

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

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

JUDICIAL CENTRE SASKATOON

APPLICANT ABBEY RESOURCES CORP.

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

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

SECOND SUPPLEMENTAL BRIEF OF LAW
(Re: Application for Initial Order)

SECOND SUPPLEMENTAL BRIEF OF LAW FILED BY THE APPLICANT IN RESPECT OF ITS
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**"), files this Second Supplemental Brief of Law in support of its Application for an Initial Order.
2. This Second Supplemental Brief of Law is intended to provide the Court with additional case law and argument in relation to the "regulatory stay" now sought by Abbey pursuant to section 11.1(3) of the *Companies' Creditors Arrangement Act*¹ (the "**CCAA**") in light of recent actions taken by the Ministry of Energy and Resources ("**MOER**").
3. On July 30, 2021, the MOER provided Abbey with a notice indicating that its Licensee Liability Rating ("**LLR**") had been adjusted. On this basis, the MOER demanded an additional security deposit in the amount of \$13,445,871. The MOER has expressly threatened to take action under *The Oil & Gas Conservation Act*² (the "**O&G Act**") should Abbey fail to furnish the additional security deposit demanded of it.
4. Herein, Abbey argues that a regulatory stay is now required for it to restructure successfully in these proceedings, and that the granting of such stay is not contrary to the public interest. Abbey argues in the alternative that, even if this Honourable Court should decline to grant the regulatory stay at this time, it should nevertheless grant the Initial Order.
5. This Brief of Law should be read in conjunction with the Brief of Law dated July 16, 2021, and the Supplemental Brief of Law dated July 26, 2021.

II. STATEMENT OF ISSUES

- A. **This Court should impose a regulatory stay pursuant to section 11.1(3) of the CCAA**
- B. **The Court should grant the Initial Order, even if it is not inclined to grant the regulatory stay**

III. ARGUMENT

- A. **This Court should impose a regulatory stay pursuant to section 11.1(3) of the CCAA**

6. Section 11.1(2) of the CCAA limits the applicability of the general stay of proceedings imposed pursuant to section CCAA 11.02 in relation to "regulatory bodies" - i.e. any "person or body

¹ RSC 1985, c C-36.

² RSS 1978, c O-2.

that has powers, duties or functions relating to the enforcement or administration” pursuant to an enactment.³ It is conceded that the MOER is a “regulatory body” within the meaning of CCAA section 11.1(1).

7. CCAA section 11.1(2) reads as follows:

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body’s investigation in respect of the debtor company **or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body**, other than the enforcement of a payment ordered by the regulatory body or the court.⁴

8. CCAA section 11.1(3) allows a CCAA court to grant an applicant a regulatory stay of proceedings, which has the effect staying certain actions undertaken by regulatory bodies that, by virtue of CCAA section 11.1(2), are not caught within the ambit of the general stay of proceedings imposed under CCAA section 11.02. Section 11.1(3) reads:

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court’s opinion

(a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.⁵

9. Section 11.1(3) of the CCAA only appears to have been applied by a CCAA court in Canada in a single reported decision - namely, the Ontario Superior Court of Justice’s (“**ONSC**”) recent decision in *Re Just Energy Corp.*⁶ There, the ONSC provided the following general comment on the operation of CCAA section 11.1(3):

79 More plainly put, the CCAA automatically stays enforcement of any payments of money ordered by the regulator. It does not, however, automatically stay other steps that a regulator may take against a regulated entity. The court may nevertheless stay such other steps if it is of the view that the failure to stay those other steps means that a viable compromise or arrangement could not be made, provided that the additional stay is not contrary to the public interest.⁷

10. The ONSC went on to confirm that, in determining whether to impose a stay pursuant to section 11.1(3) of the CCAA, the courts should remain mindful of the remedial purposes of the

³ CCAA, *supra* note 1, s 11.1(1).

⁴ *Ibid*, at s 11.1(2), emphasis added.

⁵ *Ibid*, at s 11.1(3).

⁶ 2021 ONSC 1793, [*Just Energy*].

⁷ *Ibid*, at para 79.

CCAA as were articulated by the Supreme Court of Canada (the “SCC”) in *Century Services Inc. v. Canada (Attorney General)*.⁸ Specifically, the ONSC in *Just Energy* stated that the imposition of a regulatory stay was, in that instance, “consistent with the remedial purpose of the CCAA which is to avoid social and economic losses resulting from the liquidation of an insolvent company. To permit the immediate termination of Just Energy’s licenses would not avoid social and economic losses but amplify them.”⁹

11. The following paragraphs argue that the two criteria in CCAA section 11.1(3) (a)-(b) are readily made out, and that the imposition of a limited regulatory stay is consistent with the remedial purposes of the CCAA.

