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COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

IN BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE	**SASKATOON**
APPLICANTS	**RURAL MUNICIPALITY OF MIRY CREEK No. 229** **RURAL MUNICIPALITY OF LACEDENA No. 228** **GOVERNMENT OF SASKATCHEWAN as represented by THE MINISTRY OF ENERGY AND RESOURCES**
RESPONDENT	**ABBEY RESOURCES CORP.**

IN THE MATTER OF THE RECEIVERSHIP OF ABBEY RESOURCES CORP.

AND IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* RSC 1985, c C-36, AS AMENDED

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

BRIEF OF LAW OF THE GOVERNMENT OF SASKATCHEWAN

APPLICATION SCHEDULED FOR FEBRUARY 28 AND MARCH 1, 2022

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I. INTRODUCTION

1. This is an application by the Applicants, the Rural Municipality of Miry Creek No. 229, the Rural Municipality of Lacedena No. 228 and the Government of Saskatchewan as represented by the Ministry of Energy and Resources (the "**Ministry**") in support of an Order pursuant to section 243 of the *Bankruptcy and Insolvency Act,* RSC 1985, c B-3 (the "***BIA***"), section 65(1) of *The Queen's Bench Act, 1998,* SS 1998, c Q-1.01 and section 64(8) of *The Personal Property Security Act, 1993,* SS 1993, c P-6.2 appointing Vic Kroger of MNP as receiver (the "**Receiver**") without security, of certain assets, undertakings and properties of Abbey Resources Corp. ("**Abbey**").

2. In addition to the above, the application before the Court also seeks an order terminating the Initial Order of the Honourable Mr. Justice G.A. Meschishnick granted August 13, 2021, as extended and amended most recently on January 27, 2022 and terminating the stay of proceedings therein.

3. In accordance with the practice authorized by the Court of Queen's Bench for Saskatchewan of using template orders in Saskatchewan receivership proceedings, the Applicants have submitted a redlined version of the Saskatchewan Template Receivership Order which identifies the manner in which the draft Receivership Order being requested varies from the template receivership order that has been approved by the Insolvency Panel of the Court of Queen's Bench for Saskatchewan.

II. FACTS

4. Given the history of the file, and the voluminous affidavit material on the file, the facts relied upon by the Ministry in support of this application will be referred to in the analysis portion of this brief.

III. ISSUES

1) Should the Companies Creditors Arrangement Act Proceedings be Terminated?

2) Jurisdictional Issues

3) Is it just or convenient to appoint a receiver of Abbey on the terms contained in the draft Receivership Order?

IV. LAW AND ANALYSIS

Should the Companies Creditors Arrangement Act Proceedings be Terminated?

5. To a large extent, the decision to grant and/or continue protection under the *Companies Creditors Arrangement Act* (the "**CCAA**") and implement a receiver involve the same considerations. In *BCIMC Construction Food Corporation,* the Court was forced to consider which insolvency path was more appropriate. In outlining the considerations on whether to appoint a receiver, which were ultimately also considered in determining whether protection under the CCAA was appropriate, the Court stated as follows:

> 45 In *Confederation Life*, at paras. 19-24 Farley J. set out four additional factors the court may consider in determining whether it is just and convenient to appoint a receiver:
>
> (a) The lenders' security is at risk of deteriorating;
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> (b) There is a need to stabilize and preserve the debtors' business;
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> (c) Loss of confidence in the debtors' management;
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> (d) Positions and interests of other creditors.
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> 46 All four factors apply here.
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> 47 *Security at risk of deteriorating*: There is no doubt that the lenders' security is at risk of deteriorating. All three projects are overbudget. The Debtors acknowledge that the projects are economically unviable in light of the proceeds generated by the agreements of purchase and sale. Work has stopped on the projects. Trades are not being paid. Over $38,000,000 in construction liens have been registered since March 2. $3.5 million of interest is overdue. The lenders are concerned about the risk of further deterioration as a result of liquidity problems that they fear may arise because of the Covid 19 emergency. These various factors make it necessary to gain control of the projects quickly.
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> 48 *The need to stabilize the business*: The Debtors agree that there is a need to stabilize the business. The only difference in this regard is whether it should be stabilized through a receivership or a CCAA proceeding.
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> 49 *Loss of confidence in management*: Given the length of time during which the financial irregularities have persisted, the deliberate, proactive nature of those irregularities and the deliberate efforts to hide the irregularities, the Receivership Applicants have a legitimate basis for a lack of confidence in management.
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> 50 *Position and interests of other creditors*: No other creditor has opposed the receivership application. Kingsett supports the receivership. Aviva has no preference between receivership or CCAA. Two lawyers appeared for limited partners in

> Yorkville. Mr. Mattalo supported the CCAA application. Ms. Roy was agnostic between the two but submitted that more time should be allowed for a transaction to materialize on the Yorkville project.
>
> 51 In the circumstances, the Receivership Applicants have established *a prima facie* right to a receivership. The issue is which of a receivership or a CCAA proceeding is preferable.[1]

6. Recently, the British Columbia Superior Court provided guidance on when it might be appropriate to assign a CCAA debtor into receivership and terminate the CCAA proceedings. In doing so, the Court in *Pandion Mine Finance Fund LP v Otso Gold Cup* stated as follows:

