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.

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

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 Supplemental Brief of Law in support of its Application for an Initial Order.

2. This Supplemental Brief of Law is intended to provide the Court with additional case law relevant to the "doomed to fail" argument raised in Chambers by the Respondents in these proceedings on July 20, 2021, and the alleged loss of confidence in the management of Abbey raised by one of the Respondents to these proceedings.

3. Herein, Abbey argues that the "doomed to fail" and loss of confidence arguments should not distract this Court from the fact that entry into proceedings under the *Companies' Creditors Arrangement Act* ("**CCAA**") will usefully further Abbey's efforts towards its attempted restructuring and the remedial purposes of the CCAA more generally.

4. This Brief of Law should be read in conjunction with the Brief of Law dated July 16, 2021.[1]

II. STATEMENT OF ISSUES

A. This Honourable Court should not consider the argument that Abbey's restructuring is doomed to fail based on a lack of support from key stakeholders.

B. This Court should not lend any credence to the suggestion that stakeholders have truly lost confidence in Abbey's management.

III. ARGUMENT

A. This Court should not consider the "doomed to fail" argument

5. As is set out in the First Brief of Law, the CCAA provides Courts with the discretionary authority to grant an initial stay of proceedings for a period of ten days. In determining whether to exercise this discretion, Courts have, on occasion, had to deal with opposition from creditors who have unequivocally declared that they will oppose any arrangement put forward by the debtor company. In the instant case, the Ministry of Energy and Resources (the "**MOER**") has indicated that it opposes Abbey's entry into CCAA proceedings due, in part, to the fact that it does not believe it will ever be able to vote in favour of any plan put forward by Abbey.[2]

[1] Brief of Law dated July 16, 2021 [the ***First Brief of Law***].
[2] Affidavit of Scott Weaver, dated July 26, 2021, at paras 12-13.

6. In *Asset Engineering LP v Forest & Marine Financial Limited Partnership*,[3] the British Columbia Court of Appeal had to consider whether a secured creditor's opposition to the continuation of the stay granted under the initial CCAA order was sufficient to overturn the supervising judge's decision to extend the stay beyond the initial 30 day period. In dismissing the appeal, the Court of Appeal stated:

> The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one of more parties. The "fundamental purpose" of the Act - to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned - will be furthered by granting a stay so that the means contemplated by the Act - a compromise or arrangement - can be developed negotiated and voted on if necessary.
>
> ….
>
> As for AE's insistence that it will refuse to vote in favour of any plan brought to a meeting of creditors under s. 6 of the CCAA, I am not aware of any authority that permits a creditor to forestall an application under the Act on this basis, and I doubt Parliament intended that the court's exercise of its statutory jurisdiction could be neutralized in this manner. Where the Act is invoked, the court properly considered the interests of many stakeholders, not simply those of the creditor and debtor.[4]
>
> [emphasis added]

7. In *Re Pacific Shores Resort & Spa Ltd.*,[5] two secured creditors opposed the initial CCAA application on the grounds that they would not support any plan. Despite their opposition, the CCAA order was granted as the statutory requirements of the CCAA had been met by the applicants. At the comeback hearing, the two secured creditors argued, among other things, that there was no plan that made any sense and they would not vote for any plan that required them to accept less than what they were owed. The Court readily dismissed both of these "doomed to fail" arguments and made the following statements:

> i. It is not a prerequisite that a draft plan be filed at the time of the stay. What is required, is that the debtor have a *bona fide* intention to do so while having the protections of the stay under the CCAA;[6] and
>
> ii. A recalcitrant creditor should not necessarily prevent the granting of an order under the CCAA.[7]

8. Abbey has provided the outline of its plan to reorganize its business and has expressed a clear

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[3] 2009 BCCA 319 [***Asset Engineering***].
[4] *Ibid*, at para 26 - 27.
[5] 2011 BCSC 1775 [***Pacific Shores***].
[6] *Ibid* quoting *Cliffs over Maple Bay Investments Ltd.* v. *Fisgard Capital Corp.,* 2008 BCCA 327 at para. 31.
[7] *Supra* note 5 quoting *Hunters Trailer & Marine Ltd. (Re)*, 2000 ABQB 952 at para. 19.

bona fide intention of working with its creditors to achieve its goals. Abbey has never indicated that it would not present a plan of compromise or arrangement to its creditors during the course of these CCAA proceedings. The insistence of the MOER that it will not agree to anything short of payment in full of the indebtedness owing by Abbey should not preclude this Honourable Court from exercising its discretion to grant the initial CCAA order.

9. The "doomed to fail" argument was also attempted in the context of an initial application under the CCAA and in *Can-Pacific Farms Inc.*[8] There, the Court noted that the argument has been generally discredited by various court decisions and made the following comments:

> The example I gave is that, if the plan foolishly said "we will pay the bank twice as much as it is owed", I am quite confident that even the Bank would vote for such a plan.[9]

10. While the example proffered by Burnyeat J. in *Can-Pacific* is perhaps unrealistic, the point is not. It is impossible for a creditor to say before a CCAA proceeding has been commenced that it will not vote in favour of any plan of compromise or arrangement. That determination cannot be made until such time as a plan is presented to the creditors. It is for this reason that the test for entry into CCAA proceedings, as is outlined in decisions such as *Industrial Properties Regina Limited v Copper Sands Land Corp.*[10] does not fixate simply on whether the applicant's fulcrum creditor anticipates that it will be presented with a favourable proposal. Rather, the test is focused on whether the grant of an initial order is appropriate in the circumstances, which is assessed in large part by determining whether the grant of an initial order will usefully further an insolvent debtor's "efforts towards attempted reorganization."[11]