i. A Regulatory Stay is necessary for a viable compromise or arrangement

12. Abbey holds licenses granted by the MOER under the O&G Act. Abbey requires its licenses to continue to extract gas. If Abbey’s licenses are cancelled or suspended, or if Abbey is required to suspend production at all of its well sites, it will be unable to continue to extract natural gas for direct sale.
13. On July 30, 2021, the MOER delivered a correspondence, dated July 29, 2021, to Abbey indicating that it had recalculated the value of its LLR. The MOER’s correspondence stated that, for the ostensible reason that it had devalued Abbey’s total assets from \$44,901,360 to \$6,844,726, it would require an additional security deposit from Abbey in the amount of \$13,445,781 in order for Abbey to maintain an LLR of 1.0 or greater. The MOER has directly threatened to “order the suspension [Abbey’s] wells and facilities” under section 17.01 of the O&G Act for non-payment of the additional security deposit demanded.¹⁰
14. Without recurrent revenues generated from natural gas sales, Abbey will be unable to pay its operational costs or the professional costs of restructuring. Indeed, without cash flow from natural gas sales, Abbey will not be able to carry on business in any meaningful capacity.
15. The MOER has made its opposition to Abbey’s entry into these proceedings abundantly clear. By way of its actions and, indeed, its own Affidavit evidence, the MOER has confirmed that, if it is not paid the substantial security deposit that it knows Abbey is unable to pay, it intends to wield its authority to take regulatory action that would inhibit Abbey from carrying on business. In so doing, the MOER has telegraphed its intention to thwart Abbey’s attempt to restructure

⁸ 2010 SCC 60.

⁹ *Ibid*, at para 87.

¹⁰ July 29, 2021, Affidavit of Brad Wagner at para 6.

successfully in these proceedings, even if this Honourable Court should agree that Abbey is a suitable candidate for entry into CCAA proceedings against the MOER's opposition.

16. Consequently, it is necessary and in keeping with the remedial purposes of the CCAA for this Honourable Court to grant a regulatory stay that would prohibit the MOER from cancelling or suspending Abbey's licences for non-payment of amounts owing to the MOER by Abbey pursuant to the O&G Act.
17. Abbey thus seeks that this Honourable Court grant an Order under CCAA section 11.1(3) directing that section 11.1(2) of the CCAA does not apply to certain actions, suits or proceedings taken by the MOER that would lead to the cancellation of licenses granted to Abbey under O&G Act. Specifically, Abbey seeks an Order providing that section 11.1(2) of the CCAA does not apply to any action taken by the MOER under section 12(2) of the O&G Act to amend, suspend or cancel any licence issued to Abbey under the O&G Act. Section 12(2) of the O&G Act governs the MOER's ability to revoke licences for non-emergency reasons:

12(1) The minister may amend or suspend a licence where the amendment or suspension is necessary for the purposes of public safety or the safety of any person or for the protection of property or the environment.

(2) The minister may amend, suspend or cancel a licence if:

(a) the licensee is in agreement with the amendment, suspension or cancellation;

(a.1) the licensee fails to pay the administrative levy within the prescribed period;

(b) the licensee fails to comply with a notice issued pursuant to subsection 11(1) within the period specified in the notice;

(c) the security required pursuant to section 15 has not been provided in the amount and within the time required; or

(d) the licensee has contravened any provision of this Act or the regulations or has failed to comply with any order made pursuant to this Act.

18. Additionally, though non-payment of a security deposit or a levy amount would not appear to serve as a legitimate ground for the MOER to issue any order under section 17.01 of the O&G Act, Abbey seeks to include suspension under section 17.01 of the O&G Act for non-payment of any amounts by Abbey to the MOER within the scope of the regulatory stay sought.

ii. Granting a regulatory stay is not contrary to the public interest

19. The granting of the regulatory stay sought by Abbey is not contrary to the public interest. Rather, the limited regulatory stay sought by Abbey merely seeks to prevent the MOER from

relying on its statutory authority to suspend or cancel Abbey's licences or operations for non-payment of amounts owing to it.