> [53] The purpose of a court-ordered receivership, generally, is to preserve and protect property pending the resolution of issues between the parties; *Lamare Lake* at para. 51. The cases identify a long list of considerations to be taken into account in determining whether the appointment of a receiver is just or convenient. In *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.,* 2009 BCSC 1527 at para. 25, Masuhara J. adopted a list of factors from a leading text, *Bennett on Receivership, 2nd ed.* (Toronto: Carswell, 1999) at p. 130. This approach was affirmed in *Textron Financial Canada Limited v. Chetwynd Motels Ltd.,* 2010 BCSC 477 at paras. 21-55. The factors are:
>
> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
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> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;

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[1] *BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc.* 2020 ONSC 1953 [**TAB 1**].

> m) the length of time that a receiver may be in place;
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> n) the cost to the parties;
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> o) the likelihood of maximizing return to the parties;
>
> p) the goal of facilitating the duties of the receiver.
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> [54] These factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient; *Bank of Montreal v. Gian's Business Centre Inc.,* 2016 BCSC 2348 at para. 23.[2]

7. In short, and for the reasons outlined more fully discussed in the proceeding paragraphs of this brief, it is appropriate that the CCAA proceedings be terminated.

Jurisdiction

8. While the Rural Municipalities have standing to bring this application as secured creditors pursuant to the provisions of the *BIA,* it is respectfully submitted that the Ministry has standing to bring the application for a receiver under section 65(1) of *The Queen's Bench Act* as follows:

> 65(1) A judge may, on an interlocutory application, grant a mandamus or an injunction or appoint a receiver where it appears to the judge to be appropriate or convenient that the order should be made.
>
> (2) An order pursuant to subsection (1) may be made unconditionally or on any terms and conditions that the judge considers appropriate.

9. Rule 6-41 of *The Queen's Bench Rules* sets out how a party can apply for an appointment of a receiver manager as follows:

> 6-41 Subject to the provisions of The Queen's Bench Act, the Court may make an interim order for mandamus, an injunction, the appointment of a receiver or for the interim preservation of property on an application:
>
> (a) without notice; or
>
> (b) on any notice that the Court may direct.

10. The test for a receiver manager under section 65 of *The Queen's Bench Act* is similar to the test under section 244 of the *BIA,* as set out in greater detail below. This Court, in *Pelican Lake First Nation v Bill,* outlined that a receiver will be appointed when it is just and convenient as follows:

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[2] *Pandion Mine Finance Fund LP v Otso Gold Corp,* 2022 BCSC 136 [**TAB 2**].

[14] Section 65 of The Queen's Bench Act, supra, provides that a judge of this Court may, on an interlocutory application, appoint a receiver where it appears to the judge that such an order is appropriate or convenient. The section also empowers the Court to impose terms and conditions as part of a receivership order.

….

[19] At pp. 3 and 4, Bennett on Receiverships summarized the method for obtaining a court-appointed receiver and the purpose for such a receiver in these words: . . . Under section 101 of the Courts of Justice Act, a court may appoint a receiver or a receiver and manager where it appears to the judge that it is "lust or convenient" to do so .

> . . . The most common use of this section is by a security holder who seeks the assistance of the court for the purpose of enforcing the rights under a security instrument against the debtor's assets. It is also used in many different situations whether at common law or in equity . . . . In addition, the court may appoint a receiver pursuant to the power granted by another statute or by way of equitable execution following a judgment against the debtor. Lastly, the court may appoint a receiver where it is necessary to preserve specific property from some danger during the course of a lawsuit between the parties. This situation does not arise as frequently as the others. Such a receiver is seldom given the power to sell the property except in the ordinary course of business. In this case, the receiver is a custodian of the property pending disposition of the action. The plaintiff usually claims some proprietary interest in the property.

At p. 134, Bennett on Receiverships enumerates circumstances in which a court will appoint a receiver, or a receiver and manager, namely:

> (1) any partnership dispute in order to protect assets that may be in the possession and control of one of the partners;
>
> (2) by an execution creditor for the appointment of an equitable receiver in aid of execution;
>
> (3) by shareholders of a corporation which is mismanaged; or in a shareholders' dispute where there is a "hopeless deadlock";
>
> …
>
> (7) by a party to an action where it is necessary to preserve and protect the property that is in dispute pending a declaration or a judgment.

The phrase "just or convenient" is often referred to in receivership applications. In Receiverships, Bennett at p. 91 articulates the essential requirements of such phrase:

> In determining whether it is "lust or convenient" that a receiver should be appointed, the court will consider many factors which will vary in the circumstances of the case. The court will consider whether irreparable harm might be caused if no order were made, the risk to the security holder, the apprehended or actual waste of the debtor's assets, the preservation and protection of the property ending the judicial resolution, the balance of convenience to the parties and the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others. [emphasis added].[3]

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[3] 2003 SKQB 566 [**TAB 3**].

11. Regardless of whether the relief sought is grounded in the *BIA* of *The Queen's Bench Act,* the overriding consideration is whether it is just and convenient to appoint a receiver-manager.

