THE SASKATCHEWAN TEMPLATE

CCAA *EX PARTE* ORDER

EXPLANATORY NOTES:

JUNE 13, 2008

TEMPLATE CCAA ORDER COMMITTEE

SASKATOON/REGINA, SASKATCHEWAN

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Template CCAA Order Committee,

Saskatoon/Regina, Saskatchewan

These notes are to be read in conjunction with the new standard form template *Companies' Creditors Arrangement Act* ("CCAA") *ex parte* order (the "*ex parte* Order") developed by the subcommittee (the "Committee") of the Canadian Bar Association ("CBA") in consultation with the bankruptcy and insolvency panel of the Court of Queen's Bench (Saskatchewan), chaired by Madam Justice A.R. Rothery (the "Insolvency Panel"). The notes apply to the *ex parte* Order which is being released concurrently with these explanatory notes.

I. INTRODUCTION

1. The Committee previously developed a standard form template receivership order (the "Receivership Order") with the assistance of the Insolvency Panel. The Receivership Order is now in use in this province and can be found on the Saskatchewan CBA website at "cba.org/saskatchewan" under the "Publications" area of the website. Included with the order are Explanatory Notes and a letter from the Honourable Madam Justice A.R. Rothery, which outlines how the order is to be used. Template receivership orders are now being utilized in a number of provinces, notably Ontario, Alberta and Saskatchewan.

II. PROCEDURAL AND SUBSTANTIVE MATTERS

2. At the outset, the Committee determined that the Saskatchewan template order should follow the Ontario Model Long Form Initial CCAA Order. However, in consultation with the Insolvency Panel and Madam Justice Rothery, the following procedural and substantive matters have been addressed in the Saskatchewan *ex parte* Order:

A. Style of Cause

3. Although it has been customary in Saskatchewan to name the various creditors involved in a CCAA proceeding as Respondents, because a CCAA application is fundamentally an *ex parte* application, there are, strictly speaking, no Respondents. Accordingly, it was determined that the style of cause should only list the name of the Applicant.[1] The style of cause in future applications will continue to list only the name of the Applicant. Subsequent applications should, however, refer to the nature of the application. Likewise, affidavits in support of a notice of motion and the order that is subsequently granted should also have a designation as to what application it refers to. The following are some examples:

Notice of Motion
(Re: Application for DIP Financing)

Affidavit of ***
(Re: Application for DIP Financing)

Order
(Re: Application for DIP Financing)

B. Nature of Proceedings

4. Traditionally, the practice in Saskatchewan has been to proceed by way of Originating Notice of Motion. However, as particularized in Rule 452 of The Queen's Bench Rules, an Originating Notice of Motion is appropriate for estates and trust matters, or matters concerning the construction of a written instrument. As a result, the Insolvency Panel and the Committee are of the view that a CCAA initial application should be made by way of an *ex parte* Application as opposed to an Originating Notice of Motion. This permits counsel for the Applicant to have the matter brought before the court in an expedited fashion.

C. Service on Affected Parties

5. Even though the initial CCAA application is fundamentally an *ex parte* Application, the Insolvency Panel and the Committee are of the view that there are certain "affected parties" that

[1] See s. 10 of the *CCAA* which permits applications to be brought by, petition, originating summons, or notice of motion in accordance with the practice of the court in which the application is made.

should be present at the *ex parte* Application. Affected parties might include secured creditors (such as chartered banks), major inventory suppliers, landlords and other persons that might be materially affected by any CCAA order that is granted. The Committee acknowledges that there may be circumstances in which an application is brought without notice to an affected party or affected parties. In such a situation, the Committee is of the view that the Court should be advised of the reason for not serving such party or parties.

6. Where service of the Application has been provided to certain affected parties, the names, addresses and legal counsel representing each party should be listed on the last page of the Application.

D. Procedural Requirements of *Ex Parte* Application

7. As required by Rule 441A, all *ex parte* Applications shall be by Memorandum to the Judge setting forth:

(a) the specific provisions authorizing the *ex parte* Application;
(b) the relief sought;
(c) a statement that none of the opposite parties is, to the knowledge of the Applicant, represented by legal counsel; or, setting out the name of legal counsel representing any opposite parties; and
(d) citations of the authorities relied upon, namely:
    (i) chapter and section numbers of statutes;
    (ii) rule numbers; and
    (iii) complete citations of cases with designation of relevant passages.

