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 "CCAA")

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

BRIEF OF LAW
(Re: Application for Initial Order)

BRIEF OF LAW FILED BY THE APPLICANTS IN RESPECT OF THEIR APPLICATION FOR AN INITIAL ORDER, PURSUANT TO THE *COMPANIES' CREDITORS ARRANGEMENT ACT*

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I. INTRODUCTION

1. The Applicant, ABBEY RESOURCES CORP. ("**Abbey**"), is a natural gas extraction, transit, and sales business operating principally in Saskatchewan. Since acquiring interests in 2,344 natural gas wells between 2016 and 2017, Abbey has consistently produced and sold over 11,000 GJ/day of natural gas and has regularly generated sales revenues of $10,000,000 or greater *per* year.

2. However, Abbey is currently insolvent and facing a liquidity crisis that has put its ability to continue to carry on business into jeopardy. Thus, Abbey seeks emergency remedies pursuant to the *Companies' Creditors Arrangement Act*.[1] In particular, Abbey seeks an initial order (the "**Initial Order**") that would, *inter alia*:

   i. stay the claims of all of Abbey's creditors for a period of ten days;
   ii. grant a first-priority administration charge in favour of Abbey's professional advisors, in the amount of $250,000; and
   iii. grant a second-priority directors' and officers' charge in favour of Abbey's officers and director, in the amount of $250,000.

3. Abbey seeks creditor protection and other remedies available to it pursuant to the CCAA, so it may take the appropriate steps to increase its production, reduce its fixed costs, and extend the lifespan of its assets, before the business can be restructured in a process that would allow Abbey to continue carrying on business as a going concern, having reached a compromise that is in the mutual best interest of itself and its stakeholders.

4. This Brief of Law is intended to provide the Court with the relevant statutory authority and case law in support of the application for the Initial Order. The focus of this Brief of Law is restricted to submissions relating to Abbey's eligibility for relief, the granting of an initial stay of claims against Abbey, and the necessity for the Court to grant a first-priority "administration charge" in favour of Abbey's professional advisors in Abbey's property and a second-priority charge in favour of Abbey's officers and director.

II. STATEMENT OF ISSUES

A. Abbey is eligible for relief under the CCAA

B. Abbey should be granted the Initial Stay

C. An Administration Charge is appropriate

D. A Directors and Officers Charge is appropriate

[1] RSC 1985, c C-36, [the "**CCAA**"].

III. ARGUMENT

5. The facts pertinent to the within Application are fully set out in the July 13, 2021, Affidavit of James Gettis[2] and the July 15, 2021, Affidavit of James Gettis.[3]

6. Abbey's argument proceeds herein as follows:

   i. Abbey is eligible for remedies pursuant to the CCAA;

   ii. The Court of Queen's Bench for Saskatchewan is the appropriate forum for these CCAA proceedings;

   iii. The Court should exercise its discretion to grant the initial stay in Abbey's favor;

   iv. An "administration charge", giving a priority interest in Abbey's property to Abbey's professional advisors, is appropriate in the present case;

   v. A "directors' and officers' charge", securing an indemnity in favour of Abbey's officers and director, is appropriate in the present case.

A. Applicability of CCAA and Jurisdiction of the Court

7. Eligibility for relief pursuant to the CCAA is restrictive. Section 3(1) of the Act limits the applicability thereof as follows:

> **3 (1)** This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

8. A close reading of this section shows that, in order to be eligible for CCAA relief, applicants must satisfy the conjunctive criteria of:

   i. indebtedness exceeding $5,000,000; and

   ii. being a "debtor company" within the meaning of the Act.

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[2] July 13, 2021, Affidavit of James Gettis [the ***First Gettis Affidavit***].
[3] July 15, 2021, Affidavit of James Gettis [the ***Second Gettis Affidavit***].

9. Abbey submits it is eligible for CCAA remedies, as it is presently indebted to various creditors for an aggregate amount exceeding $15,000,000, exclusive of decommissioning liabilities. It therefore falls within the meaning of a "debtor company" in the CCAA.

10. Section 2(1) of the CCAA prescribes the definitions for "company" and "debtor company":

> ***company*** means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies;
> …
>
> ***debtor company*** means any company that
>
> (a) is bankrupt or insolvent,
>
> (b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,
>
> (c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or
>
> (d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

11. Abbey falls within the definition of "company," as it is an entity carrying on business and incorporated pursuant to Alberta's *Business Corporations Act,* RSA 2000, c. B-19 (and extra-provincially registered under Saskatchewan's *The Business Corporations Act,* RSS 1978, c. B-10).

12. The CCAA contains no prescribed definition of "insolvency." In 2004, the Ontario Superior Court of Justice interpreted the meaning of insolvency in the context of CCAA proceedings in an oft-cited decision, *Re, Stelco Inc.* [4] There, Farley J. determined the term holds a somewhat broader meaning in CCAA proceedings, as compared to proceedings pursuant to the *Bankruptcy and Insolvency Act*.[5] In particular, Farley J. held the term should be interpreted, effectively, as a modified version of the definition of "insolvent person" prescribed by the BIA.[6] The BIA defines "insolvent person" as follows:

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[4] [2004] OJ No 1257 (Ont. SCJ)(WL), [2004] OTC 284, leave to appeal refused [2004] OJ No 1903 (ONCA), [***Stelco***].
[5] *Ibid* at para 27*,* citing *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3 [the "**BIA**"].
[6] *Ibid*.