Is it just or convenient to appoint a receiver over Abbey upon the terms contained in the draft Receivership Order?

12. There are a number of factors which a Court may consider in determining whether or not it is "just or convenient" to appoint a receiver. A summary of the principles, as relied upon by the Court in *Affinity Credit Union 2013 v Vortex Drilling Ltd.,* are found below.[4]

13. In *Bank of Montreal v Carnival National Leasing Ltd.,* the Bank of Montreal applied to appoint a receiver pursuant to section 243(1) of the *BIA*. Carnival was indebted to the bank for approximately $17 million and the bank held a general security agreement over the assets of Carnival, pursuant to which it had the right to appoint private or court-appointed receivers. The Ontario Super Court of Justice (Commercial List), citing the earlier decision of *Bank of Nova Scotia v Freure Village on Clair Creek,* listed the following factors as being relevant to the Court's determination:

    (a) The Court must have regard to the nature of the property and the rights and interests of all parties in relation thereto;

    (b) The fact that the moving party has a right under its security to appoint a receiver may be important, but the question is whether or not an appointment by the Court is necessary to enable the receiver to carry out its work and duties efficiently; and

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[4] 2017 SKQB 228, 50 CBR (6th) 220 [**TAB 4].**

(c) It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver is not appointed.[5]

14. In *Kasten Energy Inc. v Shamrock Oil & Gas Ltd.* the Alberta Court of Queen's Bench prescribed the following additional non-exhaustive factors that may be considered in making a determination of whether it is just or convenient to appoint a receiver:

(a) Whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

(b) The risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

(c) The apprehended or actual waste of debtor's assets;

(d) The preservation and protection of property pending judicial resolution;

(e) The balance of convenience to the parties;

(f) The fact that the creditor has the right to appoint a receiver under the documentation providing for the loan;

(g) The enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

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[5] *Bank of Montreal v Carnival National Leasing Ltd.* 2011 ONSC 1007, 74 CBR (5th) 300 [**TAB 5**]; *Bank of Nova Scotia v Freure Village on Clair Creek* (1996), 40 CBR (3d) 274, 1996 CarswellOnt 2328 at para 11 [**TAB 6**].

(h) The principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

(i) The effect of the order on other parties;

(j) The conduct of the parties;

(k) The length of time that receiver may be in place;

(l) The cost to the parties;

(m) The likelihood of maximizing return to the parties; and

(n) The goal of facilitating the duties of the receiver.[6]

15. Similar factors have also recently been considered by this Court in other applications to appoint a receiver over an insolvent debtor's assets.[7]

16. When applying the factors set out above, the Ministry respectfully submits that it is both just and convenient to appoint a receiver in this matter.

Failure to Address the Debt

17. As has been set out above, Abbey is clearly insolvent, and this is not in dispute.

18. As of August 1, 2021, Abbey was indebted to the Ministry in the following amounts:

(a) Administrative levies - $1,014,126.16

(b) Orphan levies - $335,509.26;

(c) Royalties and taxes - $2,198.00;

(d) Other Non-compliance fees - $1,000.00;

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[6] *Kasten Energy Inc. v Shamrock Oil & Gas Ltd.* 2013 ABQB 63, 99 CBR (5th) 178 [**TAB 7**].

[7] *Golden Opportunities Inc. v Phenomenome Discoveries Inc.,* unreported [**TAB 8**].

(e) Integrated Resource Information System non-compliance fines - $126,200;

(f) Mineral lease payments - $1,698,118.08; and

(g) Demand for security - $13,445,871.21.[8]

19. Not only has Abbey failed to provide a plan during the CCAA proceedings to deal with the pre-filing debts, but Abbey has also fallen in arrears on the post filing debts owing to the Ministry in the amount of $2,856.65.[9]

20. The debts owing to the Rural Municipalities have likewise increased during the proceedings. The present balances owing are as follows:

(a) To the Rural Municipality of Miry Creek No. 229 - $2,889,125.16;[10] and

(b) To the Rural Municipality of Lacadena No. 228 - $2,549,900.29.[11]

21. Despite being provided reasonable opportunity to rectify the debts, Abbey has failed to do so.

22. Finally there is the matter of the suspended order for security. The obligation of posting security was stayed early in these proceedings with a view to permitting Abbey breathing room to proceed with a plan of arrangement and a restructuring of its business affairs. The restructuring projections have focused on other matters and while decommissioning and other activity (once actually completed) will have the effect of reducing security requirements, given the financial picture facing the company, the need to post security is unlikely to disappear. Accordingly, any forward-looking projection of the company's viability must (and it is submitted, has not yet) take into account that the requirement to post security cannot be postponed indefinitely, and that some amount (perhaps less, that the present figure of over $13

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[8] Third Affidavit of Brad Wagner sworn January 25, 2022 at para 11 (the "***Third Wagner Affidavit***").

[9] *Third Wagner Affidavit* at para 13.

[10] Affidavit of Krystal Graham sworn January 26, 2022 at para 3.

