COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER: APPEAL NO.: 2501-0324AC

REGISTRAR'S STAMP

TRIAL COURT FILE NUMBER: 2401-05179

REGISTRY OFFICE: CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ALPHABOW ENERGY LTD.

DOCUMENT: **MEMORANDUM OF ARGUMENT**

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I. INTRODUCTION

1. AlphaBow Energy Ltd. ("**AlphaBow**") is insolvent. Pursuant to an Amended and Restated Initial Order ("**ARIO**"), Alphabow entered into proceedings (the "**CCAA Proceedings**") pursuant to the *Companies' Creditors Arrangement Act*[1] ("**CCAA**").

2. On December 19, 2024, the Honourable Justice Jeffrey of the Court of King's Bench of Alberta (the "**Lower Court**") approved multiple transactions providing for the assumption of all of AlphaBow's environmental end-of-life obligations ("**ARO**").[2] Approximately 10 months later, the Alberta Energy Regulator ("**AER**"), having not opposed those transactions and with full visibility into AlphaBow's finances through the CCAA Monitor's reports, demanded over $20 million in security from AlphaBow as a condition of permitting licenses to transfer which was a precondition to the transaction closing. The AER demanded the funds even though it knew that AlphaBow did not, and would not while in these proceedings, be able to comply with the request and after having approved seven transfer applications made by AlphaBow to the AER without requesting any security from AlphaBow.[3]

3. AlphaBow applies pursuant to Section 13 of the *CCAA*[4] and rule 14.5(1)(f) of the *Alberta Rules of Court*[5] for permission to appeal the decision (the "**Decision**")[6] of the Honourable Justice Bourque (the "**Chambers Justice**") dated October 29, 2025. The Chambers Justice dismissed AlphaBow's application (the "**Application**")[7] for a declaration that any request by the AER for a security deposit is stayed under the CCAA and ARIO ("**AER Security Request**") and that the

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[1] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [***CCAA***], s 13 [**TAB 1**].
[2] Reverse Vesting Order, granted on December 19, 2024 [**TAB H**]; Eleventh Report of the Monitor, filed September 18, 2025 [**TAB F**] at paras 12,14.
[3] Appendix A to this Brief – Summary of Transactions.
[4] *CCAA*, *supra*, s 13 [**TAB 1**].
[5] *Alberta Rules of Court*, AR 124/2010, r 14.5(1)(f) [**TAB 2**].
[6] Decision of Justice M. H. Bourque, October 29, 2025 [**TAB B**].
[7] Application of AlphaBow Energy Ltd. for a declaration that future requests for a security deposit is stayed, filed September 15, 2025 [**TAB A**].

failure of AlphaBow to pay security cannot be relied upon for the purposes of considering whether to approve a license transfer application.

4. The Chambers Justice erred in finding that the AER Security Request and/or the denial of a transfer application based on the inability to pay security was not captured by the stay of proceedings and in the alternative that the failure to grant the relief sought would not frustrate AlphaBow's restructuring efforts. This finding was made despite the Chambers Justice acknowledging that granting the relief sought would permit AlphaBow to exit from the CCAA Proceedings and technically qualify as a viable arrangement or compromise.[8] In denying AlphaBow's Application, the Chambers Justice erred in interpreting the applicable law and made factual findings that were based on speculation, lacked an adequate factual foundation, and were a collateral attack on prior Lower Court rulings.

II. STATEMENT OF FACTS

5. The key facts relevant to this application for leave to appeal are set out in the Twelfth Affidavit of Ben Li, sworn on September 15, 2025 (the "**Twelfth Li Affidavit**") and the Eleventh Report of the Monitor.[9]

III. ISSUE

6. The sole issue is whether permission to appeal the Decision be granted?

[8] Decision at para 37 [**TAB B**].
[9] The Twelfth Affidavit of Ben Li, sworn September 22, 2025 [**Li Affidavit**], [**TAB D**]; Eleventh Report of the Monitor, filed September 18, 2025, [**TAB F**].

IV. LEGAL ARGUMENT

A. Test for Permission to Appeal

7. The *CCAA* requires leave to appeal any order granted thereunder.[10] To be granted leave to appeal from a *CCAA* order, the applicant must establish serious and arguable grounds of appeal of real and significant interest to the parties. This test subsumes four factors: (a) the point on appeal is significant to the practice; (b) the point is of significance to the action itself; (c) the appeal is *prima facie* meritorious; and (d) the appeal will not unduly hinder progress of the action.[11] The court must then ascribe appropriate weight to each factor and decide overall whether the test is met.[12] In determining whether a party has met the test for leave to appeal, failure to prove one or more of the factors is not determinative. The court must weigh all factors in reaching its final determination.[13]

B. The Points on Appeal are Significant to the Practice

8. The AER is a provincial regulator. Determining which actions of a regulator are stayed during *CCAA* proceedings will have a significant impact on both the insolvency practice nationally and the oil and gas industry in Alberta, specifically.[14] There is limited authority on the applicability of section 11.1. of the CCAA.[15] In this context, direction from this Court will be valuable to regulators and insolvency practitioners.

9. The matter is also of significance to the oil and gas industry as it expands the priority afforded to regulators. This has significant implications to the ability of companies to obtain

[10] *CCAA, supra* at, ss 13 and 14 [**TAB 1**].
[11] *Liberty Oil & Gas Ltd, Re*, 2003 ABCA 158 at para 15-16 [*Liberty Oil*] [**TAB 3**].
[12] *Resurgence Asset Management LLC v Canadian Airlines Corporation*, 2000 ABCA 149 at para 46 [*Canadian Airlines*] [**TAB 4**].
[13] *Royal Bank of Canada v Cow Harbour Construction Ltd*, 2010 ABQB 637 at para 29 [*Cow Harbour*] [**TAB 5**].
[14] *Liberty Oil*, *supra* at para 17 [**TAB 3**].
[15] The Hothouse of Real-Time Regulation: Emerging Law under CCAA section 11.1, 2022 CanLIIDocs 4304 [*Hothouse*] [**TAB 6**].

financing and a parties willingness to fund or participate in a sales process given the uncertainty as to whether a transaction or restructuring can proceed even after court approval.

