

Clerk's stamp:

COURT FILE NUMBER 2401-03404
COURT COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY
MATTER IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, c C-36, AS AMENDED

AND IN THE MATTER OF THE COMPROMISE OR
ARRANGEMENT OF CANADIAN OVERSEAS PETROLEUM
LIMITED AND THOSE ENTITIES LISTED IN SCHEDULE "A"

DOCUMENT **APPLICATION**

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS DOCUMENT

Dentons Canada LLP
15th Floor, Bankers Court
850 – 2nd Street SW
Calgary, AB T2P 0R8
Attention: Derek Pontin
Email: derek.pontin@dentons.com
Ph: (403) 268-6301 Fax: (403) 268-3100

NOTICE TO THE RESPONDENT(S)

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

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

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

Date: July 17, 2024

Time: 2:00 p.m.

Where: Calgary Courts Centre

Via Web-Ex

Before Whom: The Honourable Justice C. Simard

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

Remedy claimed or sought:

1. The Applicant, BP Energy Company ("**BPEC**") respectfully seeks an Order:

- a. approving an amendment to the Purchase Agreement and the Transaction, as those terms are defined in the sale approval and vesting order (the “**AVO**”) granted in these proceedings on April 24, 2024, for the purpose of making the secured claims of BPEC “Permitted Encumbrances”, thereunder;
- b. granting the relief sought herein on a *nunc pro tunc* basis;
- c. requesting the aid and recognition of all courts, tribunals, and regulatory or administrative bodies, having jurisdiction in Canada, the United States of America, or in any foreign jurisdiction, to give effect to this Order; and
- d. such further and other relief as this Honourable Court may deem appropriate to give better effect to the Order made.

Grounds for making this Application:

2. Canadian Overseas Petroleum Limited and those entities listed in the attached Schedule “A” (together, “**COPL**”) are the subject of ongoing proceedings under the *Companies’ Creditors Arrangement Act*, RSC 1985 c C-36 (“**CCAA**”).
3. Concurrent recognition proceedings are ongoing in the District of Delaware under Chapter 15 of the United States Bankruptcy Code (the “**Chapter 15 Proceedings**”).
4. On April 24, 2024, Honourable Justice Yamauchi granted the AVO, authorizing the sale of certain assets of COPL to and in favour of Summit Partners Credit Fund III, L.P., Summit Investors Credit III, LLC, Summit Investors Credit III (UK), L.P., and Summit Investors Credit Offshore Intermediate Fund III, L.P. (collectively, the “**Purchaser**”, and with ABC Funding LLC as administrative and collateral agent, the “**Summit Parties**”).
5. BPEC objected to the AVO and to the recognition of the AVO in the Chapter 15 Proceedings.
6. On July 3, 2024, the Delaware Court granted an Order (the “**US Recognition Order**”) recognizing and enforcing the AVO, subject to certain provisos, including as expressly set out as follows:

27. The Purchaser and BP shall jointly submit a request to the Canadian Court for a hearing to consider entry of an agreed order amending the Vesting Order in form and substance reasonably acceptable to the Parties (the “Amending Order”), which request the Debtors shall support.

28. If the Canadian Court enters the Amending Order, the Parties shall submit under certification of counsel a proposed order in the form attached hereto as **Exhibit 4**, (i) recognizing the Amending Order, (ii) providing that the claims and liens of BP against the Debtors existing prior to the Petition Date (the

"BP Liens") are Permitted Encumbrances under the Purchase Agreement and (iii) providing that BP and the Purchaser shall enter into a mutual release agreement (the "Release Agreement") to effectuate BP's release of the BP Liens upon the Purchaser's payment to BP of an amount agreed upon by the Purchaser and BP.

29. If the Canadian Court does not enter the Amending Order, the Parties shall submit under certification of counsel a proposed order in the form attached hereto as **Exhibit 5** modifying the recognition of the releases in paragraph 12 of the CCAA Vesting Order provided for in paragraph 8 hereof as set forth in such proposed order.

...

