

COURT FILE NUMBER Q.B. No. 733 of 2021

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE SASKATOON

APPLICANT ABBEY RESOURCES CORP.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
RSC 1985, c C-36, AS AMENDED (the "CCA")

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT FOR THE CREDITORS
OF ABBEY RESOURCES CORP.

BRIEF OF LAW

(Re: Application for Second Extension Order, Declaration and Vesting Order, and Sale Approval
and Vesting Orders)

BRIEF OF LAW FILED BY THE APPLICANT IN RESPECT OF ITS APPLICATION SEEKING SALE
APPROVAL AND VESTING ORDERS AND A DECLARATION AND VESTING ORDER PURSUANT TO
THE *COMPANIES' CREDITORS ARRANGEMENT ACT*

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I. INTRODUCTION

1. The Applicant, ABBEY RESOURCES CORP. ("**Abbey**"), was granted creditor protection pursuant to the *Companies' Creditors Arrangement Act*¹ by an Order of this Honourable Court on August 13, 2021.
2. Prior to its entry into these proceedings, Abbey entered into a related-party transaction (the "**Abbey - Optimum Transaction**") to facilitate the notional transfer of significant portions of its natural gas production equipment to Optimum Petroleum Service Inc. ("**Optimum PSI**"). As is consistent with its representations made to both the stakeholders of Abbey and this Honourable Court since July of 2021, Abbey remains committed to the reversal of the Abbey - Optimum Transaction. Herein, Abbey argues that this Honourable Court may exercise its broad, discretionary authority under CCAA section 11 to grant an order (the "**Declaration and Vesting Order**") sought by Abbey to effect the reversal of the Abbey - Optimum Transaction.
3. Additionally, Abbey seeks that this Court exercise its authority under CCAA section 36 to grant two Sale Approval and Vesting Orders (the "**SAVOs**") for the pending sales of surplus equipment brokered prior to Abbey's entry into these proceedings.
4. This Brief of Law is intended to provide the Court with the relevant statutory authority and case law in support of Abbey's application for the Declaration and Vesting Orders SAVOs.

II. STATEMENT OF ISSUES

- A. Should the Court enable Abbey to conclude the pending surplus equipment sales by granting Sale Approval and Vesting Orders pursuant to CCAA section 36?
- B. Is the Court empowered by its broad, discretionary authority under CCAA section 11 to facilitate the reversal of the Abbey - Optimum Transaction?

III. ARGUMENT

A. The Court should approve the pending surplus equipment sales

5. Abbey seeks this Honourable Court's approval of two pending transactions, specifically:

¹ RSC 1985, c C-36, [CCAA].

- i. The sale of a Jenbacher J312 natural gas engine to Steel Reef Infrastructure Corporation ("**Steel Reef**") for the gross purchase price, exclusive of taxes, of \$65,000; and
 - ii. The sale of a 24" x 10' filter vessel to XTO Energy Inc. ("**XTO**") for the gross purchase price, exclusive of taxes, of \$17,000.²
6. Both transactions are arm's-length sales³ and involve surplus equipment not required for Abbey's ongoing operations.⁴ Both transactions relate to equipment sited or formally sited within the boundaries of the Rural Municipality of Miry Creek No. 229 (the "**R.M. of Miry Creek**").⁵
7. Section 36(1) of the CCAA provides this Court with the express authority to authorize any out of the ordinary course sale of an applicant debtor's property:

36 (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business **unless authorized to do so by a court**. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.⁶

8. CCAA section 36(6) allows orders made under CCAA section 36(1) to vest title to property disposed of by a debtor applicant in the name of the purchaser free and clear of all charges or encumbrances, provided that such charges and encumbrances attach to sale proceeds resulting from the disposition of the asset in question:

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.⁷

9. The following paragraphs argue: (i) that Abbey has made out the applicable technical pre-requisites for orders granted under CCAA section 36(1) set out in CCAA sections 36(2) and (7); and, (ii) that the factors the Court is required to consider in deciding whether to grant an

² Sixth Affidavit of James Gettis, dated October 1, 2021, at para 30, [**Sixth Gettis Affidavit**].