10. There is no appellate authority directly on this point, and thus the proposed appeal has significant precedential value, which weighs heavily in favour of granting leave, even where the merits of the proposed appeal are merely reasonably arguable.[16]

C. The Points on Appeal are Significant to the Action Itself

11. The Decision enables the AER to continue to request security in amounts that it knows AlphaBow does not have, frustrating efforts by AlphaBow to close the sales sanctioned by the Lower Court almost a year ago and emerge from its CCAA Proceedings. The points on appeal are critical to the success or failure of these CCAA Proceedings. If AlphaBow is successful on its appeal, then the court approved transactions can proceed upon the AER collecting security from the purchasers under the various transfer applications, which will then enable AlphaBow to exit the CCAA and the funds in its estate can be distributed.

D. The Proposed Appeal is *Prima Facie* Meritorious

12. To satisfy this element, a full examination of the merits of the proposed appeal is unnecessary and AlphaBow must only show that it has an arguable case.[17] An arguable case is one that is not frivolous.[18] AlphaBow's appeal of the Decision is not frivolous, but is rather a good faith attempt to seek clarity from this Court and to implement viable Lower Court sanctioned transactions.

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[16] *Liberty Oil*, *supra* at para 17 [**TAB 3**]; *Ketch Resources Ltd v Gauntlet Energy Corp*, 2005 ABCA 357 at para 14 [*Ketch Resources*] [**TAB 7**].
[17] *Kerr Interior Systems Ltd*, *Re*, 2008 ABCA 291 at para 11 [**TAB 8**]; *Cow Harbour*, *supra* at para 48 [**TAB 5**].
[18] *Mudrick Capital Management LP v Lightstream Resources Ltd,* 2016 ABCA 401 at paras 51-52 [*Mudrick*] [**TAB 9**].

1. The Chambers Justice erred in law in finding that the AER Security Request is not captured by the stay under the ARIO

13. The ARIO and section 11.1(2) of the CCAA both imposed a stay against creditors and in respect of certain actions of a regulatory body, including in respect of the enforcement of a payment ordered by the regulatory body.[19] The Lower Court erred in law in interpreting the CCAA and ARIO as authorizing the AER to refuse to transfer licenses to a purchaser where AlphaBow – and not the purchaser - was unable to post the security requested. Such a finding is clearly contrary to the stay which prohibits a regulator from seeking to enforce payment.

14. The AER Security Request is also stayed as it is an attempt by the AER to enforce its rights as a creditor. The AER is purporting to exercise authority under the OGCA.[20] The AER's own legislation, as a result of recent amendments[21], confirms that a regulator is acting as a creditor when it seeks to collect security. The OGCA defines "debtor" to include a person indebted to the AER for "any costs, levy, fee, penalty, deposit or other form of security or other amount".[22] This signifies the Legislature's intention to classify security deposits as debts owed to the AER. This is also consistent with the finding of the Court in Abbey Resources Corp. that the Saskatchewan equivalent of the AER was acting as a creditor when seeking a security deposit.[23] By finding that the AER was not acting as a creditor, the Chambers Justice failed to give effect to the words of the statue in their ordinary meaning and full context, which is an error of law.

15. The Court's finding that the stay did not apply appears to be based on an determination that the AER's Security Request, was part of the exercise of a "public duty" in accordance with the

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[19] Amended and Restated Initial Order, granted on April 26, 2024 [**TAB G**], *CCAA supra*, at s 11.1 [**TAB 1**].
[20] *Oil and Gas Conservation Act*, RSA 2000, c O-6 [***OGCA***] [**TAB 10**].
[21] On April 2, 2020, the *Liability Management Statutes Amendment Act*, SA 2020, c 4 s 1(18), amended Section 103(1)(a) of the *OGCA* [**TAB 11**].
[22] *OGCA*, *supra*, s 103 [**TAB 10**]. Section 103 defines "debtor" to mean "a person who is indebted to the Regulator for any costs, levy, fee, penalty, *deposit or other form of security or other amount*".
[23] August 13, 2021, FIAT In the Matter of A Plan of Compromise or Arrangement of Abbey Resources Corp [**TAB 12**].

Supreme Court of Canada's decision in *Redwater*.[24] In *Redwater*, following a sales transaction that vested out the debtor's quality assets, significant ARO was being left behind to be addressed by the Orphan Well Association. The AER sought to have the funds generated from the monetized assets to be used to offset the ARO in preference to the claims of the secured creditor.[25] In contrast, in this case, all of AlphaBow's ARO are being assumed through a combination of asset sales and a subscription agreement, which provides for a reorganization and new ownership of AlphaBow.[26] The facts of this case are distinguishable from those in *Redwater* because the relevant transactions were specifically designed by AlphaBow, with the oversight of the Monitor, to ensure all ARO is assumed and that AlphaBow will be able to exit its CCAA proceedings.

2. The Chambers Justice erred in law in interpreting and applying Section 11.1(3) of the CCAA

16. Even where a court finds that a regulatory body is not bound by the CCAA stay of proceedings, the court has the discretion to grant a targeted stay in certain circumstances. Such findings are typically owed deference; however, the Chambers Justice is not seized of the CCAA Proceedings and therefore is not the single supervising judge assigned to oversee these CCAA Proceedings. By virtue of their continuity, single supervising judges gain unique insight into stakeholder dynamics and the debtor's business realities, enabling them to exercise broad discretion in furtherance of the CCAA's objectives. This logically provides for increased deference.[27] Without the benefit of extended involvement in and knowledge of the CCAA Proceedings, the Chambers Justice's Decision warrants less deference from this Court.

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[24] Decision, at para 24 [**TAB B**]; *Orphan Well Association v Grant Thorton Ltd*., 2019 SCC 5 [*Redwater*], [**TAB 13**].
[25] *Redwater*, *supra* [**TAB 13**].
[26] Li Affidavit, at paras 15, 17 [**TAB D**].
[27] *9354-9186 Quebec Inc v Callidus Capital Corp*, 2020 SCC 10 at para 71 [*Callidus*] [**TAB 14**].

17. The Chambers Justice's interpretation of Section 11.1(3) of the CCAA is an issue of statutory interpretation, and thus a question of law reviewed for correctness.[28] While section 11.1(3) does provide the Lower Court with discretion, discretion is to be exercised in accordance with the general intent of legislature.[29] The overarching purpose of the CCAA, is to protect the interests of stakeholders and avoid the devastating social and economic effects of the termination of business operations.[30]

18. The effect of the AER's Security Request is to block transactions that would otherwise enable AlphaBow to emerge from the CCAA Proceedings enabling the resumption of operations and transfer of certain licenses to other operators.

