

COURT FILE NUMBER Q.B. 1705 of 2020

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

JUDICIAL CENTRE REGINA

**APPLICANTS R.M OF EYE HILL NO. 382, R.M. SENLAC NO. 411, R.M.
GRASSLAKE NO. 381, and R.M. FRENCHMAN BUTTE NO. 501**

**RESPONDENTS HER MAJESTY THE QUEEN, SASKATCHEWAN (as
represented by THE MINISTER OF ENERGY AND
RESOURCES), BDO CANADA LIMITED in its capacity as
Receiver of BOW RIVER ENERGY LTD., and**

**IN THE MATTER OF THE RECEIVERSHIP OF
BOW RIVER ENERGY LTD.**

**BRIEF OF LAW ON BEHALF OF THE RESPONDENT,
HER MAJESTY THE QUEEN (as represented by THE MINISTER OF ENERGY AND RESOURCES)**

MLT A I K I N S

1500 – 1874 Scarth Street
Regina, Saskatchewan
S4P 4E9

To be heard: June 28, 2021

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I. INTRODUCTION

1. Pursuant to a Distribution and Discharge Order dated March 29, 2021 (the "**D&D Order**") this court, among other matters, approved the actions of the Receiver, BDO Canada Limited in its capacity as the receiver and manager over Bow River Energy Ltd.'s ("**Bow River**"), and further adjudged and declared that the Receiver completed its mandate with honesty and good faith.
2. The only outstanding issue in the D&D Order was the narrow question of law regarding the priority distribution of Residual Proceeds (as defined at paragraph 40 of First Report of the BDO Canada Limited in its Capacity as Receiver and Manager of Bow River Energy Ltd.). To resolve this issue, paragraph 12 of the D&D Order held that any interested party could make an application, no later than April 28, 2021, for an adjudication of the issue.
3. On April 27, 2021, the RM of Eye Hill No. 382 ("**Eye Hill**") served an application seeking the following relief, *inter alia*:
 - a. directing a cross-examination of Ms. Candy Dominique, of the Saskatchewan Ministry of Energy and Resources (the "**MER**"), in respect of the Affidavit sworn by Ms. Dominique on March 19, 2021;
 - b. directing the Receiver and the Monitor to provide:
 - i. a full accounting of Bow River's assets and liabilities as it relates to the Company's Saskatchewan business and operations as at June 1, 2020;
 - ii. a full accounting of the production income and liabilities paid from June 1, 2020 to October 30, 2020; and
 - iii. a full accounting of the production income and liabilities paid from October 30, 2020 to March 29, 2021 (the "**Receivership Period**").
 - c. declaring that Saskatchewan municipal taxes owed by Bow River in respect of the CCAA Period and the Receivership Period are payable in priority to the MER or any other party.
4. On its face, the relief sought by the Eye Hill goes far beyond the scope of what is permitted in the D&D Order. The priority issue of Residual Proceeds is a question of law and does not require the fact finding exercises of cross examination, accounting and further document disclosure. All relevant accounting and documentation was provided and approved during the course of the CCAA Proceedings and the Receivership (which Eye Hill participated in). Furthermore, cross-examination is not necessary in order to "clarify the process by which the MER designated Bow River an orphan" as the process is clearly set out in the *Oil and Gas Conservation Regulations, 2012*, RSS c O-2 Reg 6.

5. This Brief of Law will address only those issues raised in the Applicants' Brief – all of which fall outside the scope permitted by paragraph 12 of the D&D Order. MER intends to present its arguments regarding the priority distribution of the Residual Proceeds in a separate Brief of Law and hearing at a later date as directed by this court.

II. FACTS

6. The relevant facts are as set out in the First Report of the Receiver dated March 18, 2021, the Supplement to the First Report of the Receiver dated March 25, 2021 and the Second Report of the Receiver dated June 24, 2021. Below is a summary of those facts:

- (a) Bow River is an Alberta-based, privately-held junior energy producer engaged in the exploration, development and production of oil and natural gas.¹
- (b) On June 1, 2020, upon the application of Bow River, the Alberta Court of Queen's Bench granted an initial order under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "**CCAA Initial Order**").² The CCAA Initial Order granted the imposition of an initial stay of proceedings against Bow River and its assets through to June 11, 2020, later extended to October 30, 2020. The CCAA Initial Order also appointed BDO Canada Limited as the monitor of Bow River.
- (c) On July 24, 2020, the Alberta Court of Queen's Bench granted an Order approving the sales and investment solicitation process over Bow River's assets and engaged Sayer Energy Advisors as the sale advisor for the monitor.³
- (d) On October 15, 2020, counsel for Bow River advised the Alberta Orphan Well Association ("**OWA**"), the Alberta Energy Regulator ("**AER**"), Indian Oil and Gas Canada and the MER that it would cease operations in Alberta and Saskatchewan.⁴ Bow River further advised that after October 29, 2020, it would no longer have the financial resources to maintain care and custody of its properties or comply with its legislative and regulatory obligations.
- (e) On October 28, 2020, Justice McCreary of the Saskatchewan Court of Queen's Bench granted an Order appointing BDO Canada Limited receiver and manager of Bow River's Saskatchewan assets. These assets consisted of approximately 764 well licences, 35 facility licences and 546 pipeline licences located primary in the Macklin and Pierceland regions.⁵

¹ Affidavit of Brad Wagner, sworn October 26, 2020 at para 7.

² Exhibit "B" to the Affidavit of Brad Wagner, sworn October 26, 2020.

³ Exhibit "C" to the Affidavit of Brad Wagner, sworn October 26, 2020.

⁴ Exhibit "D" to the Affidavit of Brad Wagner, sworn October 26, 2020.

⁵ First Report of the BDO Canada Limited in its Capacity as Receiver and Manager of Bow River Energy Ltd, March 18, 2021 at para 23 [First Report].

- (f) On March 18, 2021, the Receiver prepared the First Report and the Confidential Supplement in support of its pending application to the Court regarding approval of transactions and distribution. According to the First Report, in addition to the approximately \$462,000.00 due to the MER from Bow River, there is also a total of approximately \$26 million of abandonment and reclamation liabilities attributable to the Saskatchewan assets in accordance with the Licensee Liability Rating program.⁶
- (g) In the First Report, the Receiver recommended approval of the distribution of the Residual Proceeds to the MER to partially address Bow River's outstanding environmental regulatory obligations ("**end-of-life obligations**").