

THE SASKATCHEWAN TEMPLATE CCAA INITIAL ORDER

EXPLANATORY NOTES:

DECEMBER 6, 2017

CANADIAN BAR ASSOCIATION, SASKATCHEWAN BRANCH

BANKRUPTCY & INSOLVENCY SECTION

TEMPLATE CCAA ORDER COMMITTEE

SASKATOON/REGINA, SASKATCHEWAN

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TABLE OF CONTENTS

I.	INTRODUCTION.....	3
II.	PROCEDURAL AND SUBSTANTIVE MATTERS	4
	A. STYLE OF CAUSE.....	4
	B. NATURE OF PROCEEDINGS	5
	C. SERVICE ON AFFECTED PARTIES	6
	D. THE CONTENTS OF THE ORDER	6
	E. INTERIM FINANCING	6
III.	CLAUSE BY CLAUSE REVIEW	9
	A. TERM OF ORDER, PLAN, POSSESSION OF PROPERTY AND AUTHORIZATION TO MAKE PAYMENTS - PARAGRAPHS 1 THROUGH 10	9
	B. RESTRUCTURING - PARAGRAPHS 11 THROUGH 13.....	9
	C. NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY - PARAGRAPH 14	9
	D. NO EXERCISE OF RIGHTS OR REMEDIES - PARAGRAPH 15.....	9
	E. NO INTERFERENCE WITH RIGHTS, CONTINUATION OF SERVICES AND NON-DEROGATION OF RIGHTS - PARAGRAPHS 16- 19.....	9
	F. DIRECTORS AND OFFICERS - PARAGRAPHS 20 THROUGH 23.....	10
	G. THE MONITOR - PARAGRAPHS 24 THROUGH 33	10
	H. INTERIM FINANCING - PARAGRAPHS 34 AND 35	10
	I. VALIDITY AND PRIORITY OF CHARGES - PARAGRAPHS 36 THROUGH 41.....	10
	J. SERVICE AND NOTICE - PARAGRAPHS 42 THROUGH 47.....	11
IV.	CONCLUDING NOTES.....	12

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Template CCAA Order Committee,

Saskatoon/Regina, Saskatchewan

These notes are to be read in conjunction with the *, 2017 Template *Companies' Creditors Arrangement Act* ("CCAA") Initial Order (the "**Template CCAA Initial Order**") developed by the subcommittee (the "**Committee**") of the Canadian Bar Association, Saskatchewan Branch, Bankruptcy & Insolvency Section in consultation with the Bankruptcy and Insolvency Panel of the Court of Queen's Bench (Saskatchewan) (the "**Court**"), chaired by Madam Justice A.R. Rothery (the "**Insolvency Panel**").

I. INTRODUCTION

1. In 2010 and 2013, Chief Justices R.D. Laing and M.D. Popescul, respectively, issued Administrative Notices concerning the use of the Template CCAA Initial Order, directing any counsel applying for such an order to use the Template CCAA Initial Order and to advise the presiding judge of any additions or changes to the order by way of highlighting in bold letters or black-lining.
2. The use of template orders was adopted to reflect the increased activity in insolvency matters with the Court, and to facilitate more efficient review by the Court of draft orders.
3. In his Administrative Notice dated June 20, 2013, Chief Justice Popescul instructed that, while the discretion of any presiding judge is unfettered by the use of template orders, it is expected that any draft initial orders presented by counsel in a CCAA application will be substantially in compliance with the template orders.
4. In consultation with Justice Rothery, the Committee was struck with a view to updating the Template CCAA Initial Order. The Committee consists of the following lawyers:

Jeff Lee, Q.C., Chair, MLT Aikins LLP

Wayne Pederson, KMP Law

Michael Milani, Q.C., McDougall Gauley LLP

Joel Hesje, Q.C., McKercher LLP

Kim Anderson, Q.C., Robertson Stromberg LLP

David Gerecke, Miller Thomson LLP

Janine Lavoie-Harding, McKercher LLP

Clayton Barry, McDougall Gauley LLP

Mike Russell, McDougall Gauley LLP

Paul Olfert, MLT Aikins

5. The updated Template CCAA Initial Order does not depart substantially from the substantive provisions of orders made in recent years by judges in this province.
6. Similar to the views expressed by the committees that developed model CCAA initial orders in Ontario, Alberta and British Columbia, the Template CCAA Initial Order is intended to be neutral and inclusive in respect to the interests of all stakeholders. However, the Template CCAA Initial Order is not intended to determine the relief to be granted by the Court in any particular case. Even where a provision appears in the Template CCAA Initial Order, it may be necessary to justify the inclusion of such provision to the presiding judge. For instance, it may be that a proposed provision would unduly impact the rights of third parties, particularly if minimal notice has been given to parties other than senior creditors.
7. At the same time, the Template CCAA Initial Order is not meant to be exhaustive as to the terms of an order that will be considered by the Court. Nor is it intended to preclude further evolution of order language to reflect situations that may become common in the future. It would be expected, however, that where there are changes from the Template CCAA Initial Order, all such changes would be clearly marked (by use of a "redline" document or otherwise) in the draft Order presented to the Court, and satisfactory evidence or information would be provided to the Court as to why the additional provisions or changes are required.
8. In developing the Template CCAA Initial Order, consideration has been given to the current model CCAA initial orders currently approved for use in British Columbia, Alberta and Ontario, along with current or past commentary developed in respect of those model orders.
9. The Saskatchewan Committee would like to acknowledge the valuable input that it received from the members of the Insolvency Panel.

II. PROCEDURAL AND SUBSTANTIVE MATTERS

A. Style of Cause

10. The practice in Saskatchewan and other provinces regarding the style of cause in a CCAA Initial Order is to include only the name of the Applicant debtor company in the style of cause.¹ The style of cause in applications subsequent to the CCAA Initial Order will continue to list only the name of the Applicant. Subsequent applications should, however, refer to the nature of the application. Similarly, affidavits in support of an application

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.

and the order that is subsequently granted should also have a designation identifying the subject matter of the application. The following are some examples:

Notice of Application
(Re: Application for Interim Financing)

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

Order
(Re: Application for Interim Financing)

B. Nature of Proceedings

11. The effect of Rules 3-49(1)(f) and 3-49(2) of *The Queen's Bench Rules* and section 10(1) of the *CCAA* is to require proceedings under the *CCAA* to be commenced in Saskatchewan by way of Originating Application.
12. Pursuant to the "General Powers of the Court" set out in section 11 of the *CCAA*, the Court, "on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances". Section 11 of the *CCAA* therefore expressly contemplates that applications for relief may be made without notice as the Court may see fit.
13. Section 11.02(1) of the *CCAA* provides that the stay of proceedings set out in a *CCAA* initial order may not be effective for a period of more than 30 days. Accordingly, the Saskatchewan Template *CCAA* Order expressly provides that all of the relief granted in such initial order is granted on an interim basis only and that such relief will expire within 30 days unless extended by the Court. Such *CCAA* initial orders also expressly contemplate a further hearing within the initial 30-day period at which extension applications will be heard and considered (the "**Comeback Hearing**").
14. As a result, an applicant debtor company seeking an initial order under the *CCAA* in Saskatchewan may proceed with its initial application in one of two ways, namely:
 - (a) the applicant debtor company may seek the *CCAA* initial order within the Originating Application itself and, prior to serving such Originating Application, may seek an Order abridging the time for service of the Originating Application,² in order to facilitate an expedited hearing in emergent circumstances; or
 - (b) the applicant debtor company may serve and file an Originating Application which is returnable at a date thirty days later (at which the Comeback Hearing may occur) and

² As required by the judgment of Elson J. in *Sigfusson Northern Ltd. v Signal Energy LLC*, 2016 SKQB 46, which provides that applications for an Order abridging the time for service of an application are required to be heard and decided prior to the hearing on the merits of the application itself.

may seek the CCAA initial order from the Court on an application without notice under Rule 6-4 of *The Queen's Bench Rules*.

15. As discussed below, in either case, the practice in Saskatchewan is for the applicant debtor company to seek the CCAA initial order at an oral hearing before a Judge of the Insolvency Panel after having provided courtesy notice of such a hearing and a copy of the application materials to key stakeholders (typically comprising the senior secured creditors of the applicant debtor company, the proposed monitor and other stakeholders identified by the applicant debtor company).

C. Service on Affected Parties

16. The Committee is of the view that there are certain "affected parties" that should be present at the initial 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.
17. In addition, there are certain types of relief available under the CCAA which require a notice of application for such relief to be provided to certain persons identified in the statute itself. Examples of such relief include Orders granting interim financing (section 11.2(1) of the CCAA) or Orders approving the sale of assets by the debtor company (section 36(2) of the CCAA). If such relief is sought within the application for the CCAA initial order, it is obviously critical that the unique service and notice requirements of these portions of the CCAA be satisfied.