7. As is evident in the foregoing, further proceedings in the Chapter 15 Proceedings are contingent upon this Honourable Court's consideration of the within application.
8. The within application is made by BPEC with the express support and concurrence of the Summit Parties.
9. KSV Restructuring Inc., as court-appointed Monitor of COPL in this proceeding, is supportive of the relief being sought. COPL is also supporting this application.
10. The within application seeks an Order approving an amendment to the Purchase Agreement, as approved under the AVO. The proposed amendment will make BPEC's claim a "Permitted Encumbrance" under the Purchase Agreement, rather than a claim that is compromised under the terms of the AVO.
11. If the proposed amendment is approved, BPEC and the Purchaser will concurrently enter into a release agreement, whereunder the BP Liens (as defined in the US Recognition Order) will be released and settled in consideration of a payment from the Summit Parties to BPEC.
12. If the proposed amendment is not approved, the releases provided in the AVO will not be recognized in the US Recognition Order, except as modified by the US Court, particularly carving out any claims that BPEC may raise against the Purchaser and its affiliates.
13. The nature of the proposed amendment is such that its effect will fall in line within the existing parameters of the AVO, which permits such minor amendments to the Purchase Agreement as the Purchaser and COPL may deem necessary, with Monitor approval. BPEC takes the position that making BPEC's secured claim a "Permitted Encumbrance" is a "minor amendment", as the impact of the proposed amendment is of essentially no consequence to the COPL estate. The BPEC Liens achieve no greater position concerning COPL, nor does it affect the claims or relevant priority of any of COPL's other creditors, as the amendment is premised upon the parties' settlement and release terms.

14. BPEC seeks to have its claim recognized as a Permitted Encumbrance, rather than compromised, as claims that are Permitted Encumbrances do not engage section 36(6) of the CCAA would not be engaged in this case. This does not require any modification or restatement of the AVO, it would merely be a change of the categorization of the BPEC claim under the Purchase Agreement, resulting in the requirement that BPEC's claims be released by way of settlement agreement rather than compromised by the AVO. This is to be effected by way of the requested Amending Order.
15. The proposed amendment will assure no further delay in closing the transaction, will obviate the need for further extensions of the CCAA proceedings of COPL (and the corresponding costs associated with COPL remaining in CCAA proceedings), and will resolve any controversy among BPEC, COPL and/or the Summit Parties.
16. There is no prejudice to COPL or its stakeholders in the proposed amendment as a result of the concurrent settlement and release of the BPEC claims.
17. For an order to be granted *nunc pro tunc*, there is a two-part test [citing from *Resta v Thornton*, 2023 ABKB 498, 2023 CarswellAlta 2277, at para 20, in reference to *CIBC v Green*, 2015 SCC 60]:

To this end, the Court in *Green* established a two-part test, at para 90, for courts to apply when deciding to exercise its inherent jurisdiction to grant *nunc pro tunc* orders: 1) the party seeking relief must seek leave prior to the expiry of the limitation period, and 2) the Court should weigh a number of factors including whether:

- i) the opposing party will be prejudiced by the order;
- ii) the order would have been granted had it been sought at the appropriate time, such that the timing of the order is merely an irregularity;
- iii) the irregularity was not intentional;
- iv) the order will effectively achieve the relief sought or cure the irregularity;
- v) the delay has been caused by an act of the court; and,
- vi) the order would facilitate access to justice

18. The test in *Green*, set out by the Supreme Court, concerned a *nunc pro tunc* order in context of a limitation period. The test is not a strict examination of fact in every case, but must be applied contextually. As stated in *Patkaciunas v Economical Mutual Insurance Company*, 2021 ONSC 5945, 2021 CarswellOnt 12437 [at para 11]:

I do not read *Green* as establishing a "red line" rule that is applicable in all cases and in all circumstances regardless of whether the circumstance was ever considered in a prior case. That may be how statutes are construed; it is not how the common law is developed.

19. In *Resta v Thornton*, the Alberta Court observed there was no delay "caused by an act of the court" in that case, but nonetheless the Court found appropriate and granted the requested *nunc pro tunc* order. The Court relied principally on the fact there would be no prejudice in the Order being granted, among the other factors in the test, applied contextually.

20. In this case, BPEC submits the test is met for a *nunc pro tunc* order. Reviewing the applicable factors, in brief:

- a. The absence of prejudice to any party has already been stated. In fact, if the requested order is not granted, the Summit Parties will not receive the benefit of the release of BPEC's claim.
- b. The requested order, if granted, will facilitate the closing of the transaction, the resolution of ongoing disputes, the CCAA proceedings reaching their final and natural conclusion, and a greater overall benefit to all parties, within both the Canadian and US proceedings. This meets not only the functional test for this kind of order, but aligns with the spirit and purpose of the CCAA, and raises the point that this Court has both broad discretion and inherent jurisdiction under the federal legislation.
- c. The question of whether the order would have been granted at the time, if sought, and whether any irregularity was intentional, are linked by the fact that the AVO was granted. Whether or not BPEC is or isn't deemed to be a Permitted Encumbrance now, makes no alteration to the focus and intent of the AVO. In fact, the requested relief in this application is sought in furtherance of the AVO, and moreover bringing finality to the terms of the US Recognition Order, as outlined above.
- d. In respect of achieving the relief sought, and facilitating access to justice in this case, the requested order will meet these ends. It practically benefits all affected parties, in both jurisdictions, and brings this Transaction to a closing, rather than stimulates potential for prolonged litigation.