19. Moreover, the AER seeks to take funds, which would otherwise be payable to AlphaBow's proven creditors, because all ARO are to be assumed by entities emerging from the CCAA Proceedings by virtue of Lower Court approved transactions. This is contrary to the purpose of the CCAA. Rather than maintain the *status quo*, the AER's Security Request enables it to obtain security for the assets from purchasers while also scooping funds held by AlphaBow which are intended to be transferred to a creditor's trust and paid to creditors (which in this case include the AER and municipalities). This results in AlphaBow's proven creditors being asked to backstop the environmental obligations being assumed by purchasers. If this is permitted, it will undermine the ability of any oil and gas company to obtain access to capital as there would be no ability for lenders to obtain any recovery until all of an insolvent party's sites have been fully abandoned and reclaimed. It effectively allows the AER to do through the back door what it cannot do through the

[28] *Canadian National Railway Co v Canada*, 2014 SCC 40 at para 33 [**TAB 15**]; *Kent v Watts*, 2019 ABCA 326 at para 21 [**TAB 16**].
[29] *Harelkin v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 SCR 561 at p 564 [**TAB 17**].
[30] *Hothouse, supra* [**TAB 6**].

front and provides the AER with a veto that it can exercise, without judicial oversight, even long after vesting orders are approved.

3. The Chambers Justice erred in law by failing to conclude that the AER Security Request was a collateral attack on the Reverse Vesting Order ("RVO")

20. The RVO pronounced by the Lower Court on December 19, 2024, approved of the corporate sale of all of the shares of AlphaBow to 2628071 Alberta Ltd. and explicitly found that the factors set out in *Harte Gold Corp (Re)* had be satisfied.[31] The AER had notice of and attended the RVO hearing. The RVO was not appealed by any party. The Chambers Justice erred in law by failing to find that the AER Security Request is a collateral attack on the Lower Court's approval of the RVO and other transactions. The effect of the Security Request is to frustrate transactions already approved by the Lower Court through the request of security in an arbitrary amount that it knows AlphaBow cannot post and despite the RVO already providing a mechanism through the creditor trust, though which the AER could assert a claim against the sales proceeds held by AlphaBow.

4. The Chamber's Justice erred in law in speculating that AlphaBow will fail post-insolvency

21. The Chambers Justice's finding that AlphaBow will fail post insolvency based on speculation and is an error in law.[32]

22. The Chambers Justice erred in his consideration of what would happen to AlphaBow post-CCAA, which itself was irrelevant to the factors to be considered under section 11.1. He erred in finding, without sufficient evidence, that AlphaBow would become insolvent post emergence from

[31] Reverse Vesting Order, granted on December 19, 2024 [**RVO**] [**TAB H**]. *Harte Gold Corp (Re),* 2022 ONSC 653 [**TAB 18**].
[32] *Peppler Estate v Lee*, 2020 ABCA 282 at para 184 [**TAB 19**].

the CCAA and would not resume production, create jobs, or generate revenues to pay its associated end of life obligations resulting in AlphaBow's remaining inactive wells remaining with the Orphan Well Association.[33] There was insufficient evidence before the Chambers Justice to make such a finding, as no evidence as to the financial capabilities of the purchaser of AlphaBow's shares or its operational plans were on the record.

23. Such a finding is also contrary to the RVO. The Lower Court approved the RVO providing for AlphaBow to emerge from the CCAA Proceedings free and clear from its liabilities, which are being transferred into a creditor trust.[34]

E. The Appeal will not Unduly Hinder the Progress of the Action

24. This factor considers whether the delay occasioned by the appeal process will unduly impede the ultimate resolution of the matter, considering the CCAA's purpose, the role of the supervising judge, the need for a timely and orderly resolution of the matter, and the effect on the interests of the parties pending a decision on appeal.[35]

25. If leave to appeal is granted, the appeal process will not unduly impede the CCAA Proceedings. In fact, a decision from this Court is necessary to advance the progress of the CCAA Proceedings, as it will provide certainty to all parties as transfer applications are submitted to the AER and AlphaBow determines its restructuring strategy moving forward.

[33] Decision, *supra* at para 38 [**TAB B**].
[34] RVO, *supra* at paras 9-10 [**TAB H**].
[35] *Canadian Airlines*, *supra* at paras 41 and 42 [**TAB 4**].

V. RELIEF SOUGHT

26. The Applicant respectfully asks that its Application for Permission to Appeal be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 18th day of November, 2025.

Estimated Time for Argument: 35 minutes

BENNETT JONES LLP

Per: Keely Cameron

Keely Cameron, Michael Selnes and Sophie Fiddes, Counsel for the Appellants, AlphaBow Energy Ltd.

I. TABLE OF AUTHORITIES

1. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36
2. *Alberta Rules of Court*, AR 124/2010
3. *Liberty Oil & Gas Ltd, Re*, 2003 ABCA 158
4. *Resurgence Asset Management LLC v Canadian Airlines Corporation*, 2000 ABCA 149
5. *Royal Bank of Canada v Cow Harbour Construction Ltd*, 2010 ABQB 637
6. The Hothouse of Real-Time Regulation: Emerging Law under CCAA section 11.1, 2022 CanLIIDocs 4304
7. *Ketch Resources Ltd v Gauntlet Energy Corp*, 2005 ABCA 357
8. *Kerr Interior Systems Ltd*, *Re*, 2008 ABCA 291
9. *Mudrick Capital Management LP v Lightstream Resources Ltd,* 2016 ABCA 401
10. *Oil and Gas Conservation Act*, RSA 2000, c O-6
11. *Liability Management Statutes Amendment Act*, SA 2020, c 4
12. August 13, 2021, FIAT In the Matter of A Plan of Compromise or Arrangement of Abbey Resources Corp.
13. *Orphan Well Association v Grant Thorton Ltd*., 2019 SCC 5
14. *9354-9186 Quebec Inc v Callidus Capital Corp*, 2020 SCC 10
15. *Canadian National Railway Co v Canada*, 2014 SCC 40
16. *Kent v Watts*, 2019 ABCA 326
17. *Harelkin v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 SCR 561
18. *Harte Gold Corp (Re),* 2022 ONSC 653
19. *Peppler Estate v Lee*, 2020 ABCA 282