> ***insolvent person*** means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> > (a) who is for any reason unable to meet his obligations as they generally become due,
> >
> > (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
> >
> > (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

13. Using ordinary principles of statutory interpretation, Farley J. determined that the definition of "insolvency" must be extended to include "a financially troubled corporation…if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring.[7]"

14. As is summarized by Professor Jannis P. Sarra in *Rescue! The Companies Creditors Arrangements Act*, under the *Stelco* interpretation of insolvency, "a court should determine whether there is a reasonably foreseeable expectation at the time of filling [the initial application] that there is a looming liquidity condition or crisis that will result in the applicant running out of money to pay its debts as they generally become due in the future.[8]" Thus, in the context of CCAA proceedings, the term "insolvency" encapsulates a wider array of commercial circumstances than the term does in BIA proceedings.

15. Abbey is presently unable to meet its financial obligations as they become due and has defaulted on a number of obligations. Although Abbey has significant assets – i.e. working interests in 2,363 natural gas wells (collectively, the "**Abbey Wells")** in Saskatchewan – production from these sites has been hampered by a lack of access to free cash flow due to high fixed costs. Such inefficiencies prohibit Abbey from operating at its maximum productive capacity, which has the effect of decreasing the cash flow available to satisfy obligations owing to Abbey's existing creditors.

16. Abbey therefore falls squarely within the meaning the term "insolvent" and the definition of "debtor company" in section 2(1) of the CCAA. Consequently, Abbey meets the threshold statutory requirements for entry into CCAA.

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[7] *Ibid*.
[8] Jannis P. Sarra, *Rescue! The Companies Creditors Arrangements Act*, 2nd ed, (Toronto: Carswell, 2013), at page 102 [*Rescue*].

i. The Court has Jurisdiction in these proceedings

17. Section 9(1) governs courts' jurisdiction to hear applications under the CCAA:

> 9 (1) Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

18. A close reading of section 9 shows that it is comprised of two discrete clauses. The section provides: (a) where a company is sited in Canada, the province in which the head office or the chief place is situated is the appropriate place to bring the application; or (b), if the company is not located in Canada, an application may be brought in any province in which assets are situated.

19. As Abbey operates chiefly and nearly exclusively in Saskatchewan, it falls within the first clause. Therefore, Saskatchewan is the appropriate jurisdiction for these proceedings and Abbey is entitled to seek CCAA remedies before the Court of Queen's Bench for Saskatchewan.

B. The Court Should Grant the Initial Stay

i. The Initial Stay is Appropriate

20. As an integral feature of its structure, the CCAA provides Courts with the discretionary authority to grant an initial stay of proceedings (the "**Initial Stay**") against an applicant debtor, halting the ability of creditors to commence or carry on claims against the applicant for a preliminary period of ten days. The CCAA provides:

> 11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

21. A close reading of the act shows that the Court has the discretionary but conditional authority to grant the Initial Stay, as section 11.02(3) provides that the Court shall not grant the stay unless two conjunctive criteria are satisfied:

> (3) The court shall not make the order unless
>
> > (a) the applicant satisfies the court that circumstances exist that make the order appropriate; and
> >
> > (b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence

22. In summary, as was recognized by the Saskatchewan Court of Appeal (the "**SKCA**") in *Industrial Properties Regina Limited v Copper Sands Land Corp.*, "the court may grant an initial order staying creditor enforcement…if the applicant satisfies the court that the appropriate circumstances exist and that it is acting in good faith and with due diligence."[9]

23. Understanding Courts' past decisions respecting the "appropriate circumstances" and "good faith and due diligence" analyses is aided with reference to *dicta* regarding the general purpose and effect of the CCAA. In *Century Services*,[10] the Supreme Court of Canada (the "**SCC**"), speaking in broad strokes regarding the CCAA, observed as follows:

> [T]he purpose of the CCAA — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the BIA serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility.[11]
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> …
>
> Parliament understood when adopting the CCAA that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees.[12]
>
> …
>
> [T]he statute's distinguishing feature [is] a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the CCAA's objectives. The manner in which courts have used CCAA jurisdiction in increasingly creative and flexible ways is explored in greater detail below.[13]
>
> …
>
> Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places

[9] 2018 SKCA 36 at para 17, 2018 CarswellSask 252, emphasis added [*Copper Sands*].
[10] *Ted Leroy Trucking [Century Services] Ltd.*, *Re*, 2010 SCC 60, [2010] 3 SCR 379, [*Century Services*].
[11] *Ibid*, at para 15.
[12] *Ibid*, at para 17.
[13] *Ibid*, at para 19.

> them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while other creditors attempt a compromise.[14]

Appropriate circumstances

24. In *Copper Sands*, the SKCA held that the "appropriate circumstances" exist when the initial order advances the remedial objectives identified by the SCC in *Century Services*. The SKCA went on to clarify that an applicant is required to demonstrate the Initial Stay will "usefully further" its efforts toward financial restructuring.[15] Consequently, the Court need only determine that the Initial Stay will usefully further an applicant's goal of restructuring so as to avoid the economic and social costs of forced liquidation, or to prevent aggressive or sophisticated creditors from levering their position to the detriment of other creditors who may be willing to pursue a compromise.

