

**Amended Explanatory Notes for Long Form CCAA Order dated November 18, 2008
and Short Form CCAA Order dated September 12, 2006**

The Standard Form Template CCAA First-Day Orders

These notes are to be read in conjunction with the standard form template *Companies' Creditors Arrangement Act* ("CCAA") orders developed by the model order subcommittee (the "Committee") of the Commercial List Users' Committee of the Ontario Superior Court of Justice (the "Users' Committee"). These notes apply to both the "Short" form of CCAA Initial Order, and the "Long" form. The main differences between the Short and Long forms are noted below.

Introduction

The Committee previously developed a standard form template receivership order, which has been widely used in Ontario and has been adopted in many respects by other Canadian jurisdictions. Explanatory Notes with respect to the standard form template receivership order are also available on the Ontario Superior Court Commercial List website at "ontariocourts.on.ca/superior_court_justice/commercial", and provide more detail as to the theory and approach taken by the Committee in developing that standard form order.

The theory and approach behind the CCAA orders is the same, that is, to give the Courts and practitioners a guide for first-day or initial CCAA orders, while recognizing that such orders can and must be tailored to suit the circumstances of the case before the Court.

The Committee also notes, as it did in the explanatory notes for the standard form template receivership order, that the process of developing standard form template orders is a dynamic one. These standard form orders will be reviewed from time to time to ensure that they keep pace with legislative and practice developments. The Committee invites comments with respect to any of the standard form orders, which comments can be directed to any member of the Committee, as listed at the end of these notes.

Despite the proliferation of cross-border proceedings in recent years, the Committee decided not to include specific clauses for recognition of concurrent proceedings under a foreign statute, such as Chapter 11 of the *U.S. Bankruptcy Code*. Rather, practitioners who seek approval or recognition of a foreign proceeding (and any related court-to-court communication guidelines or protocols) are encouraged to add the necessary provisions to the appropriate form of model order and bring the changes to the attention of the presiding judge. If it is necessary to have the Order recognized in a foreign jurisdiction, a clause should be added authorizing the Monitor to act as the Applicant's "foreign representative" in any such jurisdiction.

The Committee has also taken care to ensure that the provisions of the standard form template CCAA orders are as consistent as possible with each other, and with similar provisions in the standard form template receivership order. Accordingly, many of the provisions related to service, stays of proceedings, notices, etcetera are identical, or at least similar in many respects – both as between the receivership order and the CCAA orders, and as between the two CCAA orders.

The Committee received numerous comments on the model order from representatives of the Office of the Attorney-General (Ontario) and the Department of Justice (collectively, the

"Crown") with respect to the impact of the stay of proceedings and restructuring provisions on various aspects of legislative and regulatory authority. In reviewing the comments, the Committee felt that the specific amendments requested by the Crown were not appropriate for a model order given that different regulatory regimes and legislative schemes come into play depending on the nature of the Applicant's business. In addition, the Committee felt that most of the concerns expressed by the Crown were addressed by the language included in paragraph 10 (short form) and paragraph 15 (long form) which each create a carve-out from the stay of proceedings with respect to compliance with statutory or regulatory provisions relating to health, safety or the environment. The Committee does suggest, as recommended by the Crown, that parties seeking relief under the CCAA ensure that proper notice of the application is delivered to representatives of the Office of the Attorney-General (Ontario) and Department of Justice (Canada) where it is appropriate to do so. Once the Crown has notice of the proceedings, they may seek specific relief with respect to legislative or regulatory aspects of a particular proceeding if needed.

In an effort to assist the profession, the members of the Committee felt that it would be useful to identify some of the issues that were discussed during the process of creating the standard form template CCAA orders. What follows therefore is a discussion of substantive and other legal issues but in no way reflects any determination of the Committee on any of these issues. In fact, in keeping with the determination that standard form template orders would not resolve substantive issues, the Committee expressly refrained from seeking to resolve issues that ought properly be heard in Court.

The "Short" and "Long" Forms of CCAA Initial Orders

The Committee started with the premise that first-day CCAA orders should be somewhat minimalistic in terms of the substantive rights altered on that first day, especially in cases where little or no notice of the first hearing is given. Initially, the Committee attempted to draft a "lights-on" type of order, of the nature referred to by Justice Blair in *Re Royal Oak Mines Inc.* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div.). However, a consensus quickly developed that some provisions (such as basic DIP financing and a charge in favour of directors and officers) might typically be part of even the shorter form of a first-day order, and accordingly the Committee included these types of provisions in the "Short" form or order. As a result, the "Short" order is in reality not that brief.