In addition, and pursuant to Rule 467(2a), the *ex parte* Order must have the appropriate *ex parte* endorsement on the last page of the Order, under the signature of the Deputy Local Registrar. The Memorandum to the Judge should disclose the parties that are likely to be the most affected by the Order and should indicate that such parties have either been served with the application, are aware of the application and consent to the application, or were not served. The Memorandum should also disclose the name of any party that wishes to be present at the Application. *Ex parte* Applications for an Order under the CCAA will be heard by a member of

the Insolvency Panel. Once material has been prepared, the Local Registrar in the Judicial Centre in which the Application is to be made should be contacted. The Local Registrar will contact the Chief Justice for the Court of Queen's Bench who will designate a member of the Insolvency Panel to hear the Application. The designated Judge will review the Application, the accompanying Affidavit and Draft Order and will make a determination as to whether a hearing is necessary. If a hearing is necessary, the Local Registrar will make arrangements for the date, time and manner in which the hearing is to take place. The Committee understands that in some circumstances, timing may be very critical. If all affected parties cannot be served prior to the hearing, representations should be made to the designated Judge and directions should be requested as to the necessity for serving other affected parties based on the urgency of the Application and the circumstances that exist.

E. The Contents of the Order

8. A Draft Order is to accompany the Application and is to be on the terms and provisions of the approved *ex parte* Order then in effect (the "Approved Order"). The Approved Order then in effect may be obtained from the Saskatchewan CBA website at "cba.org/saskatchewan" under the "Publications" area of the website. Any changes to the Approved Order are to be highlighted in bold. An explanation is to be provided by way of affidavit evidence as to why the change is required.

F. DIP Financing

9. The Approved Order authorizes the Applicant to enter into negotiations to obtain DIP Financing and grants leave to the Applicant to apply to the Court for an Order to authorize DIP Financing once the Applicant has negotiated terms with a DIP Lender.

An Order for DIP Financing in an Initial CCAA Order will be rare as DIP Financing is accompanied by a priority charge on the assets of the Applicant, which charge necessarily affects the rights of the Applicant's existing secured lenders and other persons with interests in or rights to the Applicant's assets. Since Applications are to be made *ex parte*, it is often inappropriate to grant DIP Financing in the Initial CCAA Order unless affected parties are given notice and special circumstances exist.

If an Order for DIP Financing in the *ex parte* Order is appropriate, the following four paragraphs should replace paragraphs 34 and 35 of the Approved Order. Please note that the numbering of the paragraphs will have to be amended accordingly.

34. THIS COURT ORDERS that:

(a) the Applicant is hereby authorized and empowered to obtain and borrow from [DIP LENDER'S NAME] (the "DIP Lender") under a credit facility and to execute and deliver the commitment letter between the Applicant and the DIP Lender dated as of [DATE], filed, and any credit agreements, mortgages, charges and security documents, guarantees and other definitive documents, (collectively the "DIP Lender Documents") in order to finance the Applicant's working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed $■ unless permitted by further Order of this Court;

(b) such credit facility shall be on the terms and subject to the conditions set forth in the commitment letter, filed;

(c) the Applicant 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 DIP Lender Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

35. 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 commitment letter, filed. The DIP Lender's Charge shall have the priority set out in paragraphs 38 and 41 hereof.

36. THIS COURT ORDERS that notwithstanding any other provisions 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 Lender Documents;

(b) upon the occurrence of an event of default under the DIP Lender Documents, the DIP Lender, upon ■ days notice to the Applicant and the Monitor, may exercise any and all of its rights and remedies against the Applicant or the Property under or pursuant to the DIP Lender Documents, including without limitation, to cease making advances to the Applicant and set off and/or consolidate any amounts owing by the DIP Lender to the Applicant against the obligations of the Applicant to the DIP Lender under the DIP Lender Documents, 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 Applicant and for the appointment of a trustee in bankruptcy of the Applicant, and upon the occurrence of an event of default under the terms of the DIP Lender Documents, the DIP Lender shall be entitled to seize and retain proceeds from the sale of the Property and the cash flow of the Applicant to repay amounts owing to the DIP Lender in accordance with the DIP Lender Documents, but subject to the priorities as set out in paragraph 38 and 41 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 Applicant or the Property.