25. Notwithstanding the obvious legal potency of the Initial Stay, the evidentiary bar which the applicant is required to meet in order to render itself eligible for relief is, in the words of the Court of Appeal, "not exceptionally onerous."[16] As was reiterated by the SKCA in *Copper Sands*, "the applicant is not required to prove that it has a 'feasible plan' but merely a 'germ of a plan.'"[17]

26. To this end, the Court need only go so far as to determine whether Abbey, given the temporary protection afforded to it by the Initial Stay, has a "reasonable possibility of restructuring."[18] Further, an applicant is neither required to provide the Court with full and exhaustive particulars of a comprehensive plan to restructure its financial affairs, nor is it obligated to demonstrate that it has the support of its creditors at the initial application stage of CCAA proceedings.[19]

27. Indeed, in light of this relatively low bar, Professor J. Sarra notes in *Rescue* that Initial Orders are typically granted by Courts:

> Given the objectives of the CCAA, the court will generally grant the initial stay unless it finds that the CCAA application is merely an effort by the debtor to avoid

[14] *Ibid,* at para 22.
[15] *Copper Sands*, *supra* note 24, at para 21.
[16] *Ibid*, at para 19.
[17] *Ibid*, at para 20, citing *Alberta Treasury Branches v Tallgrass Energy Corp*., 2013 ABQB 432, emphasis added.
[18] *Ibid*, at para 20, citing *Matco Capital Ltd. v Interex Oilfield Services Ltd*. (1 August 2006) Docket No. 06108395 (Alta QB)..
[19] *Ibid*, at paras 20-21.

> its obligations to creditors or that creditors have lost all confidence in management of the corporation.[20]

28. Respectfully, Abbey submits it meets these baseline requirements. Abbey's above-described plan is both straightforward and sound. Abbey aims to increase production and reduce fixed costs by taking simple, scientifically-sound steps and benefitting from available funding. Once Abbey is able to increase cash flow from production and reduce its fixed costs, it will be in a position to furnish proposals for compromises or arrangements with its creditors.

29. Abbey is presently unable to satisfy its liabilities as they become due. Its primary assets – i.e. the Abbey Wells – cannot be sold on short or without regulatory approval. Further, given the outcome of the SCC's decision in *Orphan Well Association v Grant Thornton Ltd.*,[21] it is uncertain as to whether it is possible for Abbey's productive assets to be sold without its unproductive assets that are in need of decommissioning.

30. Thus, in the absence of the Initial Stay, Abbey will remain in default on obligations owing to its creditors, thus rendering itself susceptible to the loss of its surface leases (and loss of access to the Abbey Wells), termination of mineral leases, and the cancellation of its production licenses. Even if Abbey does not lose its leases or licenses in the immediate future, enforcement of monetary claims may leave it with insufficient cash flow to continue to carry on operations. Consequently, to refrain from granting the Initial Order is to leave Abbey in a position where it will abruptly cease to be able to carry on business.

31. If Abbey abruptly ceases to carry on business, it will be left with no choice but to walk away from the Abbey Wells and related infrastructure, thereby placing an inordinate burden on the Province of Saskatchewan's Ministry of Energy and Resources (and other regulatory bodies) to immediately attend to Abbey's assets, avert environmental damage in the near-term, and bear the responsibility and costs of decommissioning in the long term.

32. Conversely, if the Initial Stay *is* granted, Abbey will be afforded the opportunity take the requisite steps to maximize the value of its assets, increase production, decommission and abandon unproductive wells, and reduce fixed costs. Looking further afield, if Abbey is successful in maximizing production, it may be possible for Abbey to exit the CCAA proceedings as a going concern, thereby enabling it to attend to the decommissioning of all of the Abbey Wells as they reach the end of their productive lives over the course of the years (or decades) to come.

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[20] *Rescue*, *supra* note 7, at pages 53-54, emphasis added.
[21] 2019 SCC 5, [2019] 1 SCR 150.

33. To be clear, Abbey is not in a position to maintain with absolute certainty that it will emerge from CCAA proceedings in a position to continue carrying on business. Instead, it is submitted that it is far too soon for the Court to determine whether it is, or is not, probable that Abbey will emerge from CCAA proceedings in sufficiently sound fiscal health to carry on business on a go-forward basis. It has previously been held that, in the event of this sort of uncertainty, the Court should grant the Initial Stay – as was held in *Lehndorff General Partner*, *Re*:

> Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA.[22]

34. At this juncture, it bears mention that, even if the Court should conclude that it is unlikely that Abbey will ultimately exit CCAA proceedings in such a position as to carry on business as a going concern, Abbey is not necessarily precluded from availing itself of CCAA remedies. Although it is clear, from the *Copper Sands* decision, that CCAA proceedings cannot serve as a vehicle for mere creditor avoidance to postpone an inevitable liquidation,[23] an abundance of jurisprudence on the topic confirms the CCAA *can* be used to wind-down the business and affairs of a debtor company, in what has been called a "liquidating insolvency."[24]

35. In other words, the CCAA *may* be used to give a debtor "breathing room" during the period of time in which it may seek to wind-down its business and affairs in orderly fashion, such that its creditors' interests are protected while the value of its assets is maximized.