The main difference between the two forms of orders is that the "Short" form of CCAA Initial Order does not contain the restructuring powers and some of the corresponding powers and duties of the Monitor found in the "Long" form. These restructuring powers are quite intrusive and alter substantive legal rights; the Committee's view is therefore that in cases where no notice, or short notice, of the initial hearing is given, the "Short" form of order should be sought with a date set for a further hearing to obtain additional substantive relief, which can take place on ample notice to affected parties such as landlords.

Clause by Clause Review of the Standard Form Template CCAA Orders

Parties, Recitals and Service

The Committee assumes that both forms of CCAA orders will be sought on notice to affected parties, if this is possible. Where service is not possible as a result of constraints

imposed on public companies, or due to other valid reasons, then the Committee is of the view that the "Short" form of order is the appropriate form to be sought at the first-day hearing. As with the standard form template receivership order, these CCAA orders work on the assumption that the identities and the appearance or non-appearance of parties served with notice of the application are included in the draft order requested, as required by the Ontario *Rules of Civil Procedure*.

Paragraph 3 – Further Hearing / Plan of Arrangement

The Short form of order calls for a further hearing to be held within the initial stay period, and suggests that parties should receive the Applicant's materials and the Monitor's materials no less than five days prior to this 'comeback' hearing.

Since the Long form of order assumes appropriate notice prior to the initial hearing, paragraph 3 of the Long form jumps forward to the Plan of Arrangement phase, by permitting the Applicant to file a Plan.

Debtor in Possession - Paragraphs 4 to 8 (Short order) and 4 to 10 (Long order)

Most of these paragraphs are similar in each of the two CCAA orders. They authorize the Applicant to remain in possession of its assets, to continue its business, to continue the employment of its employees, and to continue and supplement its advisors as necessary in order to move forward in the CCAA process.

The Long form of order contains (in paragraph 5) a "central cash management" system, which might be necessary where the Applicant carries on business in common with other related companies, whether or not they are also Applicants. As noted in this provision, a "central cash management" system may alter substantive rights inasmuch as it may blur the separation of the affairs of various corporate entities. Therefore, it is (a) to be used with caution, (b) where possible, only sought on notice to affected parties, and (c) to be fully described in the affidavit filed in support of the order.

Three paragraphs in each order deal first with permitted payments of liabilities whether incurred *before or after* the making of the initial order, and second with the payment of liabilities incurred only *after* the making of the initial order. The category of permitted payments for pre-filing liabilities is intentionally limited, on the general theory (expressed in paragraph 8 of the Short order and paragraph 10 of the Long order) that all pre-filing payments should be treated equally pending the filing and approval of a Plan – which usually means that payments regarding pre-filing liabilities are suspended until the Plan is approved, and that such payments are then made only in accordance with an approved Plan. These forms of CCAA orders permit payment of some pre-filing liabilities simply to avoid the administrative issues which would otherwise arise from the halting of payments which relate to 'stub periods' for regular and frequent payments such as wages. The Committee discussed the need to have a clause allowing the payment of pre-filing "critical" supplier accounts, either with a cap or some form of Monitor approval (or both). The Committee decided that the authorization to pay specific pre-filing creditors should be addressed on a case-by-case basis and that it would be appropriate for such a clause to be highlighted to the Court in a blackline to the model order.

Paragraph 9 of the Long form of order deals with the continuation of rental payments related to real property. This provision is not found in the Short form of order because the power to repudiate real property leases is not found in the Short form of order; the Short form of order assumes that all post-filing rent will be paid unless and until the Court permits otherwise.

The Stay - Paragraphs 9 to 14 (Short form) and 14 to 19 (Long Form)

Some background with respect to the evolution of stay provisions may be found in the Explanatory Notes related to the standard form template receivership order.

These provisions are very similar as between the two template CCAA orders. In addition, they are similar as between the template receivership order and the two CCAA orders, except that the CCAA orders also contain a stay of proceedings in favour of officers and directors. This stay is incorporated for three reasons: first, a Plan may compromise the claims against officers and directors; second, the directors and officers are typically protected by a court-ordered charge in a CCAA proceeding; and, third, officers and directors typically continue to play a role in a CCAA proceeding, unlike a receivership, and therefore will require some protection during CCAA proceedings.

