ELIGIBLE FINANCIAL CONTRACTS:
THE CANADIAN ANSWER TO FORWARD CONTRACTS

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Eligible Financial Contracts under the *Companies' Creditors' Arrangement Act*

In Canada, the *Companies' Creditors Arrangement Act* (the "CCAA") operates in similar fashion to Chapter 11 of the United States *Bankruptcy Code* (the "US Bankruptcy Code"). An insolvent debtor company may apply to the court for creditor protection pursuant to the CCAA. If the court grants such relief, the initial order issued by the court typically provides for a broad stay of proceedings against the debtor company. The debtor then attempts to develop and negotiate a plan of arrangement or compromise which must be accepted by a majority in number and two-thirds in value of each class of creditors voting on the plan, and must also be sanctioned by the court, in order to become effective.

In addition, the CCAA contains provisions providing for the commencement of ancillary proceedings in Canada.[1] Pursuant to section 18.6(2) of the CCAA, a court may make such orders and grant such relief as it considers appropriate to facilitate, approve or implement arrangements that will result in the co-ordination of proceedings under the CCAA with any "foreign proceeding" (as defined in the CCAA[2]).

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1 Unlike in the U.S. where section 304 (now Chapter 15) of the US Bankruptcy Code has been amended to adopt the Model Law on Cross-Border Insolvencies (the "Model Law"), drafted by the UN Commission on International Trade Law, the CCAA has not yet been so amended. However, Bill C-55, *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, which has been passed by the Federal government, but has not yet been brought into force, will result in the adoption of key portions of the Model Law. Note that the amendments, however, do not have any impact of significance on the EFC provisions.

2 Section 18.6(1) of the CCAA provides the following definition:

"foreign proceeding" means a judicial or administrative proceeding commenced outside Canada in respect of a debtor under a law relating to bankruptcy or insolvency and dealing with the collective interests of creditors generally.

While the court-ordered stay of proceeding can be very broad, there are some statutory limits. Pursuant to section 11.1(2) of the CCAA, no order under the CCAA may be made staying or restraining the exercise of any right to terminate, amend or claim any accelerated payment under an "eligible financial contract" ("EFC") if such right exists under the terms of the contract. Section 11.1 of the CCAA specifically states:

> 11.1(1) – In this section, "eligible financial contract" means
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> (a) a currency or interest rate swap agreement,
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> (b) a basis swap agreement,
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> (c) a spot, future, forward or other foreign exchange agreement,
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> (d) a cap, collar or floor transaction,
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> (e) a commodity swap,
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> (f) a forward rate agreement,
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> (g) a repurchase or reverse repurchase agreement,
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> (h) a spot, future, forward or other commodity contract,
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> (i) agreement to buy, sell, borrow or lend securities, to clear or settle securities transactions or to act as a depository for securities,
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> (j) any derivative, combination or option in respect of, or agreements similar to, an agreement or contract referred to in paragraphs (a) to (i),
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> (k) any master agreement in respect of any agreement or contract referred to in paragraphs (a) to (j),
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> (l) any master agreement in respect of the master agreement referred to in paragraph (k),

> (m) a guarantee of the liabilities under an agreement or contract referred to in paragraphs (a) to (l), or
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> (n) any agreement of a kind prescribed;
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> "net termination value" means the net amount obtained after setting off the mutual obligations between the parties to an eligible financial contract in accordance with its provisions.
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> (2) No order may be made under this Act staying or restraining the exercise of any right to terminate, amend or claim any accelerated payment under an eligible financial contract or preventing a member of the Canadian Payments Association established by the *Canadian Payments Association Act* from ceasing to act as a clearing agent or group clearer for a company in accordance with that Act and the by-laws and rules of that Association.
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> (3) For greater certainty, where an eligible financial contract entered into before an order is made under section 11 is terminated on or after the date of the order, the setting off of obligations between the company and the other parties to the eligible financial contract, in accordance with its provisions, is permitted, and if the net termination values determined in accordance with the eligible financial contract are owed by the company to another party to the eligible financial contract, that other party shall be deemed to be a creditor of the company with a claim against the company in respect of the net termination values.