> 37. THIS COURT ORDERS AND DECLARES that the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicant under the CCAA, or any proposal filed by the Applicant under the *Bankruptcy and Insolvency Act* of Canada (the "BIA"), with respect to any advances made under the DIP Lender Documents.

The above 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.

The provisions also exempt the DIP Lender from the stay of proceedings, in the event of a default by the Applicant under the DIP Lender 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, paragraph 37 provides that the DIP Lender cannot be affected by the Plan.

The standard form precedent does not attempt to spell out what must be in the "DIP Lender Documents", but the terms of the "DIP Lender Documents", once available, must clearly be reviewed by stakeholders to ensure that their respective interests are protected. The appropriateness of the DIP Lender Documents should be judged in the context of the specific facts before the Court.

III. CLAUSE BY CLAUSE REVIEW

A. Term of Order, Plan, Possession of Property and Authorization to Make Payments - paragraphs 1 through 10

10. Paragraphs 1 through 10 of the Approved Order represent standard provisions dealing with such things as the expiry date of the term of the *ex parte* Order, which must be less than 30 days from the date of issuance of the Order; the authority of the Applicant to file a plan or plans of arrangement; the authority of the Applicant to remain in possession of its property; and the authority of the Applicant to pay the expenses necessary to carry on its business during the

course of the initial stay. It is contemplated that the Applicant is required to pay all liabilities incurred after the granting of the *ex parte* Order. Paragraph 10 specifically outlines certain obligations that the Applicant is precluded and enjoined from incurring without further order of the Court.

B. Restructuring - Paragraphs 11 through 15

11. Although paragraph 11 allows the Applicant to dispose of assets in the ordinary course of business and to downsize its business, it is also authorized to dispose of redundant or non-material assets up to a certain dollar amount in any one transaction. This amount will be subject to negotiation with its creditors, as the Applicant will be able to complete such sales without the approval of the Monitor or the Court.

C. No Proceedings Against the Applicant or the Property - Paragraph 15

12. Care should be taken to ensure that the expiry date in paragraph 5 corresponds with the expiry date in paragraph 15. Paragraph 15 is a general stay against proceedings or enforcements affecting the business or the property of the Applicant. If an expanded definition of enforcement or proceeding is necessary, it should be inserted in this paragraph.

D. No Exercise of Rights or Remedies - Paragraph 16

13. Notwithstanding the general stay, specific provisions have been made for creditors to perfect security interests during the Stay Period and to register a lien or claim for lien or to commence a proceeding to protect a lien, provided that no other steps are taken except for the service of the initiating documentation.

E. No Interference With Rights, Continuation of Services and Non-Derogation of Rights - Paragraphs 17, 18 and 19

14. These provisions contemplate that during the Stay Period, suppliers of goods and services are required to continue to supply, but are not required to advance or re-advance monies or extend credit to the Applicant. The paragraphs also provide that nothing in the Order will derogate from the rights conferred and the obligations imposed by the CCAA.

F. Directors and Officers - Paragraphs 20 Through 23

15. Paragraphs 20 through 23 recognize that the Applicant may need to provide directors and officers with some protection in order that they might remain active in the management of the Applicant's business throughout the CCAA process. The provisions stay any proceedings against the directors and officers and grant the directors and officers an indemnification and charge against the assets of the Applicant. The extent of the charge is limited, however, and is only available to the extent that there is no insurance coverage. The amount of the directors' charge is to be inserted in paragraph 22 and will likely be the subject of some legal argument at the hearing of the application.

G. The Monitor - Paragraphs 24 Through 33

16. Paragraph 24 needs to be completed with the name of the Monitor. The consent of the Monitor to act should form part of the material to be presented to the Court. The duties of the Monitor are detailed in paragraph 25. Paragraph 26 provides that the Monitor is not in possession of the property of the Applicant and paragraph 27 attempts to protect the Monitor from environmental liability. The Monitor and its legal counsel are to be paid on a periodic basis, with the time interval to be inserted in paragraph 30. The Monitor and its legal counsel and the Applicant's legal counsel are also granted an administrative charge, in an amount to be inserted in paragraph 32, as security for their unpaid professional fees and disbursements. The amount of the administration charge is not intended to be the total estimated amount of all fees and disbursements to be incurred by the Monitor and legal counsel, and should only reflect the amount that may be at risk in the event payment by the Applicant is not forthcoming.