It should be noted that there is no specific stay of any person's right to set off pre-filing claims against the Applicant in response to post-filing claims by the Applicant. The standard form template orders permit the filing of notice of security interests and the registration of claims for liens under the provisions of provincial personal property regimes. This seems to accord with the statutes and the most recent case law on these topics. However, lien claimants continue to require the consent of the Applicant and the Monitor or leave of the Court in order to commence actions to enforce lien rights. It remains open to anyone seeking to prohibit setoff or the registration of security or claims for lien, to ask the Court to do so by blacklining the standard form template order and bringing the matter to the attention of the presiding judge.

Some CCAA orders contain a provision supplementary to paragraph 10 of the Short form of Order (paragraph 15 of the Long form), which states that the "rights and remedies hereby stayed shall include all rights and remedies relating to the securities, instruments, debentures, notes or bonds issued by or on behalf of the Applicant". This provision, or a tailored version of it, may often be appropriate. However, the Committee elected not to include it in the standard form CCAA orders because of its breadth and the risk that it would be included in orders as a default, without specific thought being given to its implications.

In some CCAA orders made, there has been a specific clause (referred to as a tolling clause) utilized to seek to suspend the time from running under s. 81.1 of the *Bankruptcy and Insolvency Act* (the "BIA") and thereby to preserve the ability of suppliers of goods to seek to enforce their rights to re-possess their goods at the end of the CCAA process. Some question the usefulness of this provision because, in most cases, the suppliers' rights are compromised in the proceeding or else the goods are sold or consumed before the proceeding ends. In other cases, elaborate clauses have been developed to seek to extend limitation periods that might expire during a Court-ordered stay. It certainly seems fair to ensure that a party facing the expiry of a limitation period, contractual or statutory, who is prevented by a stay from taking the steps required to perfect its rights, should be given an opportunity to take these steps once the stay is lifted. However, this rationale does not fit well with every time period that may be affected by a stay. For example, there is no case law suggesting that a lease of real property ought to be

automatically extended if it were otherwise to expire during the course of a stay. The model order likewise does not exempt parties who are subject to an impending expiry of a limitation period from the application of the stay and anyone seeking to enforce a remedy consequent on the lapse of time will continue to require leave of the Court as is the case with all other stakeholders. Accordingly, the standard form template orders simply continue to enjoin the exercise of rights and "suspend" all rights and remedies. The specific effect of any suspension will remain to be dealt with in individual cases either by amendments to the standard form template order or by subsequent proceedings.

There has been some controversy in the development of stay orders concerning the appropriateness and the jurisdiction of the Court to order counter-parties to renew contracts with the debtor. For the purpose of the standard form template orders, the "No Interference with Rights" stay provision prohibits third parties from failing to "honour renewal rights". To the extent anyone wishes to seek to force a renewal in the absence of a contractual renewal right, the matter will have to be brought to the attention of the Court.

Although paragraphs 12 and 13 of the Short form of order, and paragraphs 17 and 18 of the Long form, protect suppliers and others from forced supply in the face of non-payment, these provisions are limited in that they do not necessarily ensure payment for goods or services supplied. Suppliers must be mindful of this, and satisfy themselves that payment from the Applicant is assured once the supply is made.

Paragraph 13 of the Short form of order, and paragraph 18 of the Long form, repeat the concept found in the CCAA that nothing in these orders obligates any person to advance or re-advance monies or extend credit to the Applicant. These paragraphs also provide that nothing in these orders derogates from the rights conferred and obligations imposed by the CCAA. In other words, the mandatory provisions of the CCAA still govern, and any conflicts between these orders and the CCAA will be resolved in favour of the relevant CCAA provision. The Committee opted to use a general non-derogation clause rather than repeat specific provisions in the CCAA (i.e. no prohibition of set-off; stay does not apply to "eligible financial contracts"; etc.). The Committee notes that recently-enacted changes to the BIA and CCAA place limits on the stay of proceedings as it affects aircraft. Reference is made to the *International Interests in Mobile Equipment (aircraft equipment) Act*, S.C. 2005, c. 3.