³ *Ibid*, at para 31.

⁴ *Ibid*, at para 29.

⁵ *Ibid*, at para 35.

⁶ CCAA, *supra* note 1, at ss 36(1), emphasis added.

⁷ *Ibid*, at ss 36(6).

order under section 36(1) militate in favour of approving the pending surplus equipment sales.

(i) The technical prerequisites for the granting of the SAVOs are made out

10. CCAA sections 36(2) and (7) impose prerequisites that must be satisfied for the Court to grant an order under CCAA section 36(1). Both prerequisites are made out in the present matter.
11. CCAA section 36(2) requires that secured creditors who are likely to be affected by the proposed transaction receive notice for an application made under CCAA section 36(1):

36 (2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.⁸

12. It is submitted that the only parties potentially affected by the proposed transaction are: (i) the Ministry of Energy and Resources (“**MOER**”), by way of an interest that may be afforded to it pursuant to *The Oil and Gas Conservation Act*⁹; (ii) the R.M. of Miry Creek, by way of statutory charges that it may have in Abbey’s property pursuant to *The Municipalities Act*¹⁰; and (iii), parties with general security interests registered against Abbey in personal property registries. All such parties have been included in the Service List established in these proceedings and have been served with the materials in support of Abbey’s Application for the SAVOs. Therefore, the notice requirement in CCAA section 36(2) is made out.
13. CCAA section 36(7) requires that an applicant satisfy the Court that a proposed transaction will not jeopardize the applicant’s ability to make payments that would be required under CCAA sections 6(5)(a) and 6(6)(a) had the Court approved a compromise or arrangement. CCAA section 36(7) reads:

36 (7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.¹¹

14. CCAA section 6(5)(a) pertains to obligations owing to employees. CCAA section 6(6)(a) pertains to pension contributions for employers that participate in a prescribed pension plan. As the Company does not participate in a prescribed pension plan, CCAA section 6(6)(a) is

⁸ CCAA, *supra* note 1, at ss 36(2).

⁹ RSS 1978, c O-2.

¹⁰ SS 2005, c M-36.1.

¹¹ CCAA, *supra* note 1, at ss 36(7).

not relevant to the present discussion. CCAA section 6(5)(a) reads:

6 (5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).¹²

15. CCAA section 6(5)(a)(i) refers to section 136(1)(d) of the *Bankruptcy and Insolvency Act*,¹³ which reads as “the amount of any wages, salaries, commissions, compensation or disbursements referred to in sections 81.3 and 81.4 that was not paid.”¹⁴ BIA sections 81.3 and 81.4 refer, respectively, to security for unpaid wages and disbursements owing to employees of companies that have made assignments into bankruptcy or are subject to receivership proceedings.

16. It is respectfully submitted that the Court should be satisfied that Abbey can and will make any payments required under CCAA sections 6(5)(a) for at least three reasons. First, Abbey does not currently owe any arrears of wages, salaries, or commissions to any of its employees.¹⁵ Second, Abbey continues to generate significant natural gas sales revenues, which are sufficient for it to carry on with its operations during its restructuring and should thus be sufficient to satisfy obligations owing to employees. Third, the proposed transactions only represent a small fraction of the total value of Abbey's equipment.

17. In light of the above, Abbey submits that the prerequisites set out in CCAA sections 36(2) and

¹² *Ibid*, at ss 6(5).

¹³ RSC 1985, c B-3, [BIA].

¹⁴ *Ibid*, at ss 136(1)(d).

¹⁵ Sixth Gettis Affidavit, at para 37.

(7) are clearly satisfied.

(ii) The Court should approve the pending sales

18. CCAA section 36 empowers the Court to approve a wide variety of potential transactions, up to and including the sale of the entirety of an applicant's assets in a liquidating CCAA. Accordingly, it falls squarely within this Honourable Court's authority to approve transactions involving the disposition of disused equipment representing but a small fraction of an applicant's total asset value.