[11] Affidavit of Yvonne Nelson sworn January 25, 2022 at para 3.

million, but still rather significant), will have to addressed as part of the structure in the near future.[12]

Irreparable Harm

23. In terms of irreparable harm, it is appropriate to consider the environmental risk to the people of Saskatchewan as a whole in this portion of the analysis.

24. Starting off, the parties remain concerned, and those concerns are increasing, that Abbey is on a path towards catastrophic environmental damage. As is set out in Ms. Black's affidavit, the environmental incidents contributed to by Abbey have steadily increased in 2021 and are disproportionate in comparison to the amount of natural gas that Abbey produces.[13]

25. In addition, Abbey has now risen to the level where its proportion of environmental incidents is five times its proportion of gas production in the Province of Saskatchewan.[14]

26. At this time, the Ministry is concerned that other such non-reporting/environmental issues may be occurring as well.

27. While these numbers, in and of itself, are startling, more concerning is Abbey's attitude towards the same. Despite receiving notice, at the beginning of September, that the Ministry required a risk assessment to properly determine the environmental risk Abbey's operations posed, a review of that report discloses that the report lacks resort to information that lies within the ability of Abbey to produce, yet this was not done.

28. It does not seem unfair to suggest that each time a request for compliance is made of Abbey, the result falls short of full compliance, with an explanation being offered for the failure to address the entirety of the matter.

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[12] Fourth Affidavit of Brad Wagner sworn January 25, 2022 at paras. 7-10.

[13] Affidavit of Kathryn A. Black sworn January 25, 2022 at paras 4(c) (the "**Black Affidavit**").

[14] *Ibid.*

29. In this instance, the irreparable harm which looms is not just to one creditor, or a group of creditors, but to the residents of the immediate area, and given the proximity of the South Saskatchewan River, Saskatchewan as whole. Not only is it the residents of Saskatchewan who will bear the burden of the environmental issues, by having to live through the consequences thereof, but as Abbey continues to disregard its environmental obligations and financial consequences thereof, someone will be left to pick up the slack.

30. As Abbey continues to operate and extract natural gas from the wells, the assets remaining to pay for the environmental obligations will continue to diminish if the receivership order is not made.

31. In this instance, it will be the industry as a whole which will be left to foot the bill of the environmental clean up, and to the extent that the Orphan Well Fund cannot cover costs, the people of Saskatchewan. The increased risk of environmental harm, combined with the wasting of Abbey's assets, is irreparable harm that will be born by the Ministry, the Municipalities, and taxpayers of the Province of Saskatchewan. A receiver is necessary and required to ensure that any financial recovery for the creditors is possible.[15]

Conduct of the Parties

32. The Ministry is concerned that Abbey is has addressed the termination of surface leases, not in an organized and targeted way, but rather by taking a punitive approach, by targeting the surface leases of any party opposed to the CCAA proceedings. A review of the Ninth Affidavit indicates that 243 surface leases have been terminated, the majority of which were held by the landowners opposed to these proceedings and represented in these proceedings.[16]

33. Further concern arises from the fact that Abbey has further indicated that it would not reclaim the land immediately but would begin to reclaim and decommission the

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[15] *See e.g. Lindsey Estate v Strategic Metals Corp.* 2010 ABQB 242 at para 33 [**TAB 9**].

[16] *The Ninth Affidavit of Jim Gettis,* sworn January 21, 2022, at paras 19-21 (the "**Ninth Affidavit**").

wells when it was able to. Similar to other actions purported to be taken by Abbey, no timeline was provided for the same.[17]

34. Abbey then decided to unilaterally reduce the rent payable to the landlords of the terminated leases, despite not decommissioning the wells and removing its infrastructure from the affected lands.[18]

35. The Ministry submits that this pattern of punishing those in opposition to Abbey, and then further leaving the state of their land unaddressed, amounts to bad faith warranting the imposition of a receiver.

Confidence in Management

36. This is the most striking and, in the Ministry's opinion, most important factor to be considered when the Court is determining what relief to grant. In determining whether to terminate the CCAA proceedings, confidence in management is one of the overarching considerations for the same.

37. In this instance, the lack of confidence is profound and is created by three general themes:

    (a) A history of Abbey overpromising and underdelivering;

    (b) The continual list of matters where a factual position or a statement of intention is made by Abbey in support of its position, only to have the company later have to correct or retreat from the evidence or proposed course of action; and of evidence Mr. Gettis has given, only to revise or change as time goes on; and

    (c) The lack of an identifiable and realistic plan, not only to restructure, but to carry on business in a solvent manner post-filing.

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[17] Ninth Affidavit at para 22.

[18] Ninth Affidavit at para 23.