Directors' and Officers' Indemnification and Charge

These provisions recognize that the Applicant may need to provide directors and officers with some assurances and protections, in order that these people remain to govern the Applicant during the CCAA process. Accordingly, both a limited indemnification and a corresponding charge on the Applicant's property are created. The quantum of this charge (and the other charges) is capped, but will increase within that cap if certain obligations (including wages) are not paid. Each order also contains provisions specifying that directors and officers only have recourse to this charge to the extent that they do not have insurance coverage, and provides that insurers are not entitled to be subrogated to or claim the benefit of this charge. Reference is made to the decision of Mr. Justice Ground in *Re General Publishing Co.* (2002), 39 C.B.R. (4th) 216, upheld at (2004), 1 C.B.R. (5th) 202 (Ont. C.A.).

Restructuring Powers (Paragraphs 11 – 13, Long form only)

These provisions give the Applicant broad powers to restructure its business, and for this reason these restructuring powers are found only in the Long form of order, and the Committee expects that broad restructuring powers such as this will only be sought on ample notice to affected parties.

Subparagraph 11(b) does not resolve the ongoing debate as to whether employee terminations can only be carried out in accordance with a governing collective agreement. This is an issue which will have to be addressed by the Court, or legislatively with the passage of statutory amendments.

The standard Long form of order has adopted what the Committee believes is a clearer and simpler approach to real property leases. Previous forms of orders sometimes required the payment of rent based on concepts of "occupation", "abandonment", or the "quitting" of leased premises. To avoid confusion and interpretational difficulties, the Committee has adopted the simple approach that the Applicant either delivers a written notice of repudiation to the Landlord (in which case certain events follow), or it does not (in which case the Applicant continues to pay rent).

The standard form CCAA orders do not provide for the payment of percentage rent, merely because the members of the Committee concluded that this level of detail was unnecessary in the template order. More detail in this regard could be inserted into a first-day order, in appropriate circumstances.

Some orders have provided that landlords are exempted from the stay of proceedings, if the Applicant defaults in the performance of its lease terms. The Committee is of the view that this type of 'automatic' exemption was not appropriate, given the potential consequences for the Applicant and the CCAA proceedings, and that therefore the landlord, like most other parties, should only be exempted from the stay of proceedings by the consent of the Applicant and the Monitor or with leave of the Court.

In November, 2008, the Users' Committee approved the following amendments to the Long Form of the CCAA Order:

- Paragraph 9 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 9 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 11(c) 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 14 was deleted in its entirety. It had permitted for disposition of Property from leased premises "notwithstanding the terms of the lease", which attracted significant attention and some criticism. 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). In the best of all worlds, the factors relevant to finding the appropriate balance (retail operations vs. manufacturing operations, many premises versus a small number of premises, business-as-usual sales vs. liquidations, etc.) can be considered and put before the Court in addressing what types of provisions are appropriate. The former paragraph 14, being a part of the initial order, and being as general in its terms as it was, did not ensure that all of these factors would be addressed; and
- A new paragraph 43 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.

The standard form template CCAA orders do not contain a "PIPEDA" clause such as the provision found at paragraph 14 of the standard form template receivership order. The Long form of the model CCAA order does allow the Applicant to "pursue ... offers for material parts of its Business or Property". If the Applicant believes that any such sale might progress to the point where personal information of the type protected by the Canada *Personal Information Protection and Electronic Documents Act* will be made available to potential buyers, then a PIPEDA clause could be added to the initial CCAA order.

Paragraph 18 (Paragraph 23 of Long Form) – Appointment of Monitor

The Monitor's duties and powers are somewhat more enlarged in the Long form of order since it, unlike the Short form or order, contains restructuring powers, and the power to present a Plan and conduct creditors' meetings.

The Monitor in these standard form template orders is a 'monitor' in the true sense. It has full rights to information but does not, by way of example, have the power to take possession or control of the Applicant's business. For this reason, some provisions found in the standard form receivership order, such as protection from employee-related liabilities, are not found in the standard form template CCAA orders, as it is not expected that the Monitor will run the Applicant's business, or 'employ' the Applicant's employees.

The Committee accepted the suggestion of the Ontario Bar Association, Insolvency Section that the consent of the Monitor, in addition to the consent of the Applicant, should generally be required when a person is being exempted from a stay of proceedings under the order. This will help to keep track of what exemptions are given, and perhaps prevent inconsistencies or favouritism, recognizing that the Monitor has the right to seek directions from the Court if it has any concerns about giving its consent to a particular request.