19. CCAA section 36(3) sets out a list of six non-exhaustive factors that courts are bound to consider in determining whether it is appropriate to grant an order pursuant to CCAA section 36(1):

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.¹⁶

20. Taken as a whole, the factors that this Honourable Court is bound to consider under CCAA section 36(3) militate in favour of approval of the sales:

- i. Respecting factor (a): the process leading to the proposed sales was fair and reasonable under the circumstances. The assets in questions were openly listed for sale by an equipment broker specializing in the sale of used oil and gas equipment. Steel Reef and XTO deal at arm's-length from Abbey. Further, the broker through which the transactions were negotiated had a clear economic incentive to obtain the

¹⁶ CCAA, *supra* note 1, at ss 36(3).

best price possible for the sale of equipment by virtue of the fact that its brokerage fees are generated from a 15% commission on the gross sales price of assets sold;

- ii. Respecting factor (b): as the listing process predated Abbey's entry into CCAA proceedings, it was not possible for the Monitor to have approved of the sales process in question.
- iii. Respecting factor (c): though the Monitor's Second Report does not opine on whether the proposed transaction would be more beneficial than a disposition in bankruptcy, the Monitor is of the view that the transactions are fair and reasonable.¹⁷
- iv. Respecting factor (d): though Abbey's stakeholders were not consulted prior to the sales being brokered in the Summer of 2021, Abbey's counsel did contact counsel for the parties most likely to be affected by the sales - namely the R.M. of Miry Creek and the MOER - in advance of its application for the SAVOs to solicit input from such parties.¹⁸
- v. Respecting factor (e): the proposed transactions will have no adverse impact on any of Abbey's creditors or other stakeholders. The assets in question are not generating income for Abbey and are unlikely to be sold at a higher value. Net sale proceeds will be held in trust by the Monitor. Moreover, any charges or encumbrances securing any creditor or other stakeholder's interest on such assets will immediately attach to net sale proceeds, thereby leaving all interested parties in no worse position as a result of the sales;
- vi. Respecting factor (f): both transactions are at gross purchase prices that approach appraised fair market value and exceed orderly liquidation value; in the case of the proposed transaction to Steel Reef, the gross purchase price of \$65,000 approaches estimated fair market value at \$70,000 and significantly exceeds the estimated orderly liquidation value of \$42,000¹⁹; in the case of the proposed transaction to XTO, the gross purchase price of \$17,000 approaches estimated fair market value at \$20,000 and exceeds the estimated orderly liquidation value of \$12,000.²⁰

21. The CCAA section 36(3) factors, when considered as a whole, weigh in favour of sale approval under CCAA section 36(1). Therefore, Abbey respectfully submits that this

¹⁷ Second Report of the Monitor, dated October 4, 2021, at para 39.

¹⁸ Sixth Gettis Affidavit, at para 38.

¹⁹ Sixth Gettis Affidavit, at Exhibit "F."

²⁰ *Ibid.*

Honourable Court should grant the SAVOs required to effect the pending transactions.

B. The Court should exercise its authority under CCAA section 11 to reverse the Abbey - Optimum Transaction

22. Roughly nine months prior to its entry into CCAA proceedings, Abbey concluded the Abbey - Optimum Transaction, wherein it transferred significant portions of its tangible assets and certain intangible assets to Optimum PSI in exchange for a promissory note that created a debt which was designed to be set off by notional rental payments from Abbey to Optimum PSI. In reaction to the concerns raised by its stakeholders respecting the transaction, Abbey committed to taking steps to reverse the Abbey - Optimum Transaction prior to its entry into these proceedings.
23. Abbey now seeks the assistance of this Honourable Court in reversing the Abbey - Optimum Transaction. The following paragraphs argue that the Court may exercise its broad discretionary under CCAA section 11 to grant the Order proposed by Abbey (the “**Declaration and Vesting Order**”) to declare that the Abbey - Optimum Transaction is void *ab initio* and that any property transferred to Optimum PSI in the Abbey - Optimum Transaction shall vest in the name of Abbey, subject to the charges and encumbrances that would have attached or remained attached to such property had the Abbey - Optimum Transaction not been effected.
24. CCAA section 11 authorizes courts to exercise a wide range of authority, subject to minimal restrictions, to make orders necessary to further the aims of an applicant’s restructuring. The section reads:
- 11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.
25. In *US Steel Canada Re*²¹, the Ontario Court of Appeal (the “**ONCA**”) reiterated that CCAA section 11 is “the engine that drives this broad and flexible statutory scheme.”²² The ONCA went on to clarify that the broad powers afforded to CCAA courts by section 11 are circumscribed only by that section’s express limitations:

²¹ 2016 ONCA 662, [2016] OJ No 4688.

