

COURT FILE NUMBER KBG-SA-00151-2022

**COURT OF KING'S BENCH FOR SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY**

JUDICIAL CENTRE SASKATOON

**IN THE MATTER OF THE RECEIVERSHIP OF
ABBEY RESOURCES CORP.**

**BRIEF OF LAW ON BEHALF OF THE RECEIVER, MNP LTD.
(Filed in support of an application scheduled to be heard by the Honourable Mr. Justice
G.A. Meschishnick at 10:00 a.m. on June 14, 2024)**

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I. INTRODUCTION

1. Since the last application, the Receiver's¹ work has included:

- (a) closing the Transaction with You First;
- (b) preparing the Unsold Natural Gas Assets for surrender to the Orphan Fund; and
- (c) selling Residual Assets.

2. As discussed in the Fifth Report:

- (a) the MER has advised that it wishes to continue the receivership proceedings until late October or early November to allow the Receiver to complete the work described in paragraph 12 of the Fifth Report, which will require additional borrowings; and
- (b) the Receiver is in possession of the Net Proceeds of two asset sales Abbey completed in the CCAA Proceedings, which the Receiver wishes to utilize to partially repay the amounts borrowed from the Orphan Fund to date.

3. The Receiver has borrowed the maximum amount permitted paragraph 20 of the Receivership Order (as amended by paragraph 4 of the Sealing Order), and is therefore bringing this application to increase the Receiver's borrowing limit and the Receiver's Borrowings Charge to provide for the necessary funding to complete the work requested by the MER. The Orphan Fund has agreed to advance the amounts required. Because the Receiver's Borrowings Charge is a charge on Abbey's Property that is subordinate only to the Administration Charge and Receiver's

¹ Capitalized terms not otherwise defined in this brief of law have the meaning given to them in the Fifth Report.

Charge, the Receiver is requesting that it be authorized to utilize the Net Proceeds to partially repay the amounts borrowed from the Orphan Fund to date.

4. This brief discusses the law and evidence applicable to these two issues. For the reasons that follow, the Monitor respectfully requests that this Honourable Court grant the relief sought in the form of order filed.

II. FACTS

5. The facts are set out in the Fifth Report (and the previous reports filed in these proceedings) and, for the sake of economy, will not be referred to here, but instead in the course of the submissions made in the following sections of this brief.

III. ISSUES

6. The issues to be decided on this application are:

- (a) whether the Receiver's borrowing limit and the Receiver's Borrowings Charge should be increased to \$4,171,920; and
- (b) whether the Receiver should be authorized to utilize the Net Proceeds as a partial repayment of the amounts borrowed from the Orphan Fund to date.

IV. DISCUSSION

A. Increasing the Receiver's Borrowing Limit and Borrowings Charge

(i) Jurisdiction

7. The Court's jurisdiction to increase the Receiver's borrowing limit (with the amounts borrowed to be secured against the Property by way of the Receiver's Borrowings Charge) is grounded in sections 31(1) and 243(1)(c) of the *BIA*, which read:

31(1) With the permission of the court, an interim receiver, a receiver within the meaning of subsection 243(2) or a trustee may make necessary or advisable advances, incur obligations, borrow money and give security on the debtor's property in any amount, on any terms and on any property that may be authorized by the court and those advances, obligations and money borrowed must be repaid out of the debtor's property in priority to the creditors' claims.

[...]

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

[...]

(c) take any other action the court considers advisable.

[Emphasis added.]

8. In *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*,² the Alberta Court of Appeal noted that:

- (a) section 31(1) expressly authorizes supervising judges to make orders permitting receivers to borrow and grant security on the debtor's assets, with the amounts secured to be paid in priority to the creditors' claims; and
- (b) the broad wording of section 243(1)(c) *has been interpreted to give supervising judges the broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise.*³

9. Orders pursuant to sections 31(1) and 243(1)(c) of the *BIA* are discretionary.

(ii) **The Additional Funding is Required to Complete the Work**

10. On this application, the Receiver is seeking to increase its borrowing limit and the Receiver's Borrowings Charge from \$3,000,000 to \$4,171,920.