36. Indeed, for a period dating at least as far back as 1993, Courts have accepted that achieving the aims of the CCAA "may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally."[25] In recent years, the Ontario Superior Court of Justice observed in *Nortel Networks* that presently, "[i]t is quite common now for there to be liquidating CCAA proceedings in which there is no successful restructuring."[26]

37. The rationale for the concept of a "liquidating insolvency" is readily apparent in light of the general organizing principles of the CCAA identified by the SCC in *Century Services* – i.e. that imbued within the CCAA is an inherent flexibility that allows for flexible and creative solutions

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[22] *Lehndorff General Partner*, *Re*, [1993] O.J. No. 14 (ONSC)(WL) at para 7, 80 A.C.W.S. (3d) 62, [***Lehndorff***].
[23] *Copper Sands*, *supra* note 21, at para 20.
[24] *Nortel Networks Corp., Re*, 2014 ONSC 5274, 244 ACWS (3d) 10, [***Nortel Networks***].
[25] *Lehndorff*, *supra* note 39, at para 6.
[26] *Nortel Networks*, *supra* note 38, at para 23.

that serve the best interests of all stakeholders. With direct reference to *Century Services*, the Court in *Target Canada Co, Re* ruled as follows:

> [A]lthough there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada [*Century Services*] that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred."[27]

38. Abbey's ability to continue to carry on operations is, and will remain in, jeopardy without the "breathing space" afforded by the Initial Stay and other CCAA remedies. Additionally, Abbey risks exposure to cascading enforcement actions (for instance, the interception of natural gas sales revenues under section 317 of *The Municipalities Act*[28]), which could deprive it of sufficient cash flow to fund its operations. Alternatively, if granted relief pursuant to the CCAA, Abbey has laid out a clear and straightforward path that would allow it to unlock the potential value of its assets, thus maximizing the available value for all other stakeholders. Consequently, even if the Court determines that Abbey can fare no better in CCAA proceedings than facilitating the organized wind-down of the operations, Abbey is, nonetheless, a suitable candidate for an Initial Stay.

Good faith and due diligence

39. Courts have determined that the "good faith and due diligence" requirement *is* applicable to applications for an initial CCAA order, notwithstanding the wording of section 11.02(3)(b), which only makes specific reference to the requirement as applying to subsequent orders made under section 11.02(2).[29] However, in-depth analysis of the requirement is typically avoided during an initial application. In *Copper Sands*, the SKCA suggested that, at the initial application stage, only evidence of a *lack* of good faith or due diligence should serve as grounds to deny an application for the Initial Stay due to non-compliance with section 11.02(3)(b) of the CCAA.[30]

40. In the present case, there is no evidence to suggest that Abbey has exhibited a lack of good faith or failure to exercise due diligence.

ii. Restructuring options available to Abbey in these proceedings

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[27] 2015 ONSC 303 at para 31, [2015] OJ No 247.
[28] SS 2005, c M-36.1.
[29] *Copper Sands*, *supra* note 21, at para 23.
[30] *Ibid*.

41. Abbey resources clearly has a "germ of a plan" for a viable restructuring in these proceedings. In particular, Abbey wishes to pursue the following options:

vi. Abbey wishes to come to an arrangement with its stakeholders that would compromise its pre-filing indebtedness to a reasonable level and reduce certain fixed-costs;

vii. Abbey will reduce its fixed costs and improve its Licensee Liability Rating by utilizing available cash flow to decommission unproductive assets;

viii. Abbey will seek to increase production by installing the proprietary Smart Well Optimization Tool technology to which it has exclusive access at additional well sites; and

ix. Abbey will explore the possibility of obtaining between $4,000,000 and $6,000,000 in funding to decommission unproductive assets through the Province of Saskatchewan's Accelerated Site Closure Program.

42. Additionally, Abbey will continue to prosecute the appeal of a recent decision resulting from an Application for Judicial Review over the methodology utilized by the Saskatchewan Assessment Management Agency to value natural gas assets for taxation purposes. If successful in its appeal, the assessed value of Abbey's assets will decrease significantly to fall in line with actual market values, which would considerably reduce Abbey's fixed costs.

C. An Administration Charge is Necessary

43. Section 11.52 of the CCAA provides the Court with the power to grant a first-priority charge in an applicant debtor's property in respect of the fees and expenses of an applicant's professional advisers (the "**Administration Charge**"), inclusive of the monitor (and its counsel) and the applicant's counsel.[31]

44. In the instant case, Abbey seeks an Administration Charge for the purpose of securing fees and expenses owing by Abbey to: Abbey's counsel, the Monitor, and the Monitor's counsel.

45. Abbey seeks an Administration Charge securing Abbey's obligation to pay such fees and expenses up to the sum of $250,000.00.

46. Courts have recognized that debtor applicants in CCAA proceedings require the knowledge and expertise of their professional advisers. In *Timminco Ltd*, *Re,* the Court, recognizing the

[31] CCAA, *supra* note 1, at s 11.52(1)(a)-(b).

importance of ensuring that applicants secure the continuing participation of their professionals, noted as follows:

> In my view, in the absence of the court granting the requested super priority and protection [pursuant to section 11.52 of the CCAA], the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services.... The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the CCAA proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.[32]

47. As was discussed by the Court in *Canwest Publishing Inc*, / *Publications Canwest Inc., Re*, section 11.52 of the CCAA "does not contain any specific criteria for a court to consider in its assessment" whether the granting of an administration charge, or the quantification thereof, is appropriate.[33] In *Canwest,* the Court nonetheless went on to identify factors to be considered in the assessment of an applicant's motion for an administration charge:

> (a) the size and complexity of the businesses being restructured;
> (b) the proposed role of the beneficiaries of the charge;
> (c) whether there is an unwarranted duplication of roles;
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
> (e) the position of the secured creditors likely to be affected by the charge; and
> (f) the position of the Monitor.[34]

48. Abbey respectfully submits that, considered as a whole, the above criteria militate towards the granting of the Administration Charge. In particular, Abbey notes that the Administration Charge: is not sought for the benefit of any professionals with duplicate roles; the value of the Administration Charge is modest relative to the potential accretion of value of Abbey's assets; and the Administration Charge is, therefore, fair and reasonable in light of the complexity of the proposed restructuring.

D. A Directors' and Officers' Charge is Necessary

49. Section 11.51 CCAA provides the Court with the discretionary authority to grant a charge in favour of an insolvent debtor's officers and directors (the "**D&O Charge**"), as security for an indemnity in favour of such officers and directors against obligations and liabilities may arise against officers and directors subsequent to the commencement of CCAA proceedings. The CCAA provides that notice must be given to secured creditors likely to affected by the D&O Charge. Further, the Court must be satisfied the insolvent debtor could not obtain adequate indemnification insurance for the officers and/or directors at a reasonable cost

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[32] *Timminco Ltd*, *Re,* 2012 ONSC 506, 85 CBR (5th) 169, at para 66, emphasis added.
[33] 2010 ONSC 222 at para 54, [2010] OJ No. 188, [***Canwest***].
[34] *Ibid*, at para 54.

50. Courts have recognized that the D&O Charge is integral to the functioning of successful CCAA restructuring proceedings by serving a dual purpose:

> The purpose of a section 11.51 charge is twofold: (1) to keep the directors and officers in place during the restructuring to avoid a potential destabilization of the business; and (2) to enable the CCAA applicants to benefit from experienced board of directors and experienced senior management. Courts have accepted that, without certain protections, officers and directors will often discontinue their service in CCAA restructurings.[35]

51. In the instant case, James Gettis— a Professional Engineer with 50 years of professional experience in the oil and gas industry , and Abbey's President and sole director[36]— is indisputably a key individual required for Abbey to continue carrying on business throughout the course of these proceedings.

52. The theoretical scope of liability for officers and directors in the oil and gas industry is considerable. Section 53.6 of *The Oil and Gas Conservation Act*[37] expressly provides that officers and directors of licensees may be held personally liable for suspension, abandonment, and reclamation costs. Given the extent of abandonment costs— which range between just below $30,000,000, by Abbey's calculation, and approximately $80,000,000, by the Ministry of Energy and Resources' estimation[38]— it is submitted that Abbey could not expect to obtain an insurance policy indemnifying Abbey's officers and directors at reasonable cost.

IV. CONCLUSION AND RELIEF SOUGHT

53. Abbey respectfully submits that, without the temporary creditor protection afforded by the CCAA proceedings, it will remain in default of its obligations owing to key stakeholders, leaving it in jeopardy of revocation of its licensure, loss of access to the Abbey wells, cascading security and judgment enforcement, and inevitable bankruptcy or other insolvency proceedings. If Abbey is granted the Initial Order, however, it will have the opportunity to maximize its production, reduce fixed costs, and increase the value of its assets for the benefit of all stakeholders. In so doing, it will have the opportunity to emerge from the CCAA proceedings as an entity capable of carrying on business as a going concern.

54. Abbey, therefore, asks that this Honourable Court grant the Initial Order, substantially in the form of its draft Initial Order filed in these proceedings.

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[35] *Northstar Aerospace, Inc. (Re)*, 2013 ONSC 1780 at para 29 (CanLII), 227 ACWS (3d) 929.
[36] First Gettis Affidavit, at para 2.
[37] RSS 1978, c O-2.
[38] First Gettis Affidavit, at paras 76-77.

DATED at Edmonton, Alberta, this 16th day of July, 2021.

DLA PIPER (CANADA) LLP

Per: 

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Jerritt R. Pawlyk and Kevin N. Hoy, Counsel for Abbey Resources Corp.

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

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

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Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re Courts of Justice Act, R.S.O. 1990, c. C-43; Re plan of compromise in respect of LEHNDORFF GENERAL PARTNER LTD. (in its own capacity and in its capacity as general partner of LEHNDORFF UNITED PROPERTIES (CANADA), LEHNDORFF PROPERTIES (CANADA) and LEHNDORFF PROPERTIES (CANADA) II) and in respect of certain of their nominees LEHNDORFF UNITED PROPERTIES (CANADA) LTD., LEHNDORFF CANADIAN HOLDINGS LTD., LEHNDORFF CANADIAN HOLDINGS II LTD., BAYTEMP PROPERTIES LIMITED and 102 BLOOR STREET WEST LIMITED and in respect of THG LEHNDORFF VERMÖGENSVERWALTUNG GmbH (in its capacity as limited partner of LEHNDORFF UNITED PROPERTIES (CANADA))

Farley J.

Heard: December 24, 1992
Judgment: January 6, 1993
Docket: Doc. B366/92

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L. Crozier , for Royal Bank of Canada.
R.C. Heintzman , for Bank of Montreal.
J. Hodgson, Susan Lundy and *James Hilton* , for Canada Trustco Mortgage Corporation.
Jay Schwartz , for Citibank Canada.
Stephen Golick , for Peat Marwick Thorne* Inc., proposed monitor.
John Teolis , for Fuji Bank Canada.
Robert Thorton , for certain of the advisory boards.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.b Grant of stay
XIX.2.b.i General principles

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Effect of arrangement — Stay of proceedings

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Stay of proceedings — Stay being granted even where it would affect non-applicants that were not companies within meaning of Act — Business operations of applicants and non-applicants being so intertwined as to make stay appropriate.

The applicant companies were involved in property development and management and sought the protection of the *Companies' Creditors Arrangement Act* ("CCAA") in order that they could present a plan of compromise. They also sought a stay of all proceedings against the individual company applicants either in their own capacities or because of their interest in a larger group of companies. Each of the applicant companies was insolvent and had outstanding debentures issued under trust deeds. They proposed a plan of compromise among themselves and the holders of the debentures as well as those others of their secured and unsecured creditors deemed appropriate in the circumstances.

A question arose as to whether the court had the power to grant a stay of proceedings against non-applicants that were not companies and, therefore, not within the express provisions of the CCAA.

Held:

The application was allowed.

It was appropriate, given the significant financial intertwining of the applicant companies, that a consolidated plan be approved. Further, each of the applicant companies had a realistic possibility of being able to continue operating even though each was currently unable to meet all of its expenses. This was precisely the sort of situation in which all of the creditors would likely benefit from the application of the CCAA and in which it was appropriate to grant an order staying proceedings.

The inherent power of the court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Clearly, the court had the jurisdiction to grant a stay in respect of any of the applicants that were companies fitting the criteria in the CCAA. However, the stay requested also involved limited partnerships where (1) the applicant companies acted on behalf of the limited partnerships, or (2) the stay would be effective against any proceedings taken by any party against the property assets and undertakings of the limited partnerships in which they held a direct interest. The business operations of the applicant companies were so intertwined with the limited partnerships that it would be impossible for a stay to be granted to the applicant companies that would affect their business without affecting the undivided interest of the limited partnerships in the business. As a result, it was just and reasonable to supplement s. 11 and grant the stay.

While the provisions of the CCAA allow for a cramdown of a creditor's claim, as well as the interest of any other person, anyone wishing to start or continue proceedings against the applicant companies could use the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain the stay. In such a motion, the onus would be on the applicant companies to show that it was appropriate in the circumstances to continue the stay.

Table of Authorities

Cases considered:

Amirault Fish Co., Re, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) — *referred to*

Associated Investors of Canada Ltd., Re, 67 C.B.R. (N.S.) 237 , Alta. L.R. (2d) 259, [1988] 2 W.W.R. 211, 38 B.L.R. 148, *(*sub nom. *Re First Investors Corp.)* 46 D.L.R. (4th) 669 (Q.B.) , reversed (1988), 71 C.B.R. 71, 60 Alta. L.R. (2d) 242, 89 A.R. 344 (C.A.) — *referred to*

Campeau v. Olympia & York Developments Ltd. (1992), 14 C.B.R. (3d) 303 (Ont. Gen. Div.) — *referred to*

Canada Systems Group (EST) v. Allen-Dale Mutual Insurance Co. (1982), 29 C.P.C. 60, 137 D.L.R. (3d) 287 (Ont. H.C.) [affirmed (1983), 41 O.R. (2d) 135, 33 C.P.C. 210, 145 D.L.R. (3d) 266 (C.A.)] — *referred to*

of business within Canada, does have assets located within Ontario.

5 The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 6, 7, 8 and 11 of the CCAA; *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659 at p. 661, 16 C.B.R. 1, [1934] 4 D.L.R. 75 ; *Meridian Developments Inc. v. Toronto Dominion Bank*, [1984] 5 W.W.R. 215 (Alta. Q.B.) at pp. 219-220; *Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd.* (1988), 72 C.B.R. (N.S.) 1, 63 Alta. L.R. (2d) 361 (Q.B.) , at pp. 12-13 (C.B.R.); *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 2 C.B.R. (3d) 303 (B.C. C.A.) , at pp. 310-311, affirming (1990), 2 C.B.R. (3d) 291, 47 B.C.L.R. (2d) 193 (S.C.) , leave to appeal to S.C.C. dismissed (1991), 7 C.B.R. (3d) 164 (S.C.C.) .; *Nova Metal Products Inc. v. Comiskey (Trustee of)* , supra, at p. 307 (O.R.); *Fine's Flowers v. Fine's Flowers (Creditors of)* (1992), 7 O.R. (3d) 193 (Gen. Div.) , at p. 199 and "Reorganizations Under The Companies' Creditors Arrangement Act", Stanley E. Edwards (1947) 25 Can. Bar Rev. 587 at p. 592.

6 The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. see *Nova Metal Products Inc. v. Comiskey (Trustee of)* , supra at pp. 297 and 316; *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252 and *Ultracare Management Inc. v. Zevenberger (Trustee of)* , supra, at p. 328 and p. 330. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed: see *Meridian Developments Inc. v. Toronto Dominion Bank* , supra, at p. 220 (W.W.R.). The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors: see *Quintette Coal Ltd. v. Nippon Steel Corp.* , supra, at pp. 108-110; *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311, 51 B.C.L.R. (2d) 84 (C.A.) , at pp. 315-318 (C.B.R.) and *Re Stephanie's Fashions Ltd.* , supra, at pp. 251-252.

7 One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors. Unlike the *Bankruptcy Act* , R.S.C. 1985, c. B-3, before the amendments effective November 30, 1992 to transform it into the *Bankruptcy and Insolvency Act* ("BIA"), it is possible under the CCAA to bind secured creditors it has been generally speculated that the CCAA will be resorted to by companies that are generally larger and have a more complicated capital structure and that those companies which make an application under the BIA will be generally smaller and have a less complicated structure. Reorganization may include partial liquidation where it is intended as part of the process of a return to long term viability and profitability. See *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* , supra, at p. 318 and *Re Associated Investors of Canada Ltd.* (1987), 67 C.B.R. (N.S.) 237 (Alta. Q.B.) at pp. 245, reversed on other grounds at (1988), 71 C.B.R. (N.S.) 71 (Alta. C.A.) . It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally. See *Re Associated Investors of Canada Ltd.* , supra, at p. 318; *Re Amirault Fish Co.*, 32 C.B.R. 186, [1951] 4 D.L.R. 203 (N.S. T.D.) at pp. 187-188 (C.B.R.).

8 It strikes me that each of the applicants in this case has a realistic possibility of being able to continue operating, although each is currently unable to meet all of its expenses albeit on a reduced scale. This is precisely the sort of circumstance in which all of the creditors are likely to benefit from the application of the CCAA and in which it is appropriate to grant an order staying proceedings so as to allow the applicant to finalize preparation of and file a plan of

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To prevent a rush to the assets, which would leave less sophisticated creditors behind and precipitate a collapse of the business, the stay affords all parties the opportunity to obtain information, consider their position, and, if possible, negotiate with the debtor company. The stay prevents many contractual counterparties from acting on the insolvency of the debtor company or other contractual breaches caused by the insolvency to terminate contracts or accelerate the repayment of the indebtedness owing by the debtor company when it would interfere with the debtor's ability to restructure its financial affairs. It provides the company with "breathing space", in that it does not have to expend all its time and resources on individual enforcement actions. The stay is temporal in nature; it is a temporary suspension of creditors' rights to enforce.

Sections 11 to 11.1 set out the authority and limits of the stay provisions under the *CCAA*. Prior to 2009, the language of the statute granted the court authority to "restrain further proceedings in any actions, suits or proceedings against the company upon such terms as the court sees fit" and any lifting of the stay by the court could be imposed on such terms as the court determined.[8] The courts frequently used s. 11 of the *CCAA* as the basis for a broad grant of statutory authority, including critical supplier orders and stays of proceedings against regulatory authorities. The amendments that came into effect in 2009 expanded and made more explicit the court's authority to grant a stay, codifying the scope and limits of the stay provisions, while still retaining the court's broad remedial authority.

2. Granting the Initial Stay Order

On application for the initial stay order, the debtor proposes a draft order. An example of an initial order, in the *Nortel Networks* case, is included as Appendix 2 to this book. Initially, the courts applied different versions of a similar test in determining whether to grant an initial stay under the *CCAA*. The British Columbia courts utilized a lower threshold, whereby the court would grant a stay unless the process was "doomed to failure", and Ontario courts a higher threshold, where the debtor was required to demonstrate that there was a "reasonable prospect of a viable workout".[9] However, the tests essentially converged after several years, particularly as the courts moved to recognize the rehabilitation goals of the statute. Given the objectives of the *CCAA*, the court will generally grant the initial stay unless it finds that the *CCAA* application is merely an effort by the debtor to avoid

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[8] Pre-2009 s. 11, *CCAA*.

[9] *Re Philip's Manufacturing Ltd.* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.) at p. 28, leave to appeal refused 1992 CarswellBC 2735, 1992 CarswellBC 2736 (S.C.C.). See also *Re Sharp-Rite Technologies Ltd.*, 2000 CarswellBC 128, [2000] B.C.J. No. 135 (B.C.S.C.); *Bargain Harold's Discount Ltd. v. Paribas Bank of Canada* (1992), 10 C.B.R. (3d) 23 (Ont. Gen. Div.).

its obligations to creditors or that creditors have lost all confidence in management of the corporation.[10]

While, arguably, it is much easier now for the debtor to receive an initial stay order than it was two decades ago, the court must be satisfied that an order is appropriate, in the circumstances, before it will exercise its discretion to make the order. Madam Justice Barbara Romaine of the Alberta Court of Queen's Bench in *Matco Capital Ltd. v. Interex Oilfield Services Ltd.* declined to grant an initial *CCAA* order on the basis that there was no evidence to suggest that there was any possibility of the debtor restructuring its affairs.[11] The Court observed that while the burden is placed on an applicant for an initial *CCAA* order to show that it has a reasonable possibility of restructuring, the burden is not an onerous one.[12] The Court held:

> ¶8 As Matco points out, Interex is in the same position it was when it solicited bridge financing from Matco in May of this year, and there is no evidence that any of its efforts from that time have resulted in a refinancing source stepping forward. Added to this is the surfacing of substantial builders' liens and the corporate governance problems that Interex now faces. The prospect of any successful refinancing looks dire. If what is really more likely is a liquidating *CCAA*, the consideration becomes whether such a resolution is better advanced through existing management in a *CCAA* proceedings, or through a receivership. Given that there is now evidence that Interex is essentially rudderless, with a CEO who will likely be terminated today and a board of directors that is under threat of replacement from a major shareholder, the balance of efficient resolution tips in favour of a receivership.

In making an application under the *CCAA*, the debtor corporation does not have to demonstrate at the initial stay application stage that it has a feasible plan, although the courts have held that the debtor is wise to have consulted with major creditors in advance of the application, in order to ascertain their willingness to co-operate in the negotiation of a workout.

Madam Justice Romaine of the Alberta Court of Queen's Bench denied an application for an initial order under the *CCAA* and appointed a receiver in *Alberta Treasury Branches v. Tallgrass Energy Corp.*[13] A year prior, Alberta Treasury Branches had extended a $12 million credit facility to the debtor, payable on demand and secured by a first charge on all of the company's assets; and Toscana Capital Corporation had granted the debtor a bridge loan credit facility of $6 million, secured by

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10 *Re Philip's Manufacturing Ltd.* (1992), 9 C.B.R. (3d) 25 (B.C.C.A.) at p. 28, leave to appeal refused 1992 CarswellBC 2735, 1992 CarswellBC 2736 (S.C.C.). See also *Re Sharp-Rite Technologies Ltd.*, 2000 CarswellBC 128, [2000] B.C.J. No. 135 (B.C.S.C.); *Bargain Harold's Discount Ltd. v. Paribas Bank of Canada* (1992), 10 C.B.R. (3d) 23 (Ont. Gen. Div.).

11 *Matco Capital Ltd. v. Interex Oilfield Services Ltd.*, (Docket No. 060108395), Oral Reasons for Judgment, Romaine J. (1 August 2006), (Alta. Q.B.).

12 *Ibid.* at para. 6.

13 *Alberta Treasury Branches v. Tallgrass Energy Corp.*, 2013 ABQB 432 (Alta. Q.B.).

goal of the statute.[250] The Court concluded that it would defeat the purpose of the *CCAA* to limit or prevent an application until the financial difficulties of the applicant are so advanced that the applicant would not have sufficient financial resources to successfully complete its restructuring. Under this approach, a court should determine whether there is a reasonably foreseeable expectation at the time of filing that there is a looming liquidity condition or crisis that will result in the applicant running out of money to pay its debts as they generally become due in the future without the benefit of the stay and ancillary protection. How far forward the court should look will vary according to the complexity of and time required to complete a restructuring.

In the *Re Stelco Inc.* proceeding, the union sought to set aside the initial stay order under the *CCAA* on the basis that the debtor corporation was not insolvent. The Court's ruling was an application of the tests under the *BIA* prior to the 2009 amendments, but with a view to the objectives of the *CCAA*, such that establishing insolvency was slightly less onerous than under the *BIA*.[251]

The Court in *Re Stelco Inc.* held:

> ¶3 For the purpose of determining whether Stelco is insolvent and therefore could be considered to be a debtor company, it matters not what the cause or who caused the financial difficulty that Stelco is in as admitted by Locker on behalf of the Union. The management of a corporation could be completely incompetent, inadvertently or advertently; the corporation could be in the grip of ruthless, hard hearted and hard nosed outside financiers; the corporation could be the innocent victim of uncaring policy of a level of government; the employees (unionized or non-unionized) could be completely incompetent, inadvertently or advertently; the relationship of labour and management could be absolutely poisonous; the corporation could be the victim of unforeseen events affecting its viability such as a fire destroying an essential area of its plant and equipment or of rampaging dumping. One or more or all of these factors (without being exhaustive), whether or not of varying degree and whether or not in combination of some may well have been the cause of a corporation's difficulty. The point here is that Stelco's difficulty exists; the only question is whether Stelco is insolvent within the meaning of that in the "debtor company" definition of the *CCAA*. However, I would point out, as I did in closing, that no matter how this motion turns out, Stelco does have a problem which has to be addressed — addressed within the *CCAA* process if Stelco is insolvent or addressed outside that process if Stelco is determined not to be insolvent. The *status quo* will lead to ruination of Stelco (and its Sub Applicants)

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[250] *Re Stelco Inc.*, 2004 CarswellOnt 1211, 48 C.B.R. (4th) 299 (Ont. S.C.J. [Commercial List]), leave to appeal refused 2004 CarswellOnt 2936 (Ont. C.A.), leave to appeal refused 2004 CarswellOnt 5200, 2004 CarswellOnt 5201 (S.C.C.).

[251] Stelco subsequently experienced a profitable fiscal quarter, raising a question for further consideration as to what happens when future forecasting is inaccurate and the debtor regains solvency during the *CCAA* stay period.