II. COMPENDIUM OF DOCUMENTS

A. Application of AlphaBow Energy Ltd., filed September 15, 2025

B. Reasons for Decision in *AlphaBow Energy Ltd. (Re)*, 2025 ABKB 662

C. Transcript of Proceedings before the Honourable Justice Borque, September 22, 2025

D. Twelfth Affidavit of Ben Li sworn, September 15, 2025

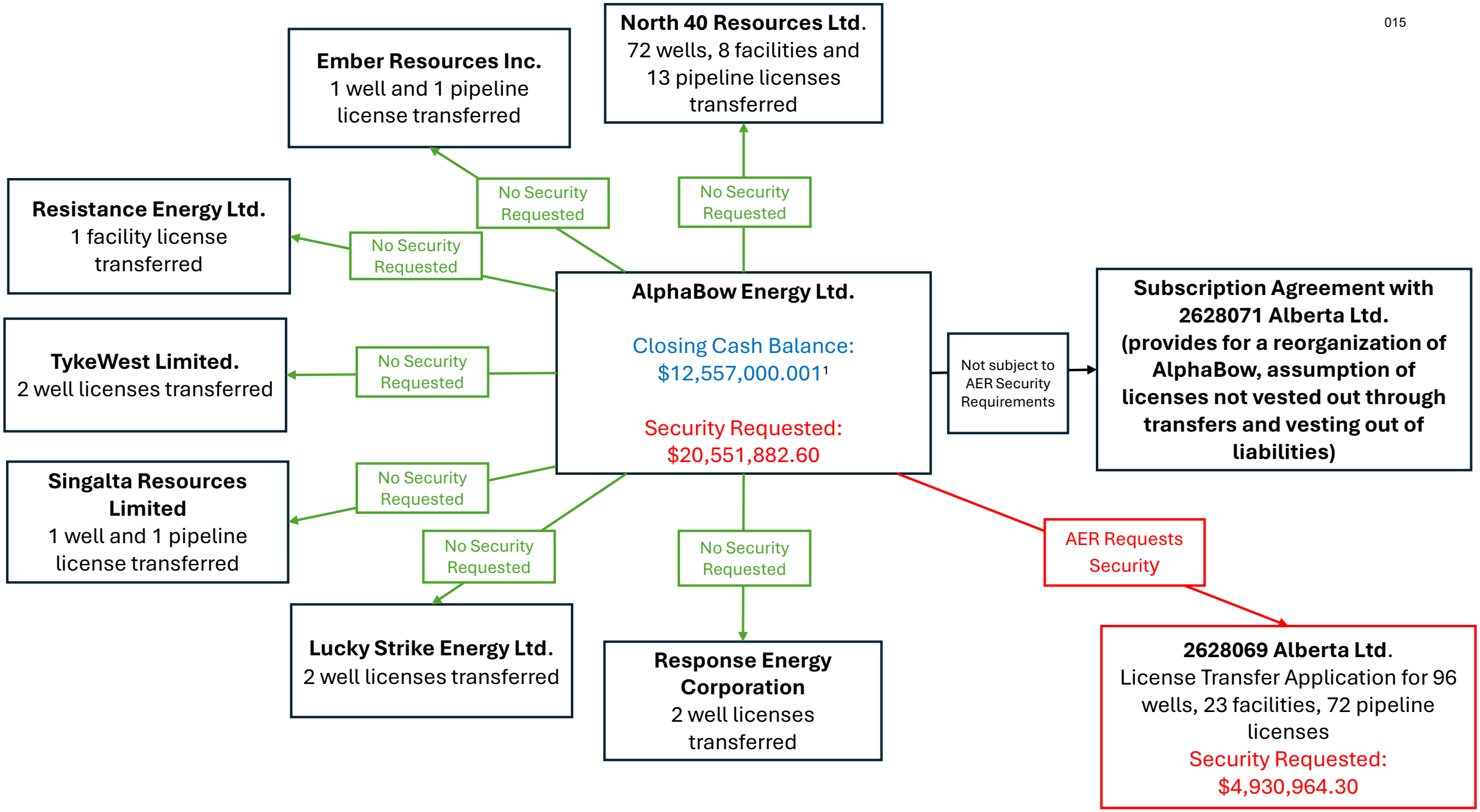
E. Affidavit of Trevor Gosselin, affirmed September 18, 2025

F. Eleventh Report of the Monitor, filed September 18, 2025

G. Amended and Restated Initial Order, granted on April 26, 2024

H. Reverse Vesting Order, granted on December 19, 2024

I. Order (Sale Approval and Vesting), granted on December 19, 2024



[1] Eleventh Report of the Monitor, filed September 18, 2025 [**TAB F**], at Appendix A.

QUEEN'S BENCH FOR SASKATCHEWAN

Date: **2021 08 13**
Docket: QBG 733 of 2021
Judicial Centre: Saskatoon

IN THE MATTER OF THE COMPANIES' CREDITORS AGREEMENT ACT, RSC 1985, c C-36, AS AMENDED

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

APPLICANT

ABBEY RESOURCES CORP.

Counsel:

Jerritt R. Pawlyk and Kevin N. Hoy	for Abbey Resources Corp.
Ian A. Sutherland and Craig Frith	for the Proposed Monitor, MNP Ltd.
Kim M. Anderson, Q.C., and Travis K. Kusch	for the Minister of Energy and Resources
David G. Gerecke, Q.C., and Dustin Gillanders	for the Rural Municipality of Lacadena No. 228
Alexander K.V. Shalashniy	for the Rural Municipality of Miry Creek No. 229
Michael Morris, Q.C,	for the Rural Municipality of Snipe Lake No. 259
Jeffrey M. Lee Q.C.	for Carry the Kettle Nakoda Nation Band No. 76

FIAT
August 13, 2021

MESCHISHNICK J.

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[1] Abbey Resources Corp. [Abbey] seeks an initial order under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*].

[2] The asset side of Abbey's balance sheet largely results from the acquisition of 2344 shallow gas wells and related infrastructure and equipment via three transactions that took place in 2016 and 2017.

[3] Since then Abbey's production from those wells and the price it has been able to sell that production for have not been sufficient to pay its debts. While it has been able to cover its day to day operating costs it has not been able to consistently pay land taxes to the municipalities and one First Nation where the wells are located, amounts due under surface leases or to mineral title holders or amounts due to the Minister of Energy and Resources [Minister] for obligations imposed under the governing legislation and regulations.