²² *Ibid.*, at para 74.

76 The jurisdiction under s. 11 has two express limitations. First, the court must find that the order is “appropriate in the circumstances”. Second, even if the court considers the order appropriate in the circumstances, it must consider whether there are “restrictions set out in” the CCAA that preclude it.²³

26. The Supreme Court of Canada (“**SCC**”) provided CCAA courts with guidance on the broad scope of their authority in CCAA proceedings in *Century Services Inc. v Canada (Attorney General)*.²⁴ There, the SCC adopted the view that the CCAA is deliberately “skeletal in nature” and that it thus does “not contain a comprehensive code that lays out all that is permitted or barred.”²⁵ The SCC further stressed that the “expansive interpretation the language of the [CCAA] is capable of supporting” is “[p]articularly noteworthy.”²⁶ Speaking to the general nature of discretionary authority under the CCAA, the majority in *Century Services* stated as follows:

[70] The general language of the CCAA should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. **Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company.** I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where **participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.**

[71] It is well established that efforts to reorganize under the CCAA can be terminated and the stay of proceedings against the debtor lifted if the reorganization is “doomed to failure” (...). However, **when an order is sought that does realistically advance the CCAA’s purposes, the ability to make it is within the discretion of a CCAA court.**²⁷

27. In summary of the above, this Court may exercise its authority under CCAA section 11 to grant the Declaration and Vesting Order if the Order is appropriate in the circumstances and will advance the purposes of the CCAA (i.e., to enable Abbey to restructure its financial affairs for

²³ *Ibid*, at para 76.

²⁴ 2010 SCC 60, [2010] 3 SCR 379.

²⁵ *Ibid*, at para 57.

²⁶ *Ibid*, at para 66.

²⁷ *Ibid*, citations omitted.

the benefit of itself and its stakeholders), provided that the Declaration and Vesting Order is not expressly prohibited by an internal limitation within the CCAA. No provision within the CCAA expressly or impliedly prohibits the Court from granting the Declaration and Vesting Order. The below analysis thus focuses on the question of whether the Declaration and Vesting Order is appropriate in the circumstances and whether it will advance the purposes of Abbey's restructuring in these proceedings.

(i) **The Declaration and Vesting Order is appropriate in the circumstances and will advance the purposes of the CCAA**

28. CCAA section 36.1 applies the provisions contained within sections 95 through 101 of the BIA governing reviewable transactions into CCAA proceedings, *mutatis mutandis*:

36.1 (1) Sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act apply, with any modifications that the circumstances require, in respect of a compromise or arrangement unless the compromise or arrangement provides otherwise.

(2) For the purposes of subsection (1), a reference in sections 38 and 95 to 101 of the Bankruptcy and Insolvency Act

(a) to "date of the bankruptcy" is to be read as a reference to "day on which proceedings commence under this Act";

(b) to "trustee" is to be read as a reference to "monitor"; and

(c) to "bankrupt", "insolvent person" or "debtor" is to be read as a reference to "debtor company"

29. Section 96 of the BIA deals with transfers concluded at undervalue. Relevant portions of BIA section 96 read:

96 (1) On application by the trustee, a court may **declare that a transfer at undervalue is void** as against, or, in Quebec, may not be set up against, the trustee — or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor — if

...

(b) the party was not dealing at arm's length with the debtor and

(i) the transfer occurred during the period that begins on the day that is one year before the date of the initial bankruptcy event and ends on the date of the bankruptcy, or...

30. Notably, section 96(1)(b) of the BIA enables a court to reverse a transaction between non-arm's length parties in the absence of any intent to defeat, delay, or defraud creditors. Thus,

even though the Abbey - Optimum Transaction was not conducted with the intent to defeat any of Abbey's creditors, it may nevertheless constitute a reviewable transaction under BIA section 96(1)(b) given that it was concluded for no cash consideration between non-arm's length parties.