Accordingly, characterization as an EFC under the CCAA is of significance because any termination right provided for in an EFC cannot be enjoined by a court-ordered stay of proceedings made pursuant to the CCAA.

Background to the EFC Provisions

Section 11.1 of the CCAA was designed to mirror earlier amendments made in 1992 to Canada's *Bankruptcy and Insolvency Act* (the "BIA"), exempting EFCs from the automatic stay of proceedings resulting from a debtor filing a proposal (or where a debtor files a notice of intention to file a proposal) to its creditors.

The amendments to the BIA were based primarily on lobbying efforts undertaken by the Canadian Bankers' Association (the "CBA") to the Standing Committee of the House of

Commons on Consumer and Corporate Affairs and Government Operations (the "Standing Committee").[3]

The CBA's position was that Canadian insolvency laws relating to hedging contracts should be similar to those contained in Chapter 11 of the US Bankruptcy Code, which permitted counterparties to terminate or close out hedging contracts during a stay period:

> A very important issue relating to commercial insolvencies is the status of financial hedging contracts in these insolvencies. We realize that this may appear to be a fairly technical issue to members of this committee. We want to assure you that it is of vital concern to the financial community as a whole, not just ourselves…..
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> A recent amendment to chapter 11 of the U.S. Bankruptcy Code does permit counter partners *[sic]* to terminate or close out hedging contracts during a stay period if one of those parties becomes insolvent. Similar legislation we feel is needed in Canada to ensure the continued competitiveness of Canadian financial markets and their ability to be part of these contracts when the other party is in fact a U.S. entity or a U.S. citizen.
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> …
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> The contracts being discussed, which we have called eligible financial contracts, are, however, important in their limited sphere. They help Canadians and other corporations worldwide to manage risks, such as changes in interest rates and in currency exchange rates.
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> ....
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> We believe that our proposal in this respect is fully consistent with your concern to rehabilitate debtors and will ensure that financial hedging instruments remain available to Canadian enterprises that need it the most: those in weak, but not desperate conditions.[4]

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[3] House of Commons, Issue No. 12, Wednesday, September 11, 1991, *Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs in Government Operation*s (the "September 11 Minutes"), 12:3-12:29

House of Commons, Issue No. 15, Tuesday, September 24, 1991, *Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs in Government Operations* (the "September 24 Minutes"), 15:3-15:31 at 15:13-15:14

R.H. Chartrand & R.B. Schwill, *Shades of Blue: Derivatives in Re Blue Range Resource Corp.*; 16 B.F.L.R. 427 at 433

[4] The September 11 Minutes, at pp. 12:7, 12:8 and 12:29

The September 24 Minutes evidence that the Standing Committee proposed the amendments in respect of a variety of financial swap and hedging arrangements and that the amendments were to parallel those in the United States.

> The Committee heard from the Canadian Bankers' Association that it wants to be able to terminate certain classes of financial transactions in the event of a filing of a notice of intention. This suggestion relates to a variety of financial swap and hedging arrangements. The fact that a termination provision for these types of contracts has recently been granted under the United States bankruptcy law indicates to us that competitive considerations might require similar provisions here.[5]

In the United States, section 556 of the US Bankruptcy Code was enacted to "prevent the insolvency of one commodity or security firm from spreading to other firms and possibly threatening the collapse of an affected market."[6] It contains a limited exemption to the automatic stay, and provides that:

> The contractual right of a commodity broker or forward contract merchant to cause the liquidation of a commodity contract, as defined in section 761 of this title, or forward contract because of a condition of the kind specified in section 365(e)(1) of this title, and the right to a variation or maintenance margin payment received from a trustee with respect to open commodity contracts or forward contracts, shall not be stayed, avoided, or otherwise limited by operation of any provision of this title or by the order of a court in any proceeding under this title. As used in this section, the term "contractual right" includes a right set forth in a rule or bylaw of a clearing organization or contract market or in a resolution of the governing board thereof and a right, whether or not evidenced in writing, arising under common law, under merchant law or by reason of normal business practice.