[4] Abbey says that with some time to restructure it will be able to increase production with a new but not yet proven technology, will see an increase in revenues when an existing contract for the sale of gas comes to an end in November of this year, will look to sell surplus equipment and use the proceeds to decommission existing wells which in turn will decrease operating costs, and will access a government program that funds the decommissioning and closure of wells.

[5] Until now Abbey has tried on an informal basis to negotiate with the Minister and the Municipalities to reduce its past and future obligations to them. It has had no success. It has done the same with the landlords of the surface rights leases and has had some success.

[6] The Minister and the R.M. of Snipe Lake (244), the R.M. of Lacadena (913), the R.M. of Miry Creek (1032), and Carry The Kettle First Nation oppose this application on a number of grounds which I will address in these reasons.

Criteria for Relief

[7] The *CCAA* requires that Abbey satisfy certain conditions in order to obtain the relief it seeks.

[8] It is not disputed that Abbey is presently indebted to various creditors in an aggregate amount exceeding $15 Million and has therefore satisfied the debt threshold of $5 Million.

[9] It is not disputed that Abbey is insolvent or that it is a "debtor company" within the meaning of the *CCAA*.

[10] Abbey has brought this application in a court having jurisdiction to make the order.

[11] It remains that Abbey satisfy me, as required by s. 11.02(3), that circumstances exist that make it appropriate to grant the order.

[12] "Appropriate circumstances" exist when the granting of an initial order advances the remedial objectives of the *CCAA*, *Industrial Properties Regina Limited v Cooper Sands Land Corp.*, 2018 SKCA 36 at para 20 [*Cooper Sands*].

[13] The remedial objectives of the *CCAA*, as identified in *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60, [2010] 3 SCR 379 [*Century Services*] at paras 15-22, were recently reaffirmed by the Supreme Court of Canada in *Canada v Canada North Group Inc.*, 2021 SCC 30 when it determined that administrative and interim financing charges which the *CCAA* authorizes the court to include in an initial order will take priority over statutory trusts

securing the remittance of income tax deducted by employers from employee wages.

[14] At its most fundamental level the purpose of granting an initial order under the *CCAA* is to permit an insolvent debtor to carry on business while it attempts to restructure its operations and financial statement, and in turn, make a proposal to its creditors. If this can be accomplished and the proposal is accepted the social and economic consequences of closure and liquidation will be avoided. It is with these remedial objective in mind that the court is granted a broad but not unlimited discretion to grant an initial order. The discretion is limited by the applicant's obligation to show that appropriate circumstances exist and that it is and has been acting in good faith and with due diligence.

[15] In *Cooper Sands* the court made is clear at para. 21 that this means that the applicant must establish that the initial order will "usefully further" its efforts towards restructuring, at para. 19, that the evidentiary bar to do so is "not exceptionally onerous" and that the applicant is not required at this point in the proceeding to establish that it has a feasible plan but only that it has "a germ of plan". However, the court adds at para. 20 that the "germ" must still lead to a finding that the applicant has "a reasonable possibility of restructuring".

Bad Faith

[16] The opponents to this application argue that Abbey has not and is not acting in good faith.

[17] *Cooper Sands*, at para. 22, points out that despite the wording of s. 11.02(3) suggesting that good faith must be established when granting orders

other than initial orders, the Supreme Court in *Century Services* determined that the good faith must also exist when an initial order is granted.

[18] I note that in *Cooper Sands* at para. 23 the court suggests that the good faith inquiry is limited to determining if it exists in seeking *CCAA* relief as opposed to looking at the applicant's conduct generally.

[19] In making its case that Abbey has not and is not acting in good faith the opponents point to a number of actions by Abbey.

[20] First, they suggest that Abbey knew from the outset that the operations it established in the three asset acquisitions would not generate sufficient cash flow to pay its debts as they become due. They argue that from the outset that without restructuring Abbey was doomed to fail. They suggest that in creating a business that it knew it could not pay its debts, Abbey was acting in bad faith.

[21] The evidence supports that the opponent's suggestion that Abbey knew it would be insolvent from day one of its operations. The gas fields acquired in the first two transactions were going to be closed by the owners. Abbey acquired these assets for no consideration and in fact was paid cash in exchange for releases and indemnifications. It used this cash to cover operating expenses.

[22] In March of 2018 Abbey circulated to the municipalities in which it operated a communication in which it acknowledged that the gas fields it acquired in the first two transactions were slated for closure and had a combined cash loss of $10 Million per year for the two years prior to Abbey acquiring them.

[23] Abbey presold gas production from these fields in 2016 and 2017 using the proceeds to fund the third acquisition which closed November 1, 2017 and to cover operating costs. Abbey's financial statements show that even with the acquisition of the 100 wells in the third transactions which, because value was paid for them, were presumably a viable operation it could not generate sufficient revenue to pay its debts.

[24] Within months of the third transaction closing Abbey began its campaign to reduce property taxes and amounts due to the Minister suggesting that taxation and assessment policy change was needed if these stakeholders wanted to see gas fields like those operated by Abbey continue to support the local and provincial economy.

[25] I am troubled by a course of business transactions that established an enterprise that was known to be insolvent from birth and saw stakeholders who were paid obligations on a timely basis prior to the creation of the enterprise almost immediately see default in the payment of the debts owing to them.

[26] Abbey did not become insolvent because of an economic downturn, a dramatic drop in the price paid for natural gas or a catastrophe. It knew that unless gas prices increased dramatically (it appears that there was no promise in that happening any time soon and in any event would have been purely speculative) or without a change in the manner in which its assets were taxed and its operations and production assessed fees, royalties and levies it would fail.

[27] However, I must also consider that the productive portion 2,244 gas wells acquired in the first two transactions would have ceased operating if Abbey had not devised a business plan to keep them in operation.

[28] I have also considered the opposing creditors have been patient in allowing Abbey to continue. Abbey acknowledges it suspended property tax payments, payments to surface lease holders and full payment of some of the obligations due to the Minister in 2018. It is only recently that some of the opposing creditors have taken collection proceedings and those proceedings were largely responsible for this application.

[29] I am reluctant to condone the practice of creating of an enterprise that is knowingly insolvent without a realistic restructuring plan at the time of creation and especially one that depended on two levels of government changing policies. There is an element of bad faith in doing so that is somewhat tempered by the diligent manner in which Abbey pursed remedies. Even though its proposals to the opposing creditors were rejected and the repetitive nature of them are now seen by the opposing creditors as a sign of poor management they were made with a view to creating a viable enterprise. In addition, Abbey has been successful in renegotiating its obligations to its surface rights holders.