31. Neither CCAA section 36.1 nor the relevant provisions of the BIA makes any express allowance for a bankrupt person or a debtor to company seek an Order reversing a potentially reviewable transaction. In the instant case, the Monitor may be in a position to rely on CCAA section 36.1 to reverse the Abbey - Optimum transaction, but likely only at the time Abbey puts forward its plan for compromise or arrangement.
32. In light of the fact that CCAA section 36.1 likely enables this Honourable Court to reverse the Abbey - Optimum transaction, albeit not at this juncture, it is submitted that it clearly falls within the discretionary authority of this Honourable Court to grant the Declaration and Vesting Order sought by Abbey, provided that the Court is satisfied that granting the Declaration and Vesting Order will realistically advance the aims of the CCAA by enabling Abbey to restructure its affairs. This it is to say, given that the Court would be in a position to resort to CCAA section 36.1 to reverse the Abbey - Optimum Transaction at a different stage in these proceedings upon the application of the Monitor, it is submitted that granting the Declaration and Vesting Order at this stage of these proceedings is "appropriate in the circumstances" within the meaning of CCAA section 11.
33. The Declaration and Vesting Order will usefully further the Company's restructuring by returning equipment notionally transferred to Optimum PSI into the hands of Abbey, thereby eliminating ambiguity about control of such equipment and avoiding an inevitable dispute with creditors - in particular, municipalities - that have taken issue with the Abbey - Optimum Transaction.
34. Abbey also argues that reversing the Abbey - Optimum Transaction by way of the Declaration and Vesting Order is preferable to the only other alternative mechanism for reversal that falls within Abbey's control - i.e., entering into an agreement with Optimum PSI providing for the transfer of assets back to Abbey. Though Abbey and Optimum PSI may be able to enter into an agreement reversing the Abbey - Optimum Transaction, such an agreement would lack the clarity and finality of an Order of this Honourable Court clearly ruling, for the benefit of all interested parties, that assets included in the Abbey - Optimum Transaction are vested in Abbey's name and remain subject to all of the liens, charges, and other encumbrances that would have attached or remained attached to such property had the Abbey - Optimum Transaction not been effected.

35. More to the point, any non-arm's length agreement transferring assets back to Abbey (which would presumably be concluded for no material cash consideration) would entail complications and potential risks for both Abbey and Optimum PSI. Requiring Abbey and Optimum PSI to conclude such a transaction would impose both parties the onerous burden of significant professional costs that would invariably be incurred in assessing the complicated legal and tax consequences of entering into an agreement to transfer property from Optimum PSI to Abbey on a no-cash basis. Consequently, in the view of Abbey, reversing the Abbey - Optimum Transaction by way of the Declaration and Vesting Order is simpler, clearer, more transparent, and cheaper than endeavouring to achieve a similar result by way of a transaction.
36. In light of all of the above, it is submitted that an Order allowing for the reversal of the Abbey - Optimum transaction is appropriate in the circumstances and will clearly further the aims of Abbey's restructuring in these proceedings for the benefit of itself and all of its stakeholders. Accordingly, it is respectfully submitted that this Honourable Court should exercise its authority under CCAA section 11 to grant the Declaration and Vesting Order.

IV. CONCLUSION AND RELIEF SOUGHT

37. For the reasons expressed herein, it is respectfully submitted that this Honourable Court may exercise its discretionary authority under CCAA sections 11 and 36(1), respectively, to grant the Declaration and Vesting Order and the SAVOs sought by Abbey. Abbey, therefore, asks that such Orders be granted substantially in the form of its draft Orders filed in these proceedings.

DATED at Edmonton, Alberta, this 6th day of October, 2021.

DLA PIPER (CANADA) LLP

Per: 

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COURT FILE NUMBER **Q.B. No. 773 of 2021**

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JUDICIAL CENTRE **SASKATOON**

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TABLE OF AUTHORITIES

**(Re: Application for Second Extension Order, Declaration and Vesting Order, and Sale Approval
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CASE LAW

TAB

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379.

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