seeking, *inter alia*, declarations that TVE has no claim against the assets of Spicelo under the doctrine of marshalling and that the Lenders are not required, pursuant to the doctrine of marshalling, to exhaust their remedies under the Share Pledge prior to the Lenders realizing upon any of the proceeds from the SISP (the “**Debtors’ Application**”).

15. On April 12, 2024, the Honourable Justice Harris heard the TVE Marshalling Application and the Debtors’ Application (collectively, the “**Marshalling Applications**”).

16. On May 14, 2024, the Honourable Justice Harris released a written decision granting the Debtors’ Application, holding that TVE has no claim against the assets of Spicelo and the Lenders are not required to exhaust their remedies pursuant to the Share Pledge prior to realizing on the proceeds from the SISP (the “**Marshalling Decision**”). The parties were also directed to agree to costs, failing which they were to provide written submissions to the Court within 60 days.

17. Respectfully, TVE submits that the Honourable Justice Harris erred:

- a. In ignoring, or failing to reference or consider the TVE Marshalling Application in the Marshalling Decision. Rather, only the Debtors’ Application is referenced therein and the Marshalling Decision misapprehends the relief that was sought by TVE;
- b. By incorrectly stating that Spicelo would pay the debts owed by GPOC to Tamarack. Under the doctrine of marshalling, the Lenders would be required to first realize upon the Share Pledge in satisfaction of the debt owing by GPOC in priority to the proceeds from the SISP, with TVE being paid from the remaining SISP proceeds. In the TVE Marshalling Application, TVE did not seek any payment directly from Spicelo, but the Debtors’ Application sought a declaration that TVE had no claim against the assets of Spicelo, which is similar to this finding;
- c. In ignoring, or failing to consider the fact that Spicelo was a primary obligor to the Lenders under the express terms of the Share Pledge and liable to pay the full amount of GPOC’s indebtedness to the Lenders;
- d. In failing to consider the effect of Spicelo’s express waiver of its right of subrogation in the Share Pledge upon the sale or disposition of the equity

securities of GPOC in the course of the within CCAA proceedings on the application of the doctrine of marshalling;

- e. By incorrectly stating that the Lenders took no position in the Marshalling Applications when in fact they expressed support at the hearing before the lower Court for the TVE Marshalling Application and the application of the doctrine of marshalling;
- f. By incorrectly stating that TVE's argument was centered in part on piercing the corporate veil to expose Spicelo's beneficial owner and shareholder, Jonathan Klesch's, involvement in GPOC as a basis for an exception to the single common debtor rule under the doctrine of marshalling. Rather, TVE argued that under the CCAA and *BIA*, Spicelo and GPOC are non-arm's length parties due to their common ownership by Mr. Klesch such that it would be inequitable to allow for Spicelo to be permitted to advance a subrogated claim;
- g. In ignoring or failing to consider the application of the doctrine of equitable subordination to any potential subrogated claim Spicelo may have against GPOC; and
- h. By directing the parties to agree on costs or provide written submissions within 60 days. The Marshalling Applications were argued in the course of the within CCAA proceedings and there should not be any costs awarded to either party.

18. The points in issue are of significance to insolvency law and warrant appellate review. Notably, the Honourable Justice Harris's application of the doctrine of marshalling misinterprets the exception to the single common debtor rule and does not consider the effect of a surety agreeing to be a primary obligor of a principal's debt nor a surety's waiver of its right of subrogation. Further, there is a lack of recent case law from this jurisdiction on the application of the doctrines of marshalling and equitable subordination, and creditors, debtors, sureties, guarantors, and practitioners would benefit from a decision from this Honourable Court on these issues.

19. The points in issue are significant to the parties. To TVE, the effect of the errors made by Honourable Justice Harris result in TVE recovering none of the over \$23 million in secured debt owed to it by GPOC to the substantial benefit of Spicelo, who is not a creditor.

20. TVE's appeal is *prima facie* meritorious. There are serious and arguable grounds of appeal with respect to the numerous errors made by the lower Court.

21. The appeal will not unduly hinder or delay with within CCAA proceedings. The sale of GPOC's equity has been completed, the Lenders have been repaid in full, Alvarez & Marsal Canada Inc. has been discharged as monitor of the other Debtors, 2437801 Alberta Ltd., 2437799 Alberta Ltd., 2437815 Alberta Ltd. and Stellion Limited, and the only substantive extant issue in these CCAA proceedings is with respect to the application of the equitable doctrines of marshalling and subrogation.

22. Such other grounds as counsel may advise and this Honourable Court may permit.

Material or evidence to be relied on:

23. The Reasons for Decision of the Honourable Justice L.K. Harris, issued on May 14, 2024 (2024 ABKB 277);

24. The TVE Marshalling Application materials before the Honourable Justice Harris filed in Court of King's Bench of Alberta Action Nos. 25-2979735, B201-979735 and 2401-01422;

25. The Affidavit of Kira Lyseng, sworn on May 23, 2024; and

26. Such further and other material as counsel may rely upon and this Court may permit.

Applicable rules:

27. Parts 1 and 14 of the *Alberta Rules of Court*, Alta Reg 124/2010.

28. Such further and other rules as counsel may advise and this Honourable Court may rely upon.

Applicable Acts and regulations:

29. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended, ss. 13 and 14.

30. Such further and other Acts and regulations as counsel may advise and this Honourable Court may permit.

Any irregularity complained of or objection relied on:

31. None.

How the application is proposed to be heard or considered:

32. By WebEx or in person, in accordance with the directions of the Court of Appeal.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.