[30] This is now 2021. Abbey has spent three years trying to informally restructure. As will be seen in the reasons that follow, Abbey has established a germ of a restructuring plan that may not require two levels of government changing public policy. Any bad faith associated with knowingly creating of an insolvent operation with no realistic plan to restructure it is not, in my view, sufficient to deny *CCAA* relief when all of the circumstances, as analyzed under the next heading, are considered.

[31] A second bad faith argument advanced by the opponents addresses Abbey's conduct in November of 2020 and the manner in which it disclosed it in making this application.

[32] In the initial affidavit filed in support of this application Abbey disclosed that effective November 1, 2020 it sold tangible operating assets to a related company for a stated consideration of $5.2 Million. The consideration was paid by the delivery of a promissory note. The purchaser also entered into a separate agreement with Abbey entitling it to exclusive use of the assets. Abbey said it entered into the sale transaction on the advice of its tax advisors.

[33] Except for the value ascribed to the assets, this sale by Abbey has all the earmarks of a reviewable transaction. At a minimum it would have delayed creditors like the municipalities in enforcing payment of the taxes owing under the mechanisms available to it under its governing legislation.

[34] When the opposing creditors identified the sale as a reviewable transaction Abbey agreed to unwind the transaction.

[35] Besides the fact that Abbey entered into the transaction it also led the court to believe in the evidence it initially filed in support of this application that it had entered into the transaction on the advice of its tax advisors. In a subsequent affidavit filed response to the allegation that the transaction prejudiced Abbey's creditors, Abbey filed a copy of the letter from its tax advisors that it said it relied on in selling the assets to the related company.

[36] A review of the tax advice and the necessary steps that were needed to obtain the resulting tax benefits reveals that Abbey did not follow that advice. It did not, for example, sell the assets in exchange for shares in the purchasing

company nor did it immediately amalgamate with the purchaser which is a step which should have put the assets back within the reach of Abbey's creditors.

[37] I am concerned that Abbey had honest intentions in selling assets to a related company and in failing to initially disclose the information that would show that the transaction was questionable. I am mindful that *Century Services* says that good faith is a matter to be considered when granting an initial order. However, it is in my view that good faith is only a matter that can be considered at this stage in testing if the appropriate circumstances exist as it is clear from the wording of s. 11.02(3)(b) that good faith only applies on a standalone basis to deny an order requested under s. 11.02(2).

[38] Despite the concerns about the sale of assets to the related company and the disclosure of the details giving rise to the agreement I am not persuaded that these matters make it inappropriate to grant the initial order as it is at this stage that I must, consider the interests of all stakeholders and the social and economic fallout of a liquidation. I do not think the benefits of a successful restructuring plan that may accrue to the surface lease holders and would accrue to the local and provincial economies should be forsaken because the applicant has taken a step to act in the self-interest of its principals. That is especially so when the applicant has agreed to unwind the transaction and the applicant's future conduct will be closely scrutinized if it asks for further relief under s. 11.02(2).

[39] The opponents to this application have also raised the problem of the applicant putting into the evidentiary record communications that were exchanged on a "without prejudice basis". It was available to the opponents to ask that those communications be struck from the record. They did not. I am not

prepared to factor matters of the admissibility of evidence into a determination of good or bad faith.

[40] Finally, the opponents say they have lost confidence in Abbey's management. This point is made in the evidence filed on behalf of Miry Creek where the affiant says Miry Creek has lost confidence in Abbeys' management because of the sale of assets to a related purchaser (which I have addressed above) and because it has been pushing the same tax and policy reform agenda since 2018. Miry Creek is of the view that attempting legislative and policy change is not real restructuring and shows a poor understanding of the issues involved.

[41] I sympathize with the opponents for having to consider and reconsider similar proposals for reform. But, this does not equate to management being incapable. From Abbey's point of view, it can also be said that it was working with the only avenues of restructuring available to it at the time.

[42] It maybe that a loss of confidence in management can lead to a conclusion that it is not appropriate to make an initial order as such an order leave management in place during the restructuring period. It may also support the conclusion that a successful proposal cannot be made as the creditors would not support it with untrustworthy management continuing to act.

[43] I do not think that the manner and content of the informal restructuring proposals made by Abbey, alone, can form the basis of a lack of confidence in management. It may show a lack of understanding of the dynamics involved in changing legislation and policy. But, there is more to managing a company like Abbey. It appears that it may now have more options in tabling a

proposal for the consideration of its creditors. That remains to be seen as does the reaction of the creditors to that proposal.

Appropriate Circumstances and Doomed to Fail

[44] The opponents to this application represent the public within their respective constituencies.

[45] They argue that Abbey's attempt at restructuring is doomed to fail.

[46] There is some divergence in the judicial authorities as to whether the "doomed to fail" argument should be considered as a reason to deny an initial order. Abbey points me to a line of cases from British Columbia starting with *Asset Engineering LP v Forest & Marine Financial Limited Partnership*, 2009 BCCA 319. It addressed the question of whether a creditor with voting control over the creditor approval of a proposal could block an initial order by asserting that it would refuse to vote in favor of any plan brought to a meeting of creditors. At para. 27 the court noted that it was unaware of any authority that would deny the issuance of an initial order on that basis. It also pointed out that to simply look at the granting of an initial order on that basis would ignore the interests of the many stakeholders who would be affected by liquidation.

[47] Similar opinions are expressed in *Pacific Shores Resort & Spa Ltd.*, 2011 BCSC 1775, *Can-Pacific Farms Inc.*, 2012 BCSC 760 and *Azure Dynamics Corporation (Re)*, 2012 BCSC 781.

[48] However, I do note that *Cooper Sands*, the controlling authority in this province, cited with approval *Alberta Treasury Branches v Tallgrass Energy Corp*, 2013 ABQB 432 [*Tallgrass*] and *Matco Capital Ltd. v Interex Oilfield Services Ltd.*, (August 1, 2006) Doc. 0601-08395 (Alta QB). Cases like

Tallgrass were not opposed simply on the basis that the creditor with a veto on a proposal would not approve a proposal. The creditors in that case argued that any plan and proposal was doomed to fail because the applicant had already exhausted refinancing and restructuring options and that the secured creditors had not acted precipitously. As well the court in *Tallgrass* noted that the applicant and "its major secured stakeholders" were already in an adversarial mode. The court concluded that the applicant did not have "any" reasonable possibility of restructuring and that in that circumstance it was not appropriate to grant the initial order.