11. The Receiver's borrowing limit and the Borrowings Charge were originally set at \$500,000. This figure was an estimate of the amount that the Receiver *may* be required to borrow based on the information that was available at the time the Receivership Order was granted.⁴

² 2021 ABCA 226.

³ *Ibid.* at para 20.

⁴ Fourth Report, para 46.

12. As discussed in paragraphs 47 – 49 of the Fourth Report of the Receiver dated October 30, 2023 (the "**Fourth Report**"), the Receiver's operation of the Natural Gas Assets was profitable in 2022; however, natural gas prices declined in 2023, which eroded the available cash to:

- (a) pay Abbey's 2023 property tax obligations;
- (b) pay Sayer's commission on the You First transaction; and
- (c) fund the necessary work in respect of the Unsold Natural Gas Assets to prepare them for surrender to the Orphan Fund.

13. The Receiver therefore sought, and the Court authorized, an increase to the Receiver's borrowing limit and Borrowings Charge from \$500,000 to \$3,000,000 (paragraph 4 of the Sealing Order).

14. Since that time:

- (a) the Receiver has had to borrow the full \$3,000,000 permitted by the Receivership Order (as amended by the Sealing Order) to fund the Receiver's exercise of the powers and duties conferred upon it by the Receivership Order and other Orders granted in these proceedings (e.g., the Sale Approval and Vesting Order dated November 2, 2023); and
- (b) the MER has requested that the Receiver complete the work detailed in paragraph 12 of the Fifth Report prior to seeking its discharge.

15. The Receiver estimates that it will need an addition \$1,171,920 to complete this work,⁵ the completion of which will benefit the rural municipalities, landowners, and general public by ensuring that the Unsold Natural Gas Assets are maintained in the summer months and made safe for surrender to the Orphan Fund in the fall.

16. The Receiver's estimate has been provided to the MER and Orphan Fund. The MER, which is the primary creditor in these proceedings, supports the relief sought on this application and the

⁵ Fifth Report, para 14.

Orphan Fund has agreed to provide the necessary funding.⁶ The Receiver is unaware of any opposition to the relief sought at this time and therefore requests that the Court grant the requested increase to the Receiver's borrowing limit and Borrowings Charge.

B. Use of the Net Proceeds

17. Paragraph 24A of the Receivership Order provides that the Administration Charge from the CCAA Proceedings, the Receiver's Charge, and the Receiver's Borrowings Charge (collectively, the "**Charges**") are charges on the Property in priority to all all security interests, trusts, liens, charges, and encumbrances, statutory or otherwise, in favour of any Person (as defined in the Receivership Order), but subject to sections 14.06(7), 81.3(4), and 81.6(2) of the *BIA*. As discussed in the preceding section of this brief, the Court has the jurisdiction to make orders of this nature pursuant to sections 31(1) and 243(1)(c) of the *BIA*.

18. Paragraph 24B of the Receivership Order provides that the priority amongst the Charges is as follows:

First – Administration Charge (to the maximum amount of \$250,000)

Second – Receiver's Charge

Third – Receiver's Borrowing Charge (to the maximum amount of \$500,000)

19. The amounts secured by the Administration Charge were paid early in these proceedings, and the Receiver's accounts have been paid on an ongoing basis from the Abbey estate; accordingly, there are no debts secured by the first and second place charges against the Property, leaving the Receiver's Borrowings Charge in first position, subject only to sections 14.06(7), 81.3(4), and 81.6(2) of the *BIA*, which read:

14.06 [...]

(7) Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the

⁶ *Ibid.* at para 15.

debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security

- (a) is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and
- (b) ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

[...]

81.3 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a bankrupt for services rendered during the period beginning on the day that is six months before the date of the initial bankruptcy event and ending on the date of the bankruptcy is secured, as of the date of the bankruptcy, to the extent of \$2,000 — less any amount paid for those services by the trustee or by a receiver — by security on the bankrupt's current assets on the date of the bankruptcy.