In 1990, the United States Congress attempted to clarify the scope of section 556 by amending certain key definitional terms, including the definition of "forward contract". In this regard, the House Report is unmistakably clear:

> [t]he primary purpose of a forward contract is to hedge against possible fluctuations in the price of a commodity. The purpose is financial and risk shifting in nature, <u>as opposed to the primary purpose of an ordinary commodity</u>

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5 The September 11 Minutes, at 15:13

6 1 Norton Bankr. L. & Prac. 2 §§ 2:10 (2004)

> contract, which is to arrange for the purchase and sale of the commodity. [emphasis added][7]

A "forward contract" is defined in section 101(25) of the US Bankruptcy Code as follows:

> "forward contract" means a contract (other than a commodity contract) for the purchase, sale or transfer of a commodity, as defined in section 761(8) of [the US Bankruptcy Code], or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade, or product or byproduct thereof, with a maturity date more than two days after the date the contract is entered into, including, but not limited to, a repurchase transaction, reverse repurchase transaction, consignment, lease, swap, hedge transaction, deposit, loan, option, allocated transaction, unallocated transaction, or any combination thereof or option thereon.

Section 556 of the US Bankruptcy Code only applies if each of the following elements can be established: (a) the existence of a "contractual right"; (b) of a commodity broker or forward contract merchant; (c) to cause the liquidation of a commodity contract, as defined in section 761 or a forward contract, as defined in section 101(25); and (d) such right arises because of the debtor's insolvency or financial condition, the commencement of a case under the US Bankruptcy Code or the appointment of a trustee or a custodian.

Unlike the situation in the U.S., however, section 11.1 of the CCAA is fairly skeletal. Among other things, it is not restricted in its effect to contracts held by "commodity brokers" or "forward contract merchants", the latter of which is defined in section 101(26) of the US Bankruptcy Code as any person:

> whose business consists in whole or in part of entering into forward contracts as or with merchants in a commodity…or any similar good, article, service, right or interest which is presently or in the future becomes the subject of dealing in the forward contract trade.

At the time the EFC amendments to the BIA were being proposed, the argument in favour of the amendments was that failing to enact such provisions would render Canadian financial institutions less competitive than their U.S. counterparts. That is, since U.S. financial

7 H.R. Rep. 101-484 at 3 (1990), reprinted in 1990 U.S.C.C.A.N. 223 at 226

intermediaries were not subject to an insolvency regime with similar restrictions on close-out netting, they could hedge their own risks more easily. This in turn would impair the ability of Canadian producers or marketers to enter into hedging agreements because they have less access to U.S. financial institutions, and therefore they would have less access to these products than entities they competed with in the U.S.

The unfairness that was intended to be avoided by allowing for the termination and netting of obligations was this: the insolvent debtor would otherwise be free, in "out of the money" transactions to speculate for free in the hope that they would increase in value, while being aware, at the same time, that it would not be able to pay if the market moved in the other direction. At the same time, without having to set-off against "out of the money" transactions, the debtor could cherry pick and terminate "in the money" transactions in order to demand a cash payment from the non-defaulting party. Alternatively, a producer with a long-term contract for the sale of a commodity above market prices would maintain such contracts, but terminate those contracts that were below market price. This was viewed by some as fundamentally unfair.

Blue Range & Androscoggin Energy

Prior to the insolvency proceedings in respect of the case of *Re Androscoggin Energy LLC* ("*Androscoggin*")[8], the only reported case on the characterization of EFCs in Canada was *Re Blue Range Resource Corp.* ("*Blue Range*")[9]. In *Blue Range*, the insolvents, Blue Range Resource Corp. and its wholly owned subsidiary (collectively "Blue Range Resource") wanted to sell some of their gas and oil leases in order to raise cash to carry out their plan of arrangement

8 Androscoggin was represented in its Chapter 11 case by Robert J. Keach and Michael A. Fagone of Berstein, Shur, Sawyer & Nelson, and in its section 18.6 proceedings by Joseph M. Steiner, Steven Golick and Nancy Roberts of Osler, Hoskin & Harcourt LLP.