D. The Contents of the Order

18. A Draft Order is to accompany the Application and is to be on the terms and provisions of the Saskatchewan Template CCAA Initial Order. Any proposed changes to the Saskatchewan Template CCAA Initial Order are to be highlighted in bold or "redlined" format comparing the proposed form of Order sought to the Saskatchewan Template CCAA Initial Order. An explanation is to be provided by way of affidavit evidence as to why such proposed changes are desirable or necessary.
19. In order to maintain the integrity of the paragraph cross-references within the Saskatchewan Template CCAA Initial Order, the Committee recommends that, if a new paragraph is added or deleted, the numbering scheme from the template is maintained. For instance, if a paragraph is added after paragraph 25, it could be numbered "25A"; if paragraph 25 is deleted, the number should be maintained and the text replaced with a notation such as "[Intentionally deleted]".

E. Interim Financing

20. The Saskatchewan Template CCAA Initial Order authorizes the Applicant to enter into negotiations to obtain Interim Financing and grants leave to the Applicant to apply to the

Court for an Order to authorize Interim Financing once the Applicant has negotiated terms with a proposed Interim Lender.

21. Orders for Interim Financing are most often sought on applications subsequent to the granting of an Initial CCAA Order as Interim Financing requires 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 for CCAA Initial Orders are often made in emergent circumstances, and because Section 11.2(1) of the CCAA requires that an application for such financing can only be granted upon notice to affected secured creditors, it is often inappropriate to grant Interim Financing in the Initial CCAA Order unless affected parties are given notice and special circumstances exist.
22. If an Order for Interim Financing in a CCAA Initial Order is appropriate, the following six paragraphs should replace paragraphs 34 and 35 of the Saskatchewan Template CCAA Initial Order. Please note that the numbering of the paragraphs will have to be amended accordingly.

INTERIM FINANCING

1. The Applicant is hereby authorized and empowered to obtain and borrow under a credit facility from **[INTERIM LENDER'S NAME]** (the "**Interim Lender**") 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.
2. Such credit facility shall be on the terms and subject to the conditions set forth in the commitment letter between the Applicant and the Interim Lender dated as of **[DATE]** (the "**Commitment Letter**"), filed.
3. The Applicant 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 "**Definitive Documents**"), as are contemplated by the Commitment Letter or as may be reasonably required by the Interim Lender pursuant to the terms thereof, and the Applicant is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities and obligations to the Interim Lender under and pursuant to the Commitment Letter and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.
4. The Interim Lender shall be entitled to the benefits of and is hereby granted a charge (the "**Interim Lender's Charge**") on the Property to secure all obligations under the Definitive Documents incurred on or after the date of this Order which charge shall not exceed the aggregate amount advanced on or after the date of this Order under the Definitive Documents. The Interim Lender's Charge shall have the priority set out in paragraphs [36] and [39] hereof.

5. Notwithstanding any other provision of this Order:
 - (a) the Interim Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Interim Lender's Charge or any of the Definitive Documents;
 - (b) upon the occurrence of an event of default under the Definitive Documents or the Interim Lender's Charge, the Interim 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 Commitment Letter, Definitive Documents and the Interim Lender's Charge, including without limitation, to cease making advances to the Applicant and set off and/or consolidate any amounts owing by the Interim Lender to the Applicant against the obligations of the Applicant to the Interim Lender under the Commitment Letter, the Definitive Documents or the Interim 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 Applicant and for the appointment of a trustee in bankruptcy of the Applicant; and
 - (c) the foregoing rights and remedies of the Interim Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicant or the Property.
6. The Interim 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 Definitive Documents.
23. The above provisions allow Interim 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 Interim Financing.
24. The provisions also exempt the Interim Lender from the stay of proceedings, in the event of a default by the Applicant under the Definitive Documents, but provide that notice must be given to both the Applicant and the Monitor before the Interim 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 Interim Lender if so warranted.
25. The standard form precedent does not attempt to spell out what must be in the "Definitive Documents", but the terms of the "Definitive Documents", once available, must clearly be reviewed by stakeholders to ensure that their respective interests are protected. The appropriateness of the Definitive Interim 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

26. Paragraphs 1 through 10 of the Template CCAA Initial Order represent standard provisions dealing with such things as the expiry date of the term of the initial 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 initial 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 13

27. 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.
28. There is no provision permitting the Applicant to dispose of property located on the leased premises without interference of any kind from landlords, and "notwithstanding the terms of any leases". In limited circumstances, such a provision may be appropriate to include in an initial order without notice to the landlord (for example, a pre-Christmas retail insolvency, or where perishable goods are involved).

C. No Proceedings Against the Applicant or the Property - Paragraph 14

29. Care should be taken to ensure that the expiry date in paragraph 2 corresponds with the expiry date in paragraph 14. Paragraph 14 is a general stay against proceedings affecting the business or the property of the Applicant.