21. The requested form of Order is attached hereto, as Schedule "B".

SCHEDULE "A"

-
1. Canadian Overseas Petroleum Limited
 2. COPL Technical Services Limited
 3. Canadian Overseas Petroleum (UK) Limited
 4. Canadian Overseas Petroleum (Bermuda) Limited
 5. Canadian Overseas Petroleum (Bermuda Holdings) Limited
 6. Canadian Overseas Petroleum (Ontario) Limited
 7. COPL America Holding Inc.
 8. COPL America Inc.
 9. Atomic Oil & Gas LLC
 10. Southwestern Production Corp.
 11. Pipeco LLC

SCHEDULE "B"

Clerk's stamp:

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| COURT FILE NUMBER | 2401-03404 |
| COURT | COURT OF KING'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| MATTER | IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c C-36, AS AMENDED AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF CANADIAN OVERSEAS PETROLEUM LIMITED AND THOSE ENTITIES LISTED IN SCHEDULE "A" |
| DOCUMENT | <u>ORDER</u> |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT DATE ON WHICH ORDER WAS PRONOUNCED: | Dentons Canada LLP 850-2nd Street SW Calgary, Alberta T2P 0R8 Attn: Derek Pontin _____ |
| NAME OF JUDGE WHO MADE THIS ORDER: | HONOURABLE JUSTICE K. YAMAUCHI |
| LOCATION OF HEARING: | CALGARY, ALBERTA |

UPON THE APPLICATION of BP Energy Company for an order approving an amendment (the "**Amendment**") to the Purchase Agreement dated April 8, 2024, and to the extent required to effect the Amendment, amending and supplementing the terms of the Approval and Vesting Order granted April 24, 2024 (the "**AVO**"), AND UPON having read the Application, the AVO, and the Affidavit(s) of _____, dated _____; AND UPON, if determined to be necessary, hearing from counsel for BP Energy Company ("**BPEC**") and counsel for Summit Partners Credit Fund III, L.P., Summit Investors Credit III, LLC, Summit Investors Credit III (UK), L.P., and Summit Investors Credit Offshore Intermediate Fund III, L.P. as purchaser under the AVO (collectively, the "**Purchaser**"), and ABC Funding LLC as administrative and collateral agent;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE AND DEFINITIONS

1. The time for service of the notice of application for this order (the "**Order**") is hereby abridged and deemed good and sufficient and this application is properly returnable today.

2. Capitalized terms used in this Order and not otherwise defined herein shall have the meanings ascribed to them in the AVO.

PURCHASE AGREEMENT AMENDMENT

3. For the purposes of the Purchase Agreement, the Transaction and the AVO, the rights, claims and security of BPEC as against COPL, as more fully described in the Affidavit of Kenneth Joaquin Anderson, dated April 23, 2024 (the “**BPEC Interests**”) are, and are deemed to be, on a *nunc pro tunc* basis, a Permitted Encumbrance.
4. By the effect of section 3 of this Order, section 36(6) of the *Companies’ Creditors Arrangement Act*, RSC 1985 c C-36, as it concerns the BPEC Interests, is not invoked as the BPEC Interests are not being compromised nor vested out of the Purchased Assets as a result of the Amendment being made *nunc pro tunc*.
5. For greater certainty, nothing in this Order shall affect the subsequent settlement and release of the BPEC Interests in and to the Purchased Assets, pursuant to which the Purchaser will obtain title to the Purchased Assets free and clear of the BPEC Interests.
6. Other than as specifically set out herein, this Order makes no modification to the AVO, nor limits the approval and effectiveness of the Purchase Agreement.

GENERAL

7. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States of America, or in any foreign jurisdiction, to give effect to this Order and to assist COPL, BPEC, the Purchaser and the Monitor, and their respective agents, in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to COPL, BPEC, and the Purchaser, and to the Monitor as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist COPL, BPEC, the Purchaser and the Monitor and their respective agents in carrying out the terms of this Order.
8. Each of COPL, BPEC, the Purchaser and the Monitor be at liberty and are hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and the Monitor is authorized and empowered to act as a representative in respect of the within proceeding for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

9. Service of this Order shall be deemed good and sufficient by:
- a. Serving the same on:
 - i. the persons listed in the service list created in these proceedings;
 - ii. any other person served with notice of the application for this Order;
 - iii. any other parties attending or represented at the application for this Order;
 - iv. the Purchaser or the Purchaser's solicitors; and,
 - v. posting a copy of this Order on the Monitor's website at:

<https://www.ksvadvisory.com/experience/case/canadian-overseas-petroleum>, and
 - b. service on any other person is hereby dispensed with.
10. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.

Justice of the Court of King's Bench of Alberta