9 *Re Blue Range Resource Corp.* [2000] A.J. No. 1032 (C.A.)

under the CCAA. In order to maximize value, the companies needed to sell those leases free and clear of any contractual commitments for the sale of gas from the leased properties at less than market rates. In some cases, Blue Range Resource had contracts for the sale of natural gas to third party marketers and also had purchase contracts with the same parties. At the same time, some of the supply contracts were at a price that was favourable to Blue Range Resource, while others were below market. Blue Range Resource wished to terminate those contracts that were below market, but keep in place the ones that were above market.[10]

In *Blue Range,* the Alberta Court of Appeal essentially held that a contract for the supply of specified volumes of natural gas at fixed future prices that provided for settlement by physical delivery was a "forward commodity contract" referred to in section 11.1(h) of the CCAA, defining “commodities” for the purpose of section 11.1 as:

> ….interchangeable, and readily identifiable as fungible commodities capable of being traded on a futures exchange or as the underlying asset of an over-the counter derivative transaction. Commodities must trade in a volatile market, with a sufficient trading volume to ensure a competitive trading price, in order that the “forward commodity contract” may be “marked to market” and their value determined. This removes from the ambit of s. 11.1(1)(h) contracts for commercial merchandise and manufactured goods which neither trade on a volatile market or are completely interchangeable for each other.[11]

In *Blue Range*, the commodity in question was natural gas, and as natural gas was a fungible commodity trading in a volatile and liquid market, the long-term contracts were therefore "eligible financial contracts" under section 11.1 of the CCAA. As a result, the termination rights under such contracts were not subject to the general stay provided for in CCAA proceedings.

Many insolvency practitioners believed that the appellate decision in *Blue Range* cast too broad a net over what can be caught up in the definition of an EFC, giving too little attention to the

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[10] Chartrand and Schwill, *supra,* n. 3, at 431-432

[11] *Blue Range*, *supra*, n. 9, at para. 45

financial aspect that ought to characterize EFCs. There was a general concern that one interpretation of the appellate decision in *Blue Range* was that a debtor requiring CCAA protection could not stay the termination of any contract that dealt with the sale and supply of a "commodity." Such a result could easily jeopardize the restructuring efforts of many companies. It was the view of many insolvency practitioners that the 'carve out' for EFCs provided for in section 11.1 of the CCAA was not meant to apply to every contract dealing with commodities (and in particular, was not meant to apply to true supply contracts), but was generally meant to protect parties to derivatives and other hedging contracts from being caught by a stay of proceedings in a restructuring (and on a similar basis to the protection afforded to such parties under U.S. bankruptcy laws).[12]

This concern was brought to the fore in the January 26, 2005 endorsement of Mr. Justice James Farley of the Ontario Superior Court of Justice (Commercial List) in Androscoggin Energy LLC's section 18.6 CCAA proceedings.[13]

Background to Androscoggin

Androscoggin Energy LLC ("Androscoggin Energy") was a Delaware corporation which operated a gas-fired power and steam generation plant in the State of Maine. To assure itself of a regular supply of gas, Androscoggin Energy entered into a series of natural gas supply contracts. The contracts were for a 10-year supply of gas at fixed prices. The obligation to take and nominate for gas was a type known as a 'load factor' deal – Androscoggin Energy was required to take a minimum amount of gas each year and each quarter up to a maximum daily quantity (MDQ). Androscoggin Energy was required to hold sufficient firm transportation on the NOVA

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[12] See, for example, Chartrand and Schwill, *supra,* n. 3

[13] *Re Androscoggin Energy LLC,* [2005] O.J. No. 395 (S.C.J.) [Commercial List]

Gas Transmission system to transport the MDQ. The delivery and transfer of title to gas supplied occurred at the notional "NOVA Inventory Transfer". The gas suppliers were obligated to deliver the nominated quantity of gas onto, and maintain receipt contracts with, the NOVA Gas system at certain receipt points. The gas suppliers agreed to dedicate a portion of their gas reserves to the contracts.