D. No Exercise of Rights or Remedies - Paragraph 15

30. Notwithstanding the general stay, specific provisions have been made for creditors to perfect security interests during the Stay Period to register a claim for lien or to commence a proceeding, 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 16- 19

31. 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

32. Paragraphs 20 through 23 recognize that the Applicant may need to provide directors and officers with 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 liability insurance coverage. The amount of the directors' charge is to be inserted in paragraph 22 and will likely be the subject of argument at the hearing of the application.

G. The Monitor - Paragraphs 24 Through 33

33. 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. There is an ability for the Applicant to pay a retainer to each of the Monitor and its legal counsel. 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. Interim Financing - Paragraphs 34 and 35

34. As previously indicated, these paragraphs in the Template CCAA Initial Order simply authorize the Applicant to enter into negotiations to obtain financing from an interim lender. The Template CCAA Initial Order contemplates that the terms of any such financing and any charge to be given to the Interim Lender will be the subject matter of a subsequent court application. If Interim lending is required immediately, the terms of the draft initial Order should be amended as previously referenced.

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

35. 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 permitted, but is not required. The ranking of the court-ordered charges as against each other is also determined. However, the proposed ranking of each charge set out in the Saskatchewan Template CCAA Initial Order is not fixed or determinative and may be subject to negotiation between the Applicant and its creditors.

36. It should be noted that the charges are declared in the Order 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 possible, and with as high a priority as possible. However, 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 charges.
37. It should also be noted that the limits on the charges expressed in the Template 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 expressed in the Template Order relate only to those amounts for which chargees have not been paid.
38. For example, a provision in a CCAA Initial Order providing that the Administration Charge shall not exceed \$500,000 means that the maximum amount of security created by the Administration Charge in favour of the beneficiaries of the Administrative Charge is \$500,000. It does not create or provide for a maximum amount of professional fees which the beneficiaries of the Administration Charge may charge for their services.

J. Service and Notice - Paragraphs 42 Through 47

39. The service and notice provisions in the Template CCAA Initial 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 \$1,000.00 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 "B" to the Template CCAA Initial Order, together with a demand for notice in the form attached as Schedule "C" to the Template CCAA Initial Order.
40. The Monitor is required to prepare a list of all creditors served with a copy of the Order (the "**Creditor List**"). Out of caution, whether or not shown as creditors in the Applicant's records, the Creditor List should include the Canada Revenue Agency, the Ministry of Revenue and Financial Services, any Ministry which may have an interest in the proceeding, such as the Ministry of the Economy and the Ministry of the Environment, the Office of the Superintendent of Bankruptcy and the Official Receiver, each registrant showing in the Personal Property Registry and the Saskatchewan Land Registry and the Saskatchewan Judgment Registry, each union and each pension plan administrator of the Applicant.
41. The Template CCAA Initial Order now provides for adoption of the Electronic Case Information and Service Protocol (the "**Protocol**"), and a number of the provisions formerly in the Template CCAA Initial Order have been moved into the Protocol.

Between the provisions in the Order and the Protocol, each person served with a copy of the CCAA Initial Order who requires notice of all further proceedings is required to serve the appropriate request for service 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, 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. 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 request for service received from that creditor

42. *The Queen's Bench Rules* require notice of all applications to be served and filed at least 14 days in advance of the day named in the notice for the hearing of the application. (See *Sigfusson Northern Ltd. v Signal Energy LLC*, 2016 SKQB 46, 88 CPC (7th) 416 [*Sigfusson*].) *Sigfusson* will govern the application for an Initial Order (unless sought without notice), but the Template CCAA Initial Order contemplates that subsequent applications may be brought on three days notice. The applicable notice period with respect to any particular proceedings will be within the discretion of the Court at the time of the hearing of the application for the Initial Order.

K. General Provisions - Paragraphs 48 Through 54

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

IV. CONCLUDING NOTES

44. Over time, and especially in circumstances where there have been legislative changes to the CCAA, the wording of the Saskatchewan CCAA Initial Order may be altered in consultation with the Committee, the Insolvency Panel and the practice in other provinces. The Committee wishes to emphasize, once again, that the Template CCAA Initial Order is not meant to be the only terms of an Order that will be considered by a Saskatchewan Court. It would be expected, however, that in circumstances where there are changes to the Saskatchewan CCAA Initial Order, those changes would be highlighted in a draft Order presented to the Court, and evidence would be provided to the Court as to why the additional provisions or changes are required.