[49] This rational is, in my view, consistent with *Cooper Sands* when in para. 21 it said that if "the court determines that the application" for an initial order "is merely an effort ... to avoid its obligations to its creditors and postpone an inevitable liquidation, the initial application should be denied."

[50] In my view the "doomed to fail" argument can succeed at the initial order application if something more is shown then simply that vetoing creditors will not vote in favor of a proposal. They must also show some rational reason as to why they will not support a restructuring plan.

[51] In this case the opposition to Abbey's application goes beyond saying that they will not support a proposal of any sort. If it had been limited to that I would have been inclined to follow the BC authorities and found that to be an insufficient basis to deny the relief sought.

[52] In this case the opposition, much like the opponents in *Tallgrass*, go beyond saying that they will simply not vote in favor of a proposal. They say that Abbey has not met the onus of showing a germ of a plan that has a reasonable possibility of success and it is for that reason it is doomed for failure.

[53] For Abbey to be successful in this proceeding it needs to have the creditors agree and for the court to approve a proposal that will both compromise existing debts and create an operation that will be able to pay its debts as they become due going forward.

[54] Leaving aside the possibility of having its creditors agree to a compromise of the outstanding debts for the moment, I considered if Abbey has satisfied its onus of providing a germ of a plan that has a reasonable possibility of it exiting this proceeding with a viable operation. The evidence shows that:

1. For the year ended October 30, 2020 Abbey reported an operating loss of $4.475 Million;

2. Until November 1, 2021 Abbey is obliged to sell the majority of its gas production at a price that is now below market value. It now estimates that once this contract expires and if natural gas prices continue at their current prices that its monthly revenues would exceed $1.1 Million per month. If that is the case Abbey's revenues over the proceeding 12-month period would exceed by about $3.27 Million the revenue reported in the financial statements for the period ending October 30, 2020;

3. Abbey says that as of July, 2021 it has been successful in renegotiating surface leases such that 1,377 of the landlords have agreed to amendments that will result in annual savings of approximately $2 Million.

4. Abbey estimates the cost of fully decommissioning a well to be approximately $10,700 per well. Within its inventory of 2,344 wells about 1,000 that are unproductive. Of those 400 could become

productive with additional investment which it cannot afford at this time and 600 are in need of decommissioning. When a well is decommissioned property taxes and mineral and surfaces lease costs fall way. No estimate of the time it would take to decommission 100 wells was provided;

5. Abbey estimates that a sale of surplus equipment would generate $1.2 Million which would pay for the decommissioning of over 100 wells;

6. Abbey also says it is pursing funding under a provincial program called the Accelerated Site Closure Program. It says that is has been told that it might qualify for funding of between $4-$6 Million to decommission non-productive wells if it were not in default in payment of the amounts owing to the Minister.

[55] This oversimplified analysis suggests that with an increase in revenue of $3.27 Million and a decrease in costs of $2 Million the loss of $4.4 Million in 2020 will be replaced with a profit. There is a possibility that Abbey may be in a position after November 1 of this year to pay its debts as they become due even without any increase in production or any cost savings from decommissioning some of its wells. There may be at least a modest excess of revenues over expenses that Abbey can use to propose a compromise of the existing debts, increase production in existing wells or reinstate production from wells that are currently unproductive.

[56] There appears to be a germ of a plan that has a reasonable opportunity to put Abbey in a position that it will be able to pay its debts as they become due if it can exist from this proceeding with an agreeable compromise of its existing debts.

[57] I turn now to the question of whether there is a germ of a possibility that Abbey can propose an agreeable compromise of its $15.3 Million in existing liabilities. That amount does not include any amount demanded by the Minister to secure future decommissioning liabilities [LLR Demand] or the other contingent decommissioning liabilities reported by Abbey in its financial statements.

[58] Let me address the LLR Demand first. The Minister, in reaction to this application reassessed the security to be deposited by Abbey for future decommissioning liabilities. By a letter dated July 29, 2021 the Minister advised Abbey that the deposit required was $13.45 Million and demanded that amount be deposited within 14 days. Presumably the Minister assessed this amount under the authority granted to the Minister in s. 15 of *The Oil and Gas Conservation Act*, RSS 1978 c O-2 [*Act*].

[59] Section 12(c) of the *Act* empowers the Minister to suspend a license if the security required by s. 15 is not provided in the amount and in the time required. Section 15(3) says that the amount of a required deposit that is not made becomes a debt owing to the Crown and may be collected in any manner including the manner proven in s. 53.2. Section 12(3) provides that unless action is urgently required that the Minister shall not cancel a license without giving the licensee a reasonable opportunity to make representations concerning the proposed cancellation.

[60] The Minister has advised that if the deposit is not made with the 14-day period it intends to order not the suspension of Abbey's licenses under s. 12 but the suspension of Abbey's operations under s. 17.01 of the *Act*.

[61] The immediate distinction that can be seen is s. 12 and s. 17.01 is that s. 12 deals with suspension of licenses and s. 17.01 deals with the suspension of operations. In addition, s. 17.01 appears to be directed at suspending the operation of specific components of an operation as opposed to the whole of the business as would be the case if a license was suspended.

[62] The Minister in opposition to this application has not been able to identify an urgent need to suspend Abbey's license pursuant to s. 12 or the need to suspend the operation of a "well, flowline or facility" for the purpose of public safety or the safety of any person or for the protection of property or the environment pursuant to s. 17.01.

[63] That being the case it is most likely that the Minister has no reason to suspend operations as there is no immediate threat. The only reason the Minister has provided for taking such action is the failure to deposit the security. In nonurgent circumstances, Abbey should be given the opportunity to respond if what the Minister really intends to do is suspend its licenses. No doubt it is during those representations that Abbey will question the calculation of the amount of the deposit that is required. I see that the components of the calculation of the deposit include the value of Abbey's assets and the total potential decommissioning liability. Both of these amounts are in dispute. Even the Minister's assessment of these amounts has varied significantly since December of 2020 when it assessed the security deposit to be provided by Abbey at $1.025 Million and then at $6.045 Million in June of this year.