38. The history of unfulfilled promises pre-dates Abbey, though has continued to play a factor in Abbey. Examples of this pattern include, but are not limited to, the following:

    (a) The Ministry notes that the SWOT technology implementation has now been delayed until March of 2022. The Ministry has no confidence that implementation will come to fruition.[19]

    Mr. Gettis', either with Abbey or other corporations that he was operating, has indicated he would be implementing SWOT, or similar technology, since 2011. To date, Mr. Gettis has failed to implement the same such that the promise of SWOT technology amounts to no more than an empty promise;[20]

    (b) Abbey has indicated its intent to reclaim and decommission hundreds of wells. This plan was initially put in place in 2018 with the plan to decommission approximately 100 wells per year. Despite three years having past, Abbey has decommissioned less than 10 wells in total;[21] and

    (c) The previous failure to decommission and reclaim wells operated by Abbey ties into the next overpromise and what is expected to be an under delivery. Abbey has indicated that it will decommission the wells for the surface leases it has terminated as soon as practicable. The affidavit material indicates as soon as practicable means 2023 to 2025 and remains subject to change. While the 2023 to 2025 timeline is unacceptable on its face, it can be reasonably assumed that the 2023 to 2025 timeline will be extended.[22]

39. There are other examples of the foregoing issues, which cause serious concern moving forward,

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[19] The Ninth Affidavit at para 10.

[20] Third Wagner Affidavit at paras 30 to 35 and Exhibits D and E.

[21] Third Wagner Affidavit at paras 22 to 28 and Exhibit C.

[22] Ninth Affidavit at paras 51-54.

(a) At the outset of the CCAA proceeding, the company indicated that the leases for 1,377 of 2,363 Abbey's wells had been amended. It was later discovered that only 804 of these leases had been amended. While it is conceded that errors are made sometimes, the magnitude of the error demonstrates the inattentiveness to detail required in these proceedings.[23]

It should be noted that as at the last report seen by the Ministry, Abbey has still not negotiated amendments for 1,377 leases as that number presently sits at 1,010;[24]

(b) During the course of these proceedings, Abbey's projections for the decommissioning costs for its pipelines have increased. Initially, Mr. Gettis attested to the decommissioning costs being $28,354,604. By October, 2021, this number had increased to $39,395,000;[25]

(c) Abbey originally projected that its free cash flow would be $5,000,000 for 2022. It is only February, 2022 and this amount has already decreased to $3,800,000 a decrease of 24%;[26]

(d) As was indicated in the Risk Assessment Analysis, Abbey has hundreds of high-risk and very high-risk pipelines that are subject to immediately failure. Abbey has estimated it can repair only the very high-risk pipelines for $680,000. Again, no timeline is provided for this work.[27]

The Ministry notes that this estimation is quite conservative and in fact, inaccurate. The Ministry estimates that to repair the high risk and very high-risk pipelines, which are approximately 343 kilometres, the cost would be

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[23] *The Sixth Affidavit of Jim Gettis,* sworn October 1, 2021, at para 10.

[24] Ninth Affidavit at para 15.

[25] *The Seventh Affidavit of Jim Gettis,* sworn November 16, 2021, at paras 34 to 30; Third Wagner Affidavit at paras 17-19.

[26] The Ninth Affidavit at paras 42 and 43.

[27] Ninth Affidavit at para 49.

$58,300,000.[28] The Ministry will address other indicators in support of this conclusion during oral submission.

While some speculation is involved in calculating this number, the fact that Abbey's calculation amounts to less than 2% of the Ministry's suggested cost is startling;

(e) The Risk Assessment Report (the "**Report**"), which was provided on or about December 6, 2021, is rife with missing and incomplete information. While Ms. Black has provided a detailed summary of the issues, a helpful summary is as follows:

(i) Abbey failed to provide the author of the Report with any information related to construction and capacity of the flowlines, which would be vital to assessing when they may fail/the likelihood of failure;[29]

(ii) The Report fails to discuss 944 non-metallic pipeline segments at all;[30] and

(iii) The Report fails to refer to any historical statistics relating to testing and failure, which would further inform the likelihood of failure.[31]

(f) Given the aforementioned failures in the Report, it is likely that the estimation of high and very high-risk pipelines operated by Abbey is overly optimistic. The potential for catastrophic environmental failure is far greater than outlined in the Report;[32]

(g) Abbey had previously, and wrongly, represented to the Ministry that it had implemented an Integrity Management System, which is a key component of

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[28] Black affidavit at paras 13 to 17.

[29] Black Affidavit at para 4(b)

[30] Black Affidavit at para 4(d)

[31] Black Affidavit at para 4(f).

[32] Black Affidavit at para 7.

the overall Safety and Loss Management System that all operators should implement to minimize environmental risk.[33]

Only after the production of the Report was the Ministry advised that this was in fact incorrect. Had the Ministry been aware of this development sooner, Abbey would have been subject to more rigorous oversight; and [34]

(h) Abbey had previously indicated it had planned to decommission 600 wells in 2022. However, that number has now been reduced to 238 wells.[35]

40. The above issues highlight a common theme in these proceedings. The initial information before the Court paints a positive, and it is suggested unrealistic, view of the facts. After obtaining an extension of the stay order, Abbey's affidavit takes a less positive, and more realistic tone, moving forward.

41. The Ministry would also be remiss if it did not note that the operating plan put forward by Abbey is unduly speculative. The number of contingencies and speculation included in the plan render it devoid of any meaning, examples of which include:

(a) The plan is dependent on Abbey disclaiming or amending all leases it has not yet amended or terminated. Given the difficulties Abbey has experienced thus far, it is unlikely this is possible; [36]

(b) The pipeline liner installation project will lead to an increase in gas flow. As set out above, Abbey has significantly understated the cost of this project and as such, it is respectfully submitted this assumption has already been proven incorrect;

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[33] Black Affidavit at para 9; Third Wagner Affidavit at Exhibit G.

