

Model CCAA Initial Order

EXPLANATORY NOTES

Please Note: *These Explanatory Notes have not yet been revised to reflect amendments to the Companies' Creditors Arrangement Act that became effective in September of 2009. Some of the commentary in these Explanatory Notes may have been superseded by those statutory amendments, or may no longer be accurate due to those statutory amendments.*

[1] Section 11(1) of the CCAA provides for notice of an application to be given. CCAA orders may be sought on notice to affected parties, if this is possible. Applications may be made without notice "as [the court] may see fit". Recent British Columbia cases have commented on the appropriateness of bringing on such applications without notice: *Re Encore Developments Ltd.* 2008 BCSC 13 and *Re Marine Drive Properties Ltd.* 2009 BCSC 145.

[2] Paragraphs 5 and 6 were separated to make it clear that only very limited payments may be made on account of pre-filing accruals and expenses. The Petitioner may consider seeking authority to make other payments during the stay, such as an amendment to paragraph 6 allowing certain payments to creditors, including critical supplier payments, on the following terms:

"..... with the written consent of the Monitor:

- (i) pay the entire amount of its obligations to any creditor if the amount of such obligations, as agreed between the Petitioner and the creditor, is \$ _____ or less as at the Filing Date;
- (ii) pay \$ _____ to any other creditor to which the outstanding obligations of the Petitioner are greater than \$ _____ as at the Filing Date, provided such creditor agrees to accept that amount in full satisfaction of all obligations of the Petitioner to such creditor as at the Filing Date;
- (iii) pay amounts owing to creditors who hold possessory or statutory liens against any asset of the Petitioner where the value of such asset exceeds the amount of the possessory or statutory liens or where the asset is deemed critical by the Petitioner and the Monitor to the business operations of the Petitioner;
- (iv) pay an amount not exceeding \$ _____ to a supplier deemed to be critical to the ongoing operations of the Petitioner."

[3] The Petitioner may wish to specifically apply to pay severance pay outstanding as at the Filing Date.

[4] The Petitioner may wish to consider a limit on this prohibition to allow for flexibility: "... provided that any capital expenditure exceeding \$ _____ shall be approved by the Monitor."

[5] The definition of Wages in paragraph 5(a) is intended to allow payment of these amounts even if owed prior to the Filing Date in recognition of the fact that Wages are paid at the end of a stub period and that continued employment is critical to the ongoing operations of the Petitioner. The extension of the payment beyond Wages in this paragraph is intended to address (a) protection of directors and officers from statutory claims and (b) that Section 18.2 of the CCAA provides for the payment of some of these amounts in any event in a restructuring. It is anticipated that the magnitude of such obligations will be brought to the attention of the Court if significant.

[6] The model order has adopted what BCMIOC believes is a clearer and simpler approach to real property leases. To avoid confusion and interpretation difficulties, the order now provides that the Petitioner either delivers a written notice of repudiation to the Landlord (in which case certain events follow), or it does not (in which case the Petitioner continues to pay rent).

In _____, 2009, BCMIOC recommended the following amendments to the model CCAA Initial Order:

- Paragraph 8 was amended to stipulate that rent is payable twice-monthly in equal instalments, on the first and fifteen of each month. Previously, it was payable "bi-weekly", which caused unnecessary calculations and stub periods (since most leases provide for monthly rent);
- Paragraph 8 was also amended to specifically require the payment of rent (in advance) for the notice period pending a repudiation. As well, the Committee attempted to clarify that rent does not have to be paid twice for the same period;
- Paragraph 12(b)(iv) now specifies that the whole (but not part) of any leased premises can be abandoned. As well, it now provides for alternate notice periods, since the seven days previously stipulated was intended as a minimum, and not a "default". The Court of course can determine whatever period it deems appropriate;
- Former paragraph 15 was deleted in its entirety. It had permitted for disposition of Property from leased premises "notwithstanding the terms of any leases". The Committee believes that the deletion of this paragraph will result in the related issues being dealt with by negotiation, and if necessary by the Court on the basis of specific materials (and with notice to affected parties); and
- A new paragraph 44 was added, to clarify that the Charges created by the Order are not a mechanism whereby (for example) real property leasehold interests can be attached and assigned by a holder of a Charge.

In addition, Counsel may wish to address specific situations involving landlords where security deposits or other security (such as letters of credit) are held.

[7] Counsel may wish to consider adding a provision allowing the granting of PMSI security after the Filing Date.

[8] In keeping with the underlying philosophy of the Model Order, this provision contains a succinct stay provision without the extensive additional provisions found in previous CCAA initial orders. Nevertheless, the intention is to encapsulate the very broad stay provisions found in those previous orders and is, in no way, intended to restrict the breadth of the stay that will typically be granted on an initial application.

In particular, this provision clarifies that the stay is not intended to, for example, prevent a secured creditor from filing a financing statement in the Personal Property Registry since such a filing does not normally affect the Petitioner's ability to restructure. If a case can be made out that in a particular fact pattern it does, then the Model Order can be amended based on those facts. Some lien proceedings are commenced by filing a writ and some claims against the Petitioner may be subject to a limitation issue. BCMIOC was of the view that there is no harm in allowing these proceedings to be commenced provided no further steps are taken.