The contracts provided that various events including non-payment, breach of a covenant, and commencement of insolvency proceedings constituted events of default. However, under the terms of the contracts, the gas suppliers were not permitted to terminate so long as payments of sums due to them were made. The supply contracts had no provisions for netting or liquidation on termination. Additionally, Androscoggin Energy's lenders were given a right to cure a default of Androscoggin Energy in limited circumstances.

Androscoggin Energy filed for protection under Chapter 11 of the US Bankruptcy Code and made an application for ancillary relief in Canada under section 18.6 of the CCAA in order to, among other things, have the Chapter 11 stay of proceedings recognized and enforced in Canada. Androscoggin Energy needed Canadian protection as the relevant long-term gas supply contracts were with Alberta-based suppliers, were significantly "in the money" and represented Androscoggin Energy's single most valuable asset. The contracts were governed by the laws of the Province of Alberta.

In the initial November 26, 2004 order obtained *ex parte* by Androscoggin Energy under section 18.6 of the CCAA, a stay prohibiting the gas suppliers from terminating the contracts was granted by the court. The Canadian suppliers of natural gas to Androscoggin Energy under these long-term contracts then brought a motion for an order that the stay of proceedings resulting

from the initial CCAA order did not apply to prevent the termination of their contracts, as they were EFCs.

In his reasons dismissing the motion, Justice Farley held that the essential relationship of the gas suppliers to Androscoggin Energy over the terms of their respective supply contracts was the actual physical supply of gas. As such, Justice Farley concluded (with "considerable trepidation") that the gas supply contracts in question were not EFCs and specifically stated that the trial court's interpretation in *Blue Range* was to be favoured (although he noted some of its difficulties) over that of the Alberta Court of Appeal.

Justice Farley also held that, even if the contracts in question were EFCs, the particular contracts in question could not be terminated in any event because, on their terms, they could only be terminated where Androscoggin Energy failed to arrange for payment (and this had not happened). Although the insolvency filing constituted an event of default under the contracts, insolvency was not a termination event. To prevent termination of those contracts, Androscoggin had obtained the permission of the U.S. Bankruptcy Court to continue to make payments under the contracts, including payment of pre-filing obligations.

The Ontario Court of Appeal's View

On appeal, with the International Swaps and Derivatives Association ("ISDA") appearing as intervener, the Ontario Court of Appeal agreed with Justice Farley's conclusion that, even if the contracts in question were characterized as EFCs, the gas suppliers were not entitled to terminate them because no termination event had occurred under the terms of the contract.[14]

[14] *Re Androscoggin Energy LLC* (2005), 72 O.R. (3d) 552 (C.A.) ("*Androscoggin C.A.")*

The Ontario Court of Appeal also agreed with Justice Farley's ultimate characterization of the contracts in question as not being EFCs, but specifically stated that it did not subscribe to the reasons given by Justice Farley for his conclusions on that point. The Ontario Court of Appeal interpreted Justice Farley's conclusions to have been based on his holding that the primary thrust of the contracts was for the physical supply of gas and not financial risk management and, in so doing, Justice Farley had favoured the trial level reasons in *Blue Range* (where the trial court had explicitly made such a distinction, but which decision was later overturned by the Alberta Court of Appeal). In contrast, the Ontario Court of Appeal held that the appellate court in *Blue Range* was correct in not drawing a distinction between physically settled and financially settled transactions as the basis for characterizing commodity supply contracts as EFCs.