[64] Until the amount of the security deposit that is required is sorted out it is not known if a viable proposal can be made to satisfy the Minister in the collection of it. I am certainly not able to say at this time that the inability

of Abbey to make this deposit dooms this proceeding to failure. A final determination of this "debt" may have a significant impact on the viability of a proposal and may well be a matter that will be revisited if Abbey seeks extensions of the initial order.

[65] With respect to the existing liabilities of approximately $15.3 Million Abbey says that:

1. $5.2 Million is owed for municipal taxes. This is somewhat at odds with the amount of $6.69 Million which the opposing municipalities say is owing to them in the affidavit material they filed ($2.5 Million to Lacadena, $0.33 Million to Carry the Kettle First Nation, $1.66 Million to Snipe Lake and $2.2 Million to Miry Creek). And, this amount does not include amounts owed to other municipalities. Abbey acknowledges that it also operates in the municipalities of Riverside and Clinworth. The amounts now claimed by the opposing municipalities includes interest and penalties both of which continue to accrue. In addition, taxes for 2021 have not yet been assessed. If the assessment for 2021 is similar to 2020 it will be in approximately $2.1 Million;

2. $6.5 Million is owed to surface rights holders (private and crown);

3. $1.6 Million is owed under leases with mineral rights holders;

4. $0.005 Million is owed for unremitted sales tax and $0.34 Million is owed for resource surcharges. Both amounts are owing to the Minister of Finance;

5. $0.4 Million is owed to contractors and supplies.

[66] Abbey also acknowledges that amounts are owed to the Minister for levies and overriding royalties. The Minister says that the amount owing to it by Abbey for an administrative levy, an orphan levy, non-compliance fees and mineral lease payments is $3.1 Million. At least some portion of this amount includes the $1.6 Million that Abbey says it owes to mineral rights holders.

[67] It is, of course, not necessary to determine at this point in this proceeding the exact amounts owing. But, it is useful to having at least an understanding of the general financial picture when assessing whether there is a germ of a plan that might reasonably result in the approval of a proposal at a creditors meeting.

[68] On this point, the Minister and the opposing municipalities say that they are unable to compromise the outstanding debts because of their governing legislation and because of the obligation they own to their respective constituents to treat everyone consistently.

[69] Attempts by Abbey, which began as early as March of 2018, to renegotiate its provincial and municipal debts and the basis for the assessment of them have been resisted because of the public policy issues they engage. In essence, the Minister and the opposing municipalities say that they could not consider any proposal that does not see their debts paid in full and that it will be impossible for Abbey to table a proposal that does so.

[70] The Minister and the opposing municipalities did not refer me to the legislative provisions that prevent them from compromising or abating outstanding obligations. I am certainly sympathetic to the position they will be in if a proposal is made to pay them less than the amount owed. However, I do not think they can make an informed decision on whether to compromise a debt

until they have the proposal before them. It will call on them to rethink the short and long-term costs and benefits of a partial payment of the outstanding debt.

[71] For example, the Minister will have to examine the costs to itself and other producers if Abbey is shuddered along with the potential for the resale of these assets to other producers. The Minister will be called to determine if the best economic return will be achieved if Abbey can continue. It may be that the economics will persuade it to vote against a proposal. It may be that the public policy issues will persuade it to vote against a proposal. It may be that a proposal will see the Minister paid in full over time. The point is that it is premature to say that it cannot support a proposal without first seeing it.

[72] The same considerations apply to the opposing municipalities. There is no guarantee that Abbey will present an acceptable restructuring proposal. But, that is not the test to be applied in determining if an initial order should be granted.

[73] In coming to the conclusion that appropriate circumstances exist to grant, with some modifications, the initial order sought I have also taken into account the interests of those who were not directly represented in this application. I expect that the holders of the surface rights would prefer to see something of the $6.5 Million owed to them. I also expect that Abbey's employees would like to remain employed and that the local economy and the jobs supported by the $8-$10 Million that Abbey injects into it would prefer to see Abbey continue to operate. These are the social and economic costs of liquidation that can be avoided with an opportunity to restructure.

[74] This is an important difference from the situation that existed in *Tallgrass*. There the creditors opposing the application were the only

stakeholders with an economic interest in the proceeding. Another distinguishing feature is that the court in *Tallgrass* found that the proceeding would most likely be a liquidation *CCAA*. While it may be that this proceeding will lead to the liquidation of Abbey, I cannot on the evidence before me conclude that liquidation is the only possibility.

[75] I have also taken into account that Abbey forecasts that it can pay its operating costs during a stay of proceedings. It does not require and does not seek an interim financing and a priority charge to secure that financing.

[76] I am satisfied that Abbey has established a germ of a plan to restructure.

Stay of Administrative Action

[77] In the proposed order initially sought by Abbey it did not ask for an order under s. 11.1(3) staying actions, suits or proceeding by a regulatory body. When the Minister advised that it would be issuing orders for Abbey to cease operations if it did not deposit the security for potential decommissioning liabilities within 14 days it became necessary to ask for the inclusion in the initial order of a provision preventing the Minister from taking that action.

[78] Earlier in these reasons I analyzed the administrative powers of the Minister to protect the public, property and the environment and whether, at this time, Abbey's operations posed any such threat.

[79] Relying on that analysis I am of the view that Abbey has established that without a stay it will not be able to make a viable proposal and that it is not contrary to the public interest that the Minister be prohibited from taking action for failure to pay an amount that it says is to be deposited with it

or is owing to it. There is no element of protection of the public, property or the environment associated with those actions.

Conclusion

[80] The initial order sought by Abbey is granted:

1. With the inclusion of a provision staying administrative action by the Minister for the failure of Abbey to pay or deposit funds the Minister says it is obliged to pay;

2. With the exclusion of those provisions creating an administrative charge securing Abbey's obligation to indemnify its officers and directors.

[81] It was argued as well that the Administrative Charge securing the reasonable professional fees of the Monitor and counsel to the Monitor and Abbey should be reduced. Noting that it took three hearings to finally hear full argument on all the issues presented in this application and that relationship between Abbey and the opposing creditors is already fractured, and considering that Abbey with the assistance of its legal counsel has been successful in obtaining this order I am not prepared to place these professionals at risk. I am therefore prepared to grant the initial order with the inclusion of an administrative charge capped at $250,000.

[82] I will make myself available the afternoon of August 20 and any time on 23, 2021 to hear any further applications in this proceeding in Prince Albert. Parties wanting to appear have leave to do so by telephone or WebEx.

J.

G.A. MESCHISHNICK