11. The "doomed to fail" argument was raised in *Azure Dynamics Corporation*[12] by a creditor who claimed to hold a veto or blocking position with respect to the approval of any plan of compromise or arrangement. The Court dismissed the "doomed to fail" argument and reinforced the point made in *Asset Engineering* that the interests of all stakeholders must be taken into account by noting:

> There are, needless to say, many other stakeholders who are not before the court such as employees, other unsecured creditors, trade creditors, landlords and the general community that the Azure Group is part of. I conclude that the position of JCI as to how it may vote on any plan of arrangement is clearly not a controlling factor on this application and as such, it cannot be said that the plan is likely to fail for this reason.[13]

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[8] 2012 BCSC 760 [***Can-Pacific***].
[9] *Ibid*, at para 8.
[10] 2018 SKCA 36 at paras 18 - 21.
[11] *Ibid*, at para 21.
[12] 2012 BCSC 781.
[13] *Ibid*, at para 12.

12. Although the MOER and the Rural Municipalities may together be the largest creditors in these proceedings, there are other creditors whose interests must be taken into account. There are several hundred surface rights holders, many of whom are farmers, who would lose future income under the surface leases and the opportunity to enjoy part payment of rental arrears if Abbey is not given the opportunity to restructure.

13. Further, if the initial CCAA order is granted, in addition to continuing operations of its 1,332 productive wells while preserving the employment of Abbey's 21 employees and full-time contract staff, Abbey will be able to explore the possibility of obtaining funding to decommission unproductive assets through the Accelerated Site Closure Program and through revenues generated from the sale of its surplus equipment. The potential of continuing operations and obtaining the funding to strategically decommission assets is a far better alternative than abruptly ceasing operations, halting production, terminating the prospect of cash-flows, and handing over 2,344 wells, pipelines and facilities to the MOER to decommission at an estimated cost between $30-60 million. Such a result is, frankly, not in the economic interest of the MOER, let alone the social and economic interest of Abbey's remaining stakeholders.

B. This Court should not give credence to the allegations of lost confidence

14. The Second Affidavit of Karen Paz dated July 26, 2021, sworn in support of the Rural Municipality of Miry Creek No. 229 (the "**RMMC"**) opposition to Abbey's application contends that there is a loss of confidence in the management of Abbey. Notably, of the five parties opposing Abbey's application, RMMC is the only party that has averred to any loss of confidence in Abbey's management.

15. The Court in *Pacific Shores* had to consider a similar issue when the secured creditor alleged that management had shown no record of success and that there had been financial mismanagement and cash flow and financial recordkeeping irregularities and made the following comments:

> "Both parties seem to have been working together to resolve the problems, and I have not been advised that bcIMC raised any issues relating to management's abilities until now. To that extent, the lack of success on the part of the petitioners has to come as no surprise to bcIMC at this time."[14]

16. In the instant case, the parties have been in discussions since 2017 in an attempt to deal with the outstanding property taxes and no allegations of a loss of confidence in management have been raised before now. While it is correct that Abbey had significant concerns regarding the

[14] *Supra* note 5, at para 28.

taxation rates and advocated for changes that would decrease its property taxes, Abbey also proposed payment plans and was very forthcoming in setting out Abbey's financial situation and the need for the parties to reach some compromise. It should come as no surprise to RMMC that Abbey finds itself in its current predicament.

17. In *BCIMC Construction Fund Corporation* v. *The Clover on Yonge Inc.*,[15] the creditors had evidence of financial irregularities within the debtors, including hiding increased costs, keeping two sets of accounting records and failing to inject equity into the development projects. These findings led to a loss of confidence in management and a receivership application. The debtor countered with a CCAA application. In granting the receivership application, the Court made the following comments:

> Although the Debtors have had more than three weeks to respond to the allegations of the improper financial practices that led the Receivership Applicants to lose confidence in them, the Debtors have failed to do so. The Debtors do not deny the allegations. They do not explain them. They do not suggest they were the conduct of a rogue employee. They do not state that the irregularities were unknown to senior management. They remain completely silent about the allegations. In these circumstances I can only assume that the allegations are true and were, at all material times, known to and accepted by senior management.[16]

18. The assertions raised by RMMC do not come close to the issues that the creditors in *Clover on Yonge* faced. RMMC complains that Abbey is unwilling to meet its property tax obligations, but its own evidence shows that Abbey was putting forward payment plans as well as advocating for tax relief as it is entitled to do under *The Municipalities Act*. RMMC makes a bald allegation of lack of good faith based on a transaction that Abbey had, without prompting or any request from RMMC or any other interested, offered to unwind for the benefit of its creditors (after having transparently disclosed the existence of such transaction at the outset of these proceedings). Abbey respectfully submits that RMMC has not provided any evidence that would elevate this to the circumstances seen in *BCIMC* and it would be inappropriate for this Honourable Court to give credence to allegations of a loss in confidence in management which are only raised for the first time in opposition to an application aimed at assisting Abbey in restructuring its business.

IV. CONCLUSION AND RELIEF SOUGHT

19. Abbey respectfully submits that if Abbey is granted the Initial Order, 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

[15] 2020 ONSC 1953 [***Clover on Yonge***].
[16] *Ibid*, at para 40.

proceedings as an entity capable of carrying on business as a going concern.

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

DATED at Edmonton, Alberta, this 29th day of July, 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
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CASE LAW **TAB**