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. This is a memorandum of fact and law is to:

    - Respond to the brief of law submitted by Abbey Resources Corp. (Abbey Resources) dated January 27, 2022; and
    - Provide an update of what, if any, lease and royalty payments have been made by Abbey Resources since the last hearing for the gas production on the Carry the Kettle First Nation's (CTK) reserve.

Response to Abbey Resources Brief of Law Dated January 27, 2022.

2. Abbey Resources is incorrect to argue that this Honorable Court has the jurisdiction to allow Abbey Resources to simply pay a *per diem* rate for the surface leases on the CTK reserve. Section 11.01 is intended to protect those, like CTK, who continue to supply of goods and services to a company under *Company Creditors Arrangement Act* (*CCAA*)) protection.

3. Abbey Resources first argues that the broad discretion under section 11 of the *Company Creditors Arrangement Act* (*CCAA*)) provides this court with the wide discretion to make an order for rent to be paid on a *per diem* basis. This, however, is a misreading of section 11 because section 11 is explicitly limited by section 11.01. Section 11.01 confirms that the intention of the *CCAA's* is to protect those who continue to supply goods and services to a company under *CCAA* protection.

4. Abbey Resources then argues that this Court ought to refuse to follow the Superior Court of Quebec's decision in *Groupe Dynamite Inc. v. Deloitte Restructuring Inc*.[1] because section 11.01 ought to be interpreted narrowly.

5. Such a narrow interpretation, however, would defeat section 11.01's important purpose, which is to protect those who continue to provide goods and services to a company under protection. This important point is explicitly noted by the Superior Court of Quebec in *Group Dynamite Inc*. as follows:

> The Court recognizes that an exception to the stay of proceedings, section 11.01 (a) of the CCAA must be "narrowly construed". Nonetheless, it is

[1] 2021 QCCS 3

> clearly drafted from the post-filing suppliers' standpoint and is intended to protect them and to counter-balance the rights of the debtor.[2]

6. In *Quest University Canada (Re)*[3] the British Columbia Supreme Court also stressed that an important purpose of the CCAA is to protect those who continue to supply goods and services to a company in protection:

> As stated above, it is commonly considered "fair" that a person continuing to supply an insolvent debtor or allow the debtor to continue using its property during the restructuring should also be compensated for that supply or use, consistent with Model Orders in place across Canada: Cow Harbour Construction at para. 16.[4]

7. Applying the "modern principle"[5] of statutory interpretation, it is submitted that the Quebec Superior Court was correct to apply 11.01 to real property leases. This interpretation supports the object of and purpose of the *CCAA*, which is to balance the goal of allowing companies to reorganize while protecting those who continue to provide them with goods and services during the reorganization.

8. Finally, Abbey Resources argues that, even if section 11.01 applies to real property, it does not obligate it to pay "to pay the maximum amounts owing under its surface leasing agreements." Abbey states that there is "no specific *CCAA* provision that requires a company to make payment to persons who supply good and services in the post-filing period,"

9. This argument fails to recognize the "common understanding" that the requirement to pay ongoing expenses is an important part of the initial order. Without them, the *CCAA* restructuring process could not proceed. In response the point that there is "no specific *CCAA* provision that requires a company to make payment to persons who supply good and services in the post-filing period," the British Columbia Supreme Court in *Quest University* states:

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[2] *Ibid*.at para, 42
[3] 2020 BCSC 921
[4] *Ibid* at para. 98
[5] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 117, *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26

> However, fundamentally, the Initial Order and the ARIO reflect the common understanding in CCAA proceedings that, as Quest continued in the process, it would continue its operations substantially in the ordinary course and would pay for those operations. It is unsurprising that counterparties to those arrangements would expect payment as a matter of fairness. It would clearly be unattractive for a post-filing supplier to allow Quest, an insolvent company, to run up substantial obligations that might or might not be paid at the end of the day, depending on the outcome of the restructuring process: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd*., 2007 SKCA 72 at paras. 41-42.[6]

10. The initial order in this case, in fact, reflects this "common understanding" by requiring the payment of a number of ongoing real property expenses such as utilities, property taxes and "rent."[7]

11. With this "understanding" that supplies must continue to be paid in the ordinary course for the goods and services supplied, Abbey Resources cannot ask this court to modify the contract and pay less on the due date that is required. This essentially asking the court to force CTK to provide goods and services in the manner that Abbey Resources wishes and not in the manner stated in the original contract.

12. Redrafting the commercial contracts by the Court is not part of the "ordinary course" of business. Post-filing suppliers would become very hesitant to continue to supply goods and services if their contracts could be rewritten by a Court after the fact. One of the reasons the Quebec Superior Court refused the defer the rent in *Groupe Dynamite Inc.* was because it "would effectively result in a redrafting of the leases."[8]

13. In conclusion, it is submitted this Hounourable Court ought not to grant Abbey Resources' request to have the rent on the surfaces leases paid on a *per diem* basis.

Update on Lease and Royalty Payments

14. Abbey Resources has made the following lease and royalty payments, which are not already noted in the affidavits Vishal Saini and Munir Jivraj both date January 19, 2022:

    <u>Leases</u>

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[6] *Ibid*, at para. 44
[7] Paragraph 9 of the order of Mr. Justice Meschishnick August 13, 2021
[8] 2021 QCCS 3 at para. 58(f)

- $15,024.30 out of the $169,384.39 of Surface Rentals due for December 2021 and January 2022;
- $110.71 of the $570.82 left owing on Surface Lease TS-3320 due in October 2021; and
- $31,582.45, which is the full rental amount for the Subsurface Rental due in January, 2022 for CL-0001.

Royalties

- $27,291.46 for the November 2021 gas production; and
- $24,070.63 for the December 2021 gas production.

15. Abbey Resources, however, has not provided the corresponding royalty data for the October, November, or December 2021 production months as required under ss. 82(2) of the *IOGC Regulations*. IOGC cannot validate Abbey Resources payments against the volumetric production without that this data.

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

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