[9] In addition, counsel should consider clauses dealing with Section 81.1 and 81.2 of the BIA, as follows:

Re 81.1: "Notwithstanding anything to the contrary herein, if the Petitioner subsequently becomes bankrupt or a receiver is appointed in respect of the Petitioner within the meaning of section 243(2) of the BIA, the period between the date of this Order and the day on which the Stay Period is terminated shall not be counted in determining the 30-day period referred to in section 81.1 of the BIA."

Re 81.2: "Notwithstanding anything to the contrary herein, if the Petitioner subsequently becomes bankrupt or a receiver is appointed in respect of the Petitioner within the meaning of section 243(2) of the BIA, the period between the date of this Order and the day on which the Stay Period is terminated shall not be counted in determining the 15-day and 30-day periods referred to in section 81.2 of the BIA."

[10] The Petitioner may wish to consider whether an application should be made relating to the ongoing entitlement/benefit of any applicable volume rebates or discounts based upon volumes supplied during the period prior to the Filing Date.

[11] Counsel should be aware that the provisions relating to Directors/Officers/Employees Indemnification and Charge may not be appropriate in all circumstances.

[12] Counsel should be aware that the provision exempting the Monitor in situations except for gross negligence may not be appropriate in all circumstances.

[13] Counsel should be aware that the provision allowing for an Administration Charge in favour of the Petitioner's counsel may not be appropriate in all circumstances.

[14] In accordance with existing jurisprudence, the imposition of a DIP Charge at the time of the Initial Order will be rare. In those circumstances, or in any Comeback Order, these provisions may be appropriate:

"DIP CHARGE

THIS COURT ORDERS that the Petitioner is hereby authorized and empowered, with the consent of the Monitor, to obtain and borrow under a credit facility (the "DIP Facility") from [DIP LENDER'S NAME] (the "DIP Lender") in order to finance the Petitioner's working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed \$ [REDACTED] unless permitted by further Order of this Court.

THIS COURT ORDERS that the DIP Facility shall be on the terms and subject to the conditions set forth in the commitment letter between the Petitioner and the DIP Lender dated as of [DATE] (the "Commitment Letter"), filed as Exhibit "[REDACTED]" to the Affidavit # [REDACTED] of [REDACTED].

THIS COURT ORDERS that the Petitioner is hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "DIP Documents"), as are contemplated by the Commitment Letter or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Petitioner is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the Commitment Letter and the DIP Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

THIS COURT ORDERS that the DIP Lender shall be entitled to the benefits of, and is hereby granted, a charge (the "DIP Lender's Charge") on the Property, which charge shall not exceed the aggregate amount owed to the DIP Lender under the DIP Documents. The DIP Lender's Charge shall have the priority set out in paragraphs [REDACTED] and [REDACTED] hereof.

THIS COURT ORDERS that, notwithstanding any other provision of this Order:

- (a) the DIP Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or any of the DIP Documents;

- (b) upon the occurrence of an event of default under the DIP Documents or the DIP Lender's Charge, the DIP Lender, upon [REDACTED] days' notice to the Petitioner and the Monitor, may exercise any and all of its rights and remedies against the Petitioner or the Property under or pursuant to the Commitment Letter, DIP Documents and the DIP Lender's Charge, including without limitation, to cease making advances to the Petitioner and set off and/or consolidate any amounts owing by the DIP Lender to the Petitioner against the obligations of the Petitioner to the DIP Lender under the Commitment Letter, the DIP Documents or the DIP Lender's Charge, to make demand, accelerate payment and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Petitioner and for the appointment of a trustee in bankruptcy of the Petitioner and, for greater certainty, upon the occurrence of an event of default under the terms of the DIP Documents, the DIP Lender shall be entitled to seize and retain proceeds from the sale of the Property and the cash flow of the Petitioner to repay amounts owing to the DIP Lender in accordance with the DIP Documents and the DIP Lender's Charge, but subject to the priorities as set out in paragraphs [REDACTED] and [REDACTED] of this Order; and
- (c) the foregoing rights and remedies of the DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Petitioner or the Property.

THIS COURT ORDERS AND DECLARES that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Petitioner under the CCAA, or any proposal filed by the Petitioner under the BIA.

[15] The priority of the Administration Charge may be subject to negotiation between those entitled to the Charges and any secured creditors, including the Lender. The results of those negotiations may be incorporated in the Initial Order as the parties see fit.

[16] *The Crown Proceeding Act*, R.S.B.C. 1996, c. 89, s. 8 provides for service on the British Columbia Crown, as follows:

“A document to be served on the government

- (a) must be served on the Attorney General at the Ministry of the Attorney General in the City of Victoria, and
- (b) is sufficiently served if
 - (i) left there during office hours with a solicitor on the staff of the Attorney General at Victoria, or

(ii) mailed by registered mail to the Deputy Attorney General at Victoria.

A similar provision relating to the federal Crown is found at s. 23(2) of the *Crown Liability and Proceeding Act*, R.S. 1985, c. C-50, which provides for service on the Deputy Attorney General of Canada or the chief executive officer of the agency in whose name the proceedings are taken, as the case may be. The Federal Crown requests that service of documents be by delivery to Department of Justice, 900 - 840 Howe Street, Vancouver, B.C. V6Z 2S9.

[17] Counsel should be aware that the final form of the Order may be modified before entry at the discretion of the Chambers Judge.

[18] For a provision of this or any subsequent order in these proceedings to make any provincial law inapplicable or inoperative, notice must be given under s. 8 of the *Constitutional Question Act* R.S.B.C. 1996, c. 68. If notice is not given, the provision could later be challenged and set aside.