The Committee did not include provisions in these standard form orders that would mandate the collection and distribution of information by the Monitor. Paragraph 27 of the Long form of order provides only that the Monitor shall provide information provided to it by the Applicant, and shall not distribute information which the Applicant has advised is confidential, unless otherwise directed by the Court. The Monitor is also relieved of any liability with respect

to the information disseminated by it in accordance with this paragraph. The Committee recognizes that this approach to the collection and distribution of information may be too restrictive in some situations, and that regular financial reporting and/or additional disclosure may be quite appropriate in some cases.

The standard form template CCAA orders contemplate that the Monitor's fees, and those of its counsel, are subject to approval by the Court. As with other provisions of the standard form template CCAA orders, this may be altered in appropriate cases.

The Orders provide that the Monitor, along with its counsel and counsel to the Applicants, is granted a charge to secure its fees and disbursements.

DIP Financing

The standard form template CCAA orders each contain relatively straightforward DIP financing provisions, since DIP financing seems to be very common in most CCAA filings, and is clearly essential in many. These provisions allow DIP financing to a pre-determined maximum amount, and also envision the filing of a Commitment Letter, so that the Court and the affected parties can turn their minds to the details of the proposed DIP financing. While both forms of order contemplate a cap on the amount of DIP funding that is permitted, it is anticipated that the cap employed for the Short form of order will be the minimum amount needed for the first 30-day period to "keep the lights on", with a more comprehensive amount being requested on the "comeback" hearing.

These orders also exempt the DIP lender from the stay of proceedings, in the event of a default by the Applicant under the DIP lending documents, but provide that notice must be given to both the Applicant and the Monitor before the DIP lender exercises its rights and remedies. The Committee believes that the notice requirement gives the Applicant sufficient protection as it would allow the Applicant to seek specific relief with respect to the DIP lender if so warranted. Finally, these orders provide that the DIP lender cannot be affected by the Plan. This is common in CCAA orders made to date.

The standard form CCAA orders do not attempt to spell out what must be in the "Definitive Documents", but the terms of these "Definitive Documents", once available, must clearly be reviewed by stakeholders to ensure that their respective interests are protected. Among other things, these Definitive Documents may propose altering the rights of lenders, equipment lessors, and other secured creditors, by securing pre-filing advances with the DIP lender's charge or by otherwise altering priorities. The appropriateness of the Definitive Documents should be judged in the context of the specific facts before the Court.

Validity and Priority of Charges

These provisions are typical in the sense that they do not require the Court-ordered charges to be registered under any system of registration such as the Ontario *Personal Property Security Act*.

The ranking of the Court-ordered charges is also spelled out in these standard form orders. The ranking set out in the model orders is not meant to be determinative, but rather reflects the most common ranking found in orders to date. This ranking, of course, may be

subject to negotiation, and should be tailored to the circumstances of the case before the Court. Similarly, the quantum of each charge may be negotiated and be either unlimited or limited to a maximum amount.

It should be noted that the charges created by these orders are declared to "rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise". The Committee is of the view that it is desirable that the template orders grant as broad a charge as is possible, and with as high a priority as possible. The Committee recognizes, however, that the 'super-priority' of the charges created may be limited by other variables, such as lack of notice to certain secured or statutory creditors over whom priority is being asserted, and by specific statutory terms which do not permit the granting of a priority charge over certain statutory-based charges.

Notice of CCAA proceedings, and General Provisions

The provisions in these standard form template CCAA orders are fairly typical, and require that the Applicant send a copy of the Initial Order to most of its creditors within 10 business days of the entry of the order. These provisions also allow service by e-mail in accordance with the Commercial List's E-filing protocol, and for the posting of materials on the Monitor's website, each now a common feature of CCAA proceedings.

These orders give the Monitor broad powers to seek recognition in domestic or foreign jurisdictions, and request the aid of all courts, tribunals, regulatory and administrative bodies.

Finally, these orders provide that they are each effective as of 12:01 a.m. Eastern Standard/Daylight Time, on the date on which the order is made.

Concluding Notes

It is hoped that the use of templates will simplify cases by providing a well-understood starting point and by focusing counsel and the Court upon the rationales for customizations required in the particular circumstances of each case before the Court. This area is not a simple one and many of the clauses which are now seen as "standard" have long histories involving valid arguments pro and con.

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The Committee would like to acknowledge the valuable input and consultation provided by the following organizations:

Ontario Association of Insolvency and Restructuring Professionals

Ontario Bar Association, Insolvency Section

Office of the Attorney-General (Ontario)

Department of Justice (Canada)

Commercial List Users' Committee of the Ontario Superior Court of Justice