The Ontario Court of Appeal focussed on the fact that the contracts at issue in *Blue Range* "served a financial purpose unrelated to the physical settlement of the contracts."[15] The Alberta Court of Appeal had similarly noted that the *Blue Range* contracts "[served] an important financial purpose which is unrelated to physical or financial settlement; they are risk management tools."[16]

The Ontario Court of Appeal held that the "financial purpose" found in the *Blue Range* contracts was evidenced by the terms of the contracts, which enabled the parties to:

1. manage the risk of a commodity that fluctuated in price by allowing the counterparty to terminate the agreement in the event of an assignment in bankruptcy or a CCAA proceeding; and

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15 *Androscoggin C.A.*, *supra*, n. 14, at 563

16 *Blue Range, supra,* n. 9, at para. 18

2. offset or net their obligations under the contracts, thereby enabling the parties to crystallize their losses and enabling them to avoid future losses by re-hedging their exposure.

However, unlike the contracts before the Alberta Court of Appeal, the Ontario Court of Appeal held that the Androscoggin Energy contracts served no such financial purpose and therefore were not EFCs. The court concluded that hallmarks of a commodity contract serving a financial purpose are that, by its terms, it can be terminated on a bankruptcy or CCAA filing, and that netting or offsetting of obligations is permitted with a view to crystallizing losses and enabling the solvent counterparty to avoid further losses by dealing with its exposure through re-hedging its position. As the contracts in *Androscoggin* possessed none of these "hallmarks" (which are typically found, for example, in an ISDA Master Agreement), the Ontario Court of Appeal concluded that they could not be characterized as EFCs. The court also concluded that the mere *pro forma* insertion of such terms into a contract would not result in its automatic characterization as an EFC. Rather, regard must be had to the contract as a whole to determine its character.

Ultimately, the gas suppliers acted as the stalking horse bidders at an auction conducted in the U.S. in March 2005, pursuant to which the contracts were ultimately sold to a higher bidder. In April 2005, the US Bankruptcy Court approved the sale, with the Ontario Superior Court of Justice [Commercial List] granting a recognition order in respect of the sale shortly thereafter. In the end, the Androscoggin Energy estate realized almost U.S.$116 million, which would have been lost had the courts in both jurisdictions not prevented the early termination of the contracts. Indeed, had the gas suppliers been able to terminate the contracts on the basis that they were EFCs (notwithstanding the fact that the relevant contracts did not provide the suppliers with a

right to terminate in the face of an insolvency), there would have been no automatic liquidation of the contracts for the benefit of Androscoggin Energy.

Calpine Canada Energy Ltd.

The only EFC characterization case of significance decided following *Androscoggin* involved certain Calpine entities that had filed for protection under the CCAA[17]. In *Re Calpine Canada Energy ("Calpine Canada")*[18], the Alberta Court of Queen's Bench considered whether or not a call on production agreement (the "COP Agreement") between the relevant Calpine entity ("Calpine") and a gas supplier, Pengrowth Corporation ("Pengrowth") was an EFC.

Pursuant to an agreement entered into in 2002, Calpine sold certain oil and natural gas rights and assets located on lands in British Columbia to Pengrowth. In accordance with the terms of the purchase and sale agreement, Pengrowth and Calpine entered into a COP Agreement upon the closing. The COP Agreement provided Calpine:

> … with a recurring right of first refusal to purchase any portion of the gas or oil produced from the lands that were sold on market terms and conditions. The agreement remains in force for as long as gas and oil are produced from the lands, unless terminated sooner by the parties. It provided for a fixed delivery point and a price for the production spelled out by reference to current market prices. It does not compel Pengrowth to produce gas or oil from the lands.[19]

The price of gas under the COP Agreement was the current market price as determined by various industry measures, less toll charges.

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17 Interestingly, a different Calpine entity, Calpine Northbrook Corporation of Maine, Inc. was the managing member of Androscoggin.

18 *Re Calpine Canada Energy Ltd.,* [2006] A.J. No. 412 (Q.B.)