[34] Black Affidavit at para 10.

[35] Ninth Affidavit at para 52.

[36] Ninth Affidavit at para 41(i).

(c) Given the results of the Report, the Minister ordered a shut down of the high risk and very high-risk pipelines operated by Abbey given the environmental risk.[37]

The plans provided by Abbey do not consider or adjust for the loss of revenue caused by the recently issued Order requiring the shut down of all High and Very High-Risk Segments. It is estimated that this will reduce Abbey's production by up to 50%.[38]

Based on the most recent Projected Cash Flow for Abbey, a 50% reduction in its cash production would likewise reduce its Operating Revenue from $4,109,687 to $2,054,843.50. Assuming this to be the case, the Closing Balance, or cash on hand, for Abbey as of April 10, 2022 would be reduced from $1,323,544 to -$731,299.50. Even a more modest reduction in income would have devastating impacts on Abbey's ability to function[39]; and

(d) The germ of a plan amounts to no more than outlining the basic methods in which a debtor may settle debts with a creditor. Abbey merely states it hopes to make equitable distributions to its creators on an objective method. No actual dollar figures, payout dates or proposed plans are actually provided.[40]

42. Any plans put forward to date to remedy the pipelines, abandon the wells or restructure are financial not viable. The numbers are unrealistic and are not achievable. This attempt to restructure has run its course.

43. Simply put, this proceeding is no further ahead than it was in August, 2021. Abbey is no closer to a restructuring or proposal and in fact, it has only served to further distance itself from its creditors by terminating leases, not making payment on its

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[37] Paragraphs 19 to 21 and Exhibit of the Black Affidavit.

[38] Ninth Affidavit at para 45; *Third Wagner Affidavit* at para 41.

[39] Ninth Affidavit at Exhibit A; Paragraph 22 and Exhibit C of the Black Affidavit.

[40] Ninth Affidavit at para 62.

continuing obligations and not following through on its legislative obligations to remedy and abandon wells and pipelines.

44. Finally, there is the matter of the ongoing assurance provided by Abbey that it takes it obligations, and in particular, its obligations to the environment and the Ministry seriously, and the contrasting reality. That contrast is no more clearly demonstrated in the actions of Abbey in conducting a test installation of liner in the operating pipeline. The operation was conducted notwithstanding a requirement imposed by the Ministry that a calculation be checked and resubmitted. Moreover, even if the foregoing requirement was inadvertently missed by Abbey, the remaining requirements of informing the ministry of construction and of the pressure tests required, and the further requirement of obtaining a Licence to open the line, were completely ignored.[41]

45. Based on all of the above, the Ministry respectfully submits that no objective bystander, let alone a creditor, could have confidence the present management's ability to manage Abbey going forward.

Overall Balance of Convenience

46. This factor requires the Court to assess which of the parties would suffer greater harm from the granting or refusing an interlocutory injunction, or in this case, which party would suffer greater harm in the granting or refusal of the Receivership Order.

47. Rather than continue to pay management of the company from the revenue derived from Abbey's wells, those funds can be allocated to addressing the environmental concerns, and ultimately, to limit recourse to the Orphan Well Fund.

48. For these reasons, the appointment of the receiver effectively recognizes the current desperate financial position of Abbey and provides a method to stabilize matters and provide some certainty on a go forward basis.

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[41] Black Affidavit, para. 22- 24.

49. The appointment of a receiver is of little prejudice to Abbey itself, given the low or non-existent chance of a successful outcome, even with its massive debts stayed under the Initial Order.

50. Conversely, if the CCAA process continues, it appears that the Ministry will be left to use ad hoc recovery methods as prescribed in the legislation to recover what, if any, were left of Abbey's assets to reclaim and decommission the thousands of wells in operation in Saskatchewan. This is clearly a serious prejudice to the Ministry and the residents of Saskatchewan as a whole.

51. The Ministry proposes Abbey as the receiver. The Ministry notes that MNP serves as the present Monitor.

52. Having regard to the circumstances, the Ministry respectfully submits that it is both just and convenient to appoint a receiver over the property of Abbey.

53. The Ministry has sufficient confidence in the proposed Receiver that in the event a receivership order is granted, the Ministry will suspend the pipeline suspension order for 30 days to permit the Receiver to conduct the further investigations it recommends.

V. CONCLUSION

54. For all of the foregoing reasons, the Ministry respectfully requests that this Honourable Court grant an Order appointing MNP as receiver of the assets, undertakings and properties of Abbey in accordance with the terms of the draft Receivership Order.

DATED at the City of Saskatoon in the Province of Saskatchewan, this 25th day of February, 2022.

ROBERTSON STROMBERG LLP

Per:

M. Kim Anderson Q.C.

Counsel for the Applicant

VI. LIST OF AUTHORITIES

PURSUANT TO RULE 13-38.1, THE AUTHORITIES WHICH ARE PUBLICLY AVAILABLE ON CANLII HAVE NOT BEEN APPENDED.