(2) For the purposes of subsection (1), commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for during the period referred to in that subsection, are deemed to have been earned in that period.

(3) The claim of a travelling salesperson who is owed money by a bankrupt for disbursements properly incurred in and about the bankrupt's business during the period referred to in subsection (1) is secured, as of the date of the bankruptcy, to the extent of \$1,000 — less any amount paid for those disbursements by the trustee or by a receiver — by security on the bankrupt's current assets on that date.

(4) A security under this section ranks above every other claim, right, charge or security against the bankrupt's current assets — regardless of when that other claim, right, charge or security arose — except rights under sections 81.1 and 81.2 and amounts referred to in subsection 67(3) that have been deemed to be held in trust.

[...]

81.6 (1) If a person who is subject to a receivership is an employer who participated or participates in a prescribed pension plan for the benefit of the person's employees, the following amounts that are unpaid immediately before the first day on which there was a receiver in relation to the person are secured by security on all the person's assets:

[...]

(2) A security under this section ranks above every other claim, right, charge or security against the person's assets, regardless of when that other claim, right, charge or security arose, except rights under sections 81.1 and 81.2 and securities under sections 81.3 and 81.4.

[Emphasis added.]

20. As noted in the Fifth Report, the Receiver is of the view that none of the foregoing sections are engaged on the facts.⁷ With respect to:

- (a) section 14.06(7), the MER's claim for the costs of remedying any environmental condition or damage affecting the Unsold Natural Gas Assets is not entitled to any priority pursuant to this section at this time because the costs have yet to be incurred;⁸
- (b) section 81.3(4), there are no claims of any clerks, servants, travelling sales-persons, labourers, or workers owed wages, salaries, commissions, or compensation by Abbey for services rendered in the six months prior to the receivership; and
- (c) section 81.6(2), there are no unpaid pension plan benefits for the benefit of Abbey's employees.⁹

21. Consequently, the amounts advanced by the Orphan Fund, which are secured by the Receiver's Borrowings Charge, are a first charge on the Property (including the Net Proceeds) at present. The Receiver is requesting authorization to utilize the Net Proceeds to reduce the amount secured by the Receiver's Borrowings Charge by making a partial payment to the Orphan Fund.

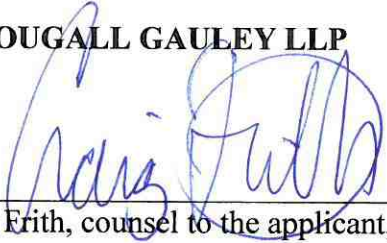
V. CONCLUSION

11. For the reasons stated in this brief of law, the Receiver respectfully requests that the requested relief be granted in the form of the draft order filed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of June, 2024.

McDOUGALL GAULEY LLP

Per:



Craig Frith, counsel to the applicant,
MNP Ltd.

⁷ *Ibid.* at para 18.

⁸ *Yukon (Government of) v Yukon Zinc Corporation*, 2021 YKCA 2, at para 82.

⁹ Fifth Report, at para 18.

VI. AUTHORITIES

TABLE OF AUTHORITIES (in accordance with Rule 13-38.1 of <i>The King's Bench Rules</i>)		
LEGISLATION/JURISPRUDENCE	SECTIONS/PARAGRAPHS RELIED ON	LEGAL PRINCIPLES
<i>Bankruptcy and Insolvency Act</i> , RSC 1985, c B-3	Sections 31(1) and 243(1)(c)	- court authority to permit the Receiver to borrow money and grant security on the debtor's assets - supervising judges have the broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise
<i>DGDP-BC Holdings Ltd v Third Eye Capital Corporation</i> , 2021 ABCA 226	Paragraph 20	<i>Ibid.</i>
<i>Yukon (Government of) v Yukon Zinc Corporation</i> , 2021 YKCA 2	Paragraph 82	- the government's priority claim for the costs of remedying environmental conditions or damage affecting the debtor's property pursuant to section 14.06(7) of the <i>BIA</i> does not arise until the costs are actually incurred

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