H. DIP Financing - Paragraphs 34 and 35

17. As previously indicated, these paragraphs in the Approved Order simply authorize the Applicant to enter into negotiations to obtain financing from a debtor in possession lender. The Approved Order contemplates that the terms of any such financing and any charge to be given to the DIP Lender will be the subject matter of a subsequent court application. If DIP lending is required immediately, the terms of the draft *ex parte* Order should be amended as previously referenced.

I. Validity and Priority of Charges - Paragraphs 36 Through 41

18. These provisions grant validity to and provide for the enforcement and priority of all charges created by the Order. Registration at the Personal Property Registry or the Land Titles Registry is not required. The ranking of the court-ordered charges as against each other is also determined. However, the ranking of each charge is not determinative and may be subject to negotiation between the Applicant and its creditors.

19. It should be noted that the charges created by the Approved Order 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 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 the interests of 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.

20. It should also be noted that the limits on the charges expressed in the Approved Order are not intended to limit the amounts that may be paid to or that may accrue to the benefit of any chargee. For example, the Applicant is entitled to pay the fees of its counsel, the Monitor and the Monitor's counsel as such fees are incurred and invoiced throughout the restructuring process. Therefore, the limits of the charges relate only to those amounts for which chargees have not been paid.

J. Service and Notice - Paragraphs 42 Through 51

21. The service and notice provisions in the Approved Order have been significantly modified in order to streamline the ability of all of the participants in the CCAA proceedings to serve reports, notices and applications. The Monitor is required to serve all of the creditors of the Applicant with claims exceeding $250 within 10 days of the date of issuance of the Order. Service is to be effected by ordinary mail, courier or personal delivery at the address appearing on the records of the Applicant. The Monitor is also required to send a cover letter to each

creditor in the form attached as Schedule "A" to the Approved Order, together with a demand for notice in the form attached as Schedule "B" to the Approved Order.

22. Each person served with a copy of the Approved Order who requires notice of all further proceedings is required to serve a demand for notice on each of the Applicant and the Monitor, by serving the Applicant's legal counsel and the Monitor's legal counsel in the manner specified in the Approved Order. The Monitor is required to prepare a list of all creditors served with a copy of the Order (the "Creditor List"), and a list of all creditors that have served demands for notice (the "Service List"). Each demand for notice is to indicate either a facsimile number or an e-mail address by which that creditor has elected to be served with notice all further proceedings.

23. The Monitor is required to post a copy of the Creditor List and the Service List on a website. Service by any person can be effected on a creditor by serving the documents in the manner contemplated in the demand for notice received from that creditor.

24. Paragraph 50 contemplates that although each Notice of Motion in the proceedings must be served on each person on the Service List in the manner contemplated, service of any other Court materials (such as an affidavit that is filed in support of a Notice of Motion) may be served by posting the documents on the website maintained by the Monitor and giving each creditor notice that the documents may be obtained on that website.

K. General Provisions - Paragraphs 52 Through 58

25. These provisions give the Monitor broad powers to seek recognition of the Approved Order and the aid of other courts, tribunals, regulatory and administrative bodies. In addition, the Approved Order provides that it is effective at 12:01 a.m., central standard time on the date of issuance.

IV. CONCLUDING NOTES

26. The Committee certainly appreciates the commitment made by the Ontario Standard Form Template Order Sub-committee in the drafting of the Ontario Long Form and Short Form CCAA Orders and the accompanying Explanatory Notes. The Committee would also like to acknowledge the invaluable input of Madam Justice A.R. Rothery, the Chairperson of the

Insolvency Panel for the Province of Saskatchewan. A special thanks is also directed to Clayton Barry of the Saskatoon office of McDougall Gauley for his exceptional efforts in compiling the comments and redrafts by members of the Committee. The Committee would also like to recognize the contributions of Robert C. Magnuson of the Kanuka Thuringer LLP law firm who passed away prior to the completion of the project.

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