Tab	Decision	Paragraph	Principal
1.	*BCIMC Construction Fund Corporation et al v The Clover on Yonge Inc.* 2020 ONSC 1953	45	Outlines the considerations for whether a CCAA proceeding, or a receiver is more appropriate.
2.	*Pandion Mine Finance Fund LP v Otso Gold Corp,* 2022 BCSC 136	53	Sets out the general considerations for when to transfer a matter from CCAA protections to a receivership.
3.	*Pelican Lake First Nation v Bill,* 2003 SKQB 566	14-20	States that the overriding consideration for whether a receiver should be appointed under *The Queen's Bench Rules* is whether it is just and convenient.
4.	*Affinity Credit Union 2013 v Vortex Drilling Ltd.,* 2017 SKQB 228, 50 CBR (6th) 220	19.	Sets out the general principles to be considered when deciding whether to appoint a receiver.
5.	*Bank of Montreal v Carnival National Leasing Ltd.* 2011 ONSC 1007, 74 CBR (5th) 300	27	Sets out the non-exhaustive principles for appointing a receiver.
6.	*Nova Scotia v Freure Village on Clair Creek* (1996), 40 CBR (3d) 274, 1996 CarswellOnt 2328	10	Sets out the non-exhaustive principles for appointing a receiver.
7.	*Kasten Energy Inc. v Shamrock Oil & Gas Ltd.* 2013 ABQB 63, 99 CBR (5th) 178	13, 22 and 37	Sets out the general principles to be considered when deciding whether to appoint a receiver. Further confirms that receivers can be appropriate in oil and mining corporations.
8.	*Golden*		Attached.

	Opportunities Inc. v Phenomenome Discoveries Inc., unreported,QB 1639 of 2015, Feb 25, 2016		
9.	*Lindsey Estate v Strategic Metals Corp.* 2010 ABQB 242.	33	The risk of the deterioration of a debtors assets is irreparable harm that supports the appointment of a receiver.

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Q.B. 1639 of 2015

Golden Opportunities Fund Inc. v Phenomenome Discoveries Inc.

Jeff Lee Q.C. and Paul Olfert for Golden Opportunities Fund Inc.

No one Appearing for Phenomenome Discoveries Inc. but withdrawing counsel Kim Anderson and Dayan Goodenowe (CEO, director and significant shareholder,directly or indirectly, of PDI) were present in the court room

Fiat February 25, 2016 Scherman J.

1. By application of November 23, 2015 Golden Opportunities Fund Inc. (GOFI) sought the appointment of a Receiver of the business and assets of Phenomenome Discoveries Inc. (PDI) under s. 243 of *the Bankruptcy and Insolvency Act* (BIA) and s. 64 of *The Personal Property Security Act* of Saskatchewan (PPSA).
2. With the consent of PDI an Interim Receivership Order was made on December 3, 2015 which has been extended by subsequent orders of this court to February 29, 2016. During the course of that interim receivership order GOFI has advanced to the Interim Receiver some $650,000 to permit it to fund the ongoing operations of PDI.
3. The Interim Receiver has reported to the court that:
   i. PDI has no funds to continue operations in the normal course;
   ii. By February 29, 2016 it will have a shortfall of some $70,000 in funding in respect of operations to that date;
   iii. PDI's situation is complicated by the withdrawal of legal counsel and the departure of certain key staff members;
   iv. The working relationship between the Interim Receiver and Dayan Goodenowe have deteriorated to an unworkable arrangement;
   v. GOFI has advised it is not prepared to continue funding of an interim receivership and in the absence of funding continuing the Interim Receivership is futile;
   vi. The Board of Directors of PDI at a February 19, 2016 meeting resolved that it would consent to the appointment of a receiver.

Counsel Notified, Copies Provided
Date: Feb 26/16
Signed: M. Lasby

4. The evidence satisfies me that:
    i. PDI is insolvent;
    ii. Under the terms of PDI's debenture security agreement with GOFI events of default have occurred that entitle GOFI to appoint a receiver by instrument or seek an order of the court appointing a receiver;
    iii. Dayan Goodenowe has lost the confidence of the majority of Board of Directors of PDI and of GOFI in respect of his ability to effectively manage the business of PDI and/or to carry out those steps that GOFI feels are in the best interests of PDI and to protect its interests as a secured lender;
    iv. PDI and Dayan Goodenowe have refused or neglected to give effect to various steps outlined in a Memorandum of Understanding of December 3, 2015 and as a result GOFI is not prepared to continue to provide funding to the Interim Receiver beyond what it had committed to provide;
    v. GOFI is prepared to provide up to $400,000 in funding to a Receiver appointed pursuant to its application.
5. Under s. 243(1) of the BIA this court can, on application of a secured creditor, appoint a receiver where it considers it just and convenient to do so. Instructive decisions on the factors relevant to the court's determination of whether it is "just and convenient" include *Bank of Montreal v. Carnival National Leasing Ltd.* 2011 ONSC 1007 and *Kasten Energy Inc. v. Shamrock Oil & Gas Ltd.* 2013 ABQB 63.
6. In *Carnival* the court said the following regarding the just and convenient criteria para 24 of its reason:

> In *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]), Blair J. (as he then was) dealt with a similar situation in which the bank held security that permitted the appointment of a private receiver or an application to court to have a court appointed receiver. He summarized the legal principles involved as follows:
>
> > 10 The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so: the Courts of Justice Act, R.S.O. 1990, c. 43, s. 101. In deciding whether or not to do so, it must have regard to all of the circumstances but in particular the nature of the property and the rights and interests of all parties in relation thereto. The fact that the moving party has a right under its security to

appoint a receiver is an important factor to be considered but so, in such circumstances, is the question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently; see generally *Third Generation Realty Ltd. v. Twigg* (1991) 6 C.P.C. (3d) 366 at pages 372-374;*Confederation Trust Co. v. Dentbram Developments Ltd.* (1992), 9 C.P.C. (3d) 399; *Royal Trust Corp. of Canada v. D.Q. Plaza Holdings Ltd.* (1984), 54 C.B.R. (N.S.) 18 at page 21. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed: *Swiss Bank Corp. (Canada) v. Odyssey Industries Inc.*(1995), 30 C.B.R. (3d) 49.

7. In *Kasten* the court said the following:

> 13 Both parties agree that the factors that may be considered in making a determination whether it is just and convenient to appoint a Receiver are listed in a non-exhaustive manner in *Paragon Capital Corp. v. Merchants & Traders Assurance Co.*, 2002 ABQB 430 (Alta. Q.B.) at para 27, (2002), 316 A.R. 128 (Alta. Q.B.) [Paragon Capital], citing from Frank Bennett, *Bennett on Receiverships*, 2nd ed (Toronto: Thompson Canada Ltd, 1995) at 130] to include:
>
> a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;
>
> b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;
>
> c) the nature of the property;
>
> d) the apprehended or actual waste of the debtor's assets;
>
> e) the preservation and protection of the property pending judicial resolution;
>
> f) the balance of convenience to the parties;
>
> g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;
>
> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

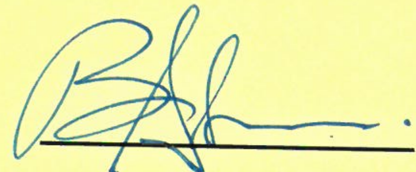
p) the goal of facilitating the duties of the receiver.

See also, *Lindsey Estate v. Strategic Metals Corp.*, 2010 ABQB 242 (Alta. Q.B.) at para 32, aff'd 2010 ABCA 191 (Alta. C.A.); and *Romspen Investment Corp. v. Hargate Properties Inc.*, 2011 ABQB 759 (Alta. Q.B.) at para 20

8. Here GOFI and PDI were able to agree on an interim receivership of some 3 months duration during which GOFI invested $650,000 with a view to resolving problems within PDI. This investment was premised, from GOFI's perspective, on the expectations that the terms contemplated by the Memorandum of Understanding of Dec. 3, 2015 would be implemented. It is clear from the evidence that Dayan Goodenowe was not cooperative in implementing what was contemplated by that Memorandum.
9. The Interim Receiver has come to the conclusion that the working relationship between the Interim Receiver and Dayan Goodenowe has deteriorated to an unworkable arrangement and that continuation of the interim receivership is futile.
10. The Board of directors has consented to the appointment of a receiver. This fact demonstrates that the Board of Directors does not have confidence in Dayan Goodenowe and that the Board accepts the reality that the appointment of a receiver with broad powers to manage is in the best interests of PDI and its shareholders.
11. GOFI is both a lender and shareholder and thus it has an overall interest in doing what is best for PDI to maximize the benefit to it as both a lender and a shareholder. GOFI has concluded that the appointment of a receiver best protects its interests as both a lender and shareholder.
12. The loss of key personnel, the need for continuing funding to operate, the fact that the proposed receiver has concluded it cannot work with effectively with Mr. Goodenowe, and the various other factors established by the evidence and identified for consideration in *Carnival* and *Kasten* have lead me to conclude that the appointment of a receiver is just and convenient.
13. The appointment of a receiver ensures that the business can continue to operate in the short term with a view to maximizing the return to all affected parties. It balances the interests of all affected parties, lenders and

shareholders alike and appears in all of the circumstances to be the most efficient way for the business to be managed.

14. I order that a receivership order in the form of the draft filed with the court on February 23, 2016 shall issue.
15. As particularized in the draft order filed, what I am ordering includes the termination of the appointment of FTI Consulting Canada Inc. as interim receiver, approval of its actions as interim receiver and its immediate appointment as Receiver with the powers and the other consequential and related orders detailed in the draft order I have said shall issue.
16. The receivership order also specifies that FTI Consulting Canada is appointed Receiver of Phenomenone Laboratory Services Inc. and all of its assets, undertakings, properties and business. The application as originally brought by GOFI did not contemplate receivership of Phenomenone Laboratory Services Inc. because it was not known at the time that this corporation was a wholly owned subsidiary of PDI. Given that it is a wholly owned subsidiary, the management of this asset of PDI falls within the control of the Receiver. I thought it appropriate in the circumstances to directly and expressly order FDI Consultants Canada Inc. be appointed Receiver of Phenomenone Laboratory Services Inc.



Scherman J.