19 *Calpine Canada*, *ibid*, at para. 4

Analyzing the contract as a whole, the Alberta court held that the COP Agreement was not an EFC as it simply lacked too many of the relevant indicia. It had no fixed price, it had no fixed term and Pengrowth was neither obliged to produce, nor obliged to produce at any specific rate. Therefore, the contract could not be 'marked to market' (an important indicator of an EFC). In addition, the COP Agreement had no netting provisions, (neither a necessary nor sufficient condition of an EFC, but a significant indicator nonetheless), and there was no evidence of any offsetting hedging transactions entered into by Pengrowth (which the court took as support for the conclusion that the COP Agreement was not the type of contract that is part of the forward contract trade). Further, in analyzing the contract "as a whole", the court concluded that the COP Agreement formed part of the consideration for the sale of the lands (given the fact that the "toll kicker" would always be burdensome to Pengrowth, and of benefit to Calpine). Thus, the court concluded, the COP Agreement was more analogous to the types of contracts specifically excluded from the category of EFCs by the court in *Blue Range* – namely, a standard gas utility contract, where the demand, price and quality of gas to be purchased is based solely upon the purchaser's fluctuating needs from time to time.

The court also commented on the fairness of the result, noting:

> The last part of the analysis directed by the Court of Appeal in *Blue Range* is the fairness of result test. While this test is not always easy to apply, it appears clearer in this situation than in many. If the respondents were allowed to terminate the COP Agreement, they would derive a benefit from being able to enter into long-term, fixed price contracts for the gas produced from the lands, or selling in the spot market without the burden of transportation costs. The Calpine applicants would derive no benefit from the termination. Although the COP agreement has value to the Calpine applicants, no amount would be payable to the CESCA Partnership on its termination. They would lose a valuable contractual asset without compensation. Moreover, the COP Agreement was part of the consideration extracted when Calpine sold the lands to Pengrowth. Therefore, termination of the contract would deprive the Calpine applicants and their creditors of the ongoing benefit of the sale of the lands. Finally, the CESCA Partnership would lose a relatively secure supply of gas at market price.

> On balance, termination would not meet the fairness of result test. If, however, termination of the COP Agreement remains stayed, the respondents are no worse off than other suppliers of goods and services to the Calpine applicants. The respondents have not adduced evidence that a failure to be able to terminate the contract will cause any prejudice to their hedging strategy. Calpine's creditors as a group will benefit from the value of this contractual asset.[20]

Certain insolvency practitioners have criticized the court's emphasis on fairness as imposing an additional layer of uncertainty into the mix (the 'uncertainty' complaint was similarly made following the *Androscoggin* decision). However, the response to such criticism is found in the *Calpine Canada* decision itself, where Justice Romaine of the Albert Court of Queen's Bench stated:

> Given that the CCAA's predominate purpose as a remedial statute dictates a narrower construction of section 11.1(1) than the mere enquiry if a contract could fall within one of its "comprehensive and intimidating" list of categories, *(Blue Range*, at para. 10), and given the ingenuity and innovation of those who deal in the derivatives market, there can be no "bright-line" definition that will determine whether a contract falls within the exception set out in the CCAA. While some contracts clearly will fall within the exception, either by their nature or by reason of existing case law, there are others that do not fit so clearly and that may necessitate a more searching analysis by CCAA parties and the court.[21]

At the end of the day, the *Calpine Canada* decision continues along the path set in *Androscoggin* and other CCAA decisions which highlight the CCAA's purpose as a remedial statute, designed to allow the debtor breathing room in which to reorganize its business. This objective dictates that exemptions from the application of a stay ought to be narrowly construed. To do otherwise would be to defeat the statute's very purpose. It is therefore insufficient that a contract in question be a commodities contract to fall within the definition of an EFC; rather, one must view any purported EFCs through a financial lens – they must be financial and risk shifting in nature.

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[20] *Calpine Canada, supra,* n. 18, at paras. 28-29

[21] *Calpine Canada, supra,* n. 18, at para. 24