20. In essence, the regulatory stay sought by Abbey is intended to prohibit the MOER from relying on Abbey's non-payment of a security deposit or levies to the MOER as grounds to suspend, amend, or cancel Abbey's licences issued under the O&G Act, or to otherwise take steps to prohibit Abbey from continuing to producing natural gas.
21. Abbey does not seek to impose a stay that would prohibit the MOER from acting in its capacity as a regulatory body to protect the public, property, and the environment. The stay sought by Abbey would not prohibit the MOER from requiring Abbey to comply, generally, with the regulatory regime imposed upon oil and gas producers in Saskatchewan. Notwithstanding the imposition of the regulatory stay, Abbey will remain bound to adhere to abandonment, restoration, remediation, or reclamation orders properly issued by the MOER. Likewise, the MOER will remain empowered to order that Abbey suspend the operation of any of its wells or flow lines if it determines that their continued operation poses a risk to property or the environment.
22. In *Just Energy*, the ONCA considered a counterfactual scenario - i.e. the consequences of what would happen if the regulatory stay were not ordered - in determining whether the regulatory stay was contrary to the public interest. There, the ONCA noted that the consequences of regulatory action would "create more market disruption than would a stay."¹¹
23. The instant case likewise merits consideration of a counterfactual scenario: if the Abbey is not granted the regulatory stay and the MOER should rely on its statutory authority to revoke Abbey's licences for non-payment of a security deposit, Abbey's restructuring efforts will fail and the company will ultimately face a disorderly liquidation. In such circumstance, the public will be in no better position than if the regulatory stay had not been issued. No additional security deposit will have been furnished by Abbey and other amounts owing to the MOER will remain unpaid on account of Abbey's insolvency. Indeed, the public will find itself in a worse position, as Abbey will cease to generate revenues and it will not have the opportunity to use such cash flow to begin the process of decommissioning its unproductive assets during the course of its restructuring.
24. In this regard, granting the regulatory stay sought by Abbey is not contrary to the public interest, but rather is in keeping with the remedial purposes of the CCAA.

¹¹ *Just Energy*, supra note 6, at para 86.

B. The Court should grant the Initial Order, even if it is not inclined to grant the regulatory stay

25. Even if this Honourable Court should decline to grant the regulatory stay sought by Abbey under section 11.1(3) of the CCAA at the Initial Order stage, it is nevertheless submitted that it would be appropriate for the Court to grant the Initial Order. This is to say, the MOER's attempt to wield its regulatory authority for the clear and obvious purpose of hindering the Company's efforts to restructure by entry into CCAA proceedings should not dissuade this Honourable Court from granting the Initial Order.
26. At present, the MOER has only indicated that it intends to Order the "suspension of the Applicant's wells and facilities pursuant to section 17.01 of [the O&G Act]" if Abbey fails to furnish an additional security deposit.¹² However, it does not appear as if section 17.01 of the O&G Act could possibly entitle the MOER to take any action against Abbey for failure to furnish a security deposit or to make payment to it generally. Section 17.01 of the O&G Act empowers the MOER to make emergency orders for the purpose of public safety or environmental protection:

17.01(1) Notwithstanding any licence, permit or approval, if, in the minister's opinion, it is necessary to do so for the purposes of public safety or the safety of any person, for the protection of property or the environment or for any other prescribed purpose, the minister may order any person to:

a) suspend the operation of any well, flowline or facility in the manner and within the time specified in the order; and

(b) abandon, restore, remediate or reclaim any well, flowline or facility, or the site of any well, flowline, or facility, in the manner and within the time specified in the order.

27. The MOER may have intended to refer in its Affidavit to section 12 of the O&G Act, which does entitle it to suspend or cancel licences for non-payment of security deposits or levies. Even supposing this is the case, the MOER is still unable to immediately cancel or suspend Abbey's licences without complying with procedural fairness requirements included in the O&G Act. Section 12(3) of the O&G Act provides that, except in the case of emergencies, the MOER shall not cancel or suspend licences without giving the producer the opportunity to make representations to the MOER.

(3) Unless, in the minister's opinion, action is urgently required, the minister shall not amend, suspend or cancel a licence pursuant to clause (2)(a.1), (b), (c) or (d) unless the licensee has been given a reasonable opportunity to make

¹² July 29, 2021, Affidavit of Brad Wagner, at para 6.

representations to the minister, in a form and manner determined by the minister, concerning the proposed amendment, suspension or cancellation.

28. Section 12(3) of the O&G Act is of interest in the present case given the MOER's unexplained decision to abruptly devalue Abbey's assets from approximately \$45,000,000 to roughly \$6,800,000 for the purposes of calculating Abbey's LLR. Denying Abbey the opportunity to restructure on the grounds that the Ministry may elect to revoke licensure in the future on grounds that may not stand up to scrutiny is not in keeping with the remedial purposes of the CCAA.

IV. CONCLUSION AND RELIEF SOUGHT

29. Abbey respectfully submits that the regulatory stay sought by it is required for it to restructure in these proceedings and that the granting of the same is not contrary to the public interest.
30. Abbey, therefore, asks that this Honourable Court grant the Initial Order, inclusive of the regulatory stay provisions sought by Abbey.

DATED at Edmonton, Alberta, this 4th day of August, 2021.

DLA PIPER (CANADA) LLP

Per: 

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

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**TABLE OF AUTHORITIES
(Re: Application for Initial Order)**

CASE LAW

Re Just Energy Corp, 2021 ONSC 1793 (CanLII).

Century Services Inc. v. Canada (Attorney General), 2010 SCC 60 (CanLII).