

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 PROPOSED PLAN OF ARRANGEMENT FOR THE
CREDITORS OF ABBEY RESOURCES CORP. (THE “APPLICANT”)

MEMORANDUM OF FACT AND LAW ON BEHALF OF
INDIAN OIL AND GAS CANADA

INTRODUCTION

1. Indian Oil and Gas Canada (IOGC) submits that this Honourable Court ought to order that Abbey Resources Corp. (Abbey Resources):
 - Pay the full amount of the rent due to the Carry the Kettle First Nation (CTK) for its oil and gas leases on the First Nation's reserve; and
 - Pay the royalties due within one month from the month that the resources were extracted. The payment should be made immediately or on or before the 25th day of the month following production

FACTUAL BACKGROUND

1. Lease payments

2. Abbey Resources' position at the application for an extension of the stay in November was that it would only make "prorated" surface lease rental payments to CTK. At paragraph 17 his affidavit of November 23, 2021, James Gettis states:

As no anniversary dates for surface leases held by CTK First Nation came due between August 13, 2021, and October of 2021, the Company has not yet made any surface lease rental payments to CTK First Nation since its entry into CCAA proceedings on August 13, 2021. CTK First Nation surface leases generally have anniversary dates falling between the months of November and February. As those anniversary dates come due, the Company will make prorated surface lease rental payments to CTK First Nation in the ordinary course in the manner in which it pays its other surface rights holders. [Emphasis Added]

3. Abbey Resources, however, has, in fact, basically not made any of the required surface lease rental payments to CTK. In his affidavit of January 19, 2022, Vishal Saini states
 - Abbey Resources has not paid any of the \$104,629.69 in rent for the surface lease with CTK, which came in December 2021; and
 - Abbey Resources has also not paid any of the \$31,110.94 in rent for the surface lease with CTK which came due in January of 2022 as of the date he swore his affidavit.¹

¹ Affidavit Vishal Saini date January 19, 2022 at para. 7

4. The only rental payment Abbey Resources has made since the stay order in August is \$91.63 of the \$662.45 on surface lease TS-3320. This was due on October 1, 2021.²

2. Royalties

5. Abbey Resources is continuing to extract and sell natural gas each month from CTK reserve lands. Abbey Resources, however, is waiting the three months allowed by section 80 of the *Indian Oil and Gas Regulations*³ (*IOGC Regulations*) to pay the royalties on the gas extracted.

ARGUMENT

1. Payment of the Full Amount of Rent Due

6. The Honourable Court does not have the jurisdiction to allow Abbey Resources to pay rent on a pro-rata/monthly basis rather than the full amount on the date that the rent is due. Further and in the alternative, if this Court does have the jurisdiction to allow such a pro-rata payment, it ought not to do so. The *Company Creditors Arrangement Act* (CCAA) explicitly protects those, like CTK, who continue to provide goods and services to a company under protection. It is very unfair to shift any more risk onto CTK.
7. The CCAA recognizes that those who continue to supply goods and services during a restructuring must be protected. Section 11.01 of the CCAA does not allow a stay ordered under sections 11 or 11.02 to prevent a person from demanding immediate payment for the use of leased property after the stay has been made. Section 11.01 states:

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

8. The court therefore does not have the jurisdiction to prevent the First Nation from demanding the immediate full payment of the annual rentals as they come due. In *Groupe Dynamite*

² *Ibid.* at para. 8

³ SOR/2019-196

*Inc. v. Deloitte Restructuring Inc.*⁴ the Quebec Superior Court found that section 11.01(a) did not allow it to prevent a landlord from demanding payment of rent for leased premises during the pandemic as follows:

The Court thus concludes that an order declaring that no post-filing rent is due and payable for the Manitoba and Ontario Stores would violate section 11.01 (a) of the CCAA and is beyond the Court's discretion.⁵

9. Further and in the alternative, if this Court does have jurisdiction, it is submitted that it ought not to allow the pro-rata payment of rent. This changes the fundamental nature of the lease from a yearly lease to a month-to-month lease, which shifts further the risk to CTK. CTK loses the security of a long-term while Abbey continues to enjoy the benefit of extracting gas from the reserve land. Those, like CTK, who continue to provide goods and services to companies attempting to reorganize are particularly vulnerable and the Court should protect them from as much risk as possible.
10. In *Quest University Canada (Re)*⁶ the British Columbia Supreme Court refused the request of Quest University to defer the payment of rent on leases for student residences. The Court found that a deferral would expose the landlord to significant risk and loss if the CCAA restructuring should fail. It would be “manifestly unfair” for the landlord to bear substantial risk and loss to allow all of the other stakeholders to enjoy this benefit.⁷
11. In *Groupe Dynamite Inc. v. Deloitte Restructuring Inc.*⁸ the Quebec Superior Court also stated that even if it did have the discretion to stay the payment of rent, it would not have.

2. The Payment of Royalties

12. This Honourable Court also ought to order that Abbey Resources pay royalties for the gas it extracts from CTK’s reserve within one month rather than the three months provided by the *IOGC Regulations*. This Court has the discretion to order this and it significantly reduces the risk for CTK in continuing to supply gas to Abbey Resources.

⁴ 2021 QCCS 3

⁵ *Ibid.* at para 52

⁶2020 BCSC 921

⁷ *Ibid.* at para 101

⁸ 2021 QCCS 3

13. Section 80 of the *IOGC Regulations* allows a royalty be paid any time within three months after the oil or gas is produced as follows:

The royalty must be paid on or before the 25th day of the third month after the month in which the oil or gas is produced.

14. As set out in the affidavit of Munir Jivraj, however, as a practical matter it is quite possible to pay the royalty within one month of the gas being extracted.⁹ In fact, under the previous *IOGC Regulations* in force until 2019, a royalty was required to be paid on the 25th day of the month following the month of production.¹⁰
15. CTK is extremely vulnerable in this situation because it is supplying gas to a company attempting to reorganize under the *CCAA*. A three month delay between the extraction of the gas and the payment of the royalties virtually guarantees that CTK will not be compensated for three months of production if Abbey Resources is not successful in reorganizing under the *CCAA*.
16. This court has the discretion to order that Abbey Resources be pay royalties for gas extracted from CTK reserve lands within one month. In *Canada v. Canada North Group Inc.*,¹¹ Justice Wagner for the majority notes that section 11 of the *CCAA* confers jurisdiction on the supervising court to “make any order that it considers appropriate in the circumstances” and then states:

This power is vast. As the Chief Justice and Moldaver J. recently observed in their joint reasons, “On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be ‘appropriate in the circumstances’”¹²

17. One of the purposes of the *CCAA* is to provide protection to suppliers like CTK who continue to provide goods and services to companies attempting to reorganize. If the *CCAA*

⁹ Affidavit of Munir Jivraj dated

¹⁰ *Indian Oil and Gas Regulations, 1995*, SOR/94-753, s. 33

¹¹ 2021 SCC 30

¹² *Ibid.* at para. 21

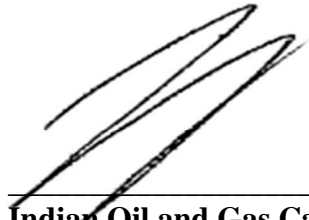
is going to be successful in allowing companies like Abbey Resources to continue, it must minimize the risk to suppliers like CTK.

ORDER SOUGHT

18. It is respectfully submitted that this Honourable Court ought to order that:

- a. Abbey Resources shall immediately pay all rent in full on its surface leases on CTK reserve lands that has come due after the date August 24, 2021;
- b. Abbey Resources shall immediately pay rent in full on its surface leases on CTK reserve lands as they come due unless otherwise ordered by this Court; and
- c. Abbey Resources shall pay the royalties on oil and gas obtained from or attributable to leases on CTK lands on or before the twenty-fifth day of the following month.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of January, 2022.



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LIST OF AUTHORITIES

1. *Canada v. Canada North Group Inc.*, 2021 SCC 30
2. *Groupe Dynamite Inc. v. Deloitte Restructuring Inc.*, 2021 QCCS 3
3. *Indian Oil and Gas Regulations*, SOR/2019-196, s. 80
4. *Indian Oil and Gas Regulations, 1995*, SOR/94-753, s. 33
5. *Quest University Canada (Re)*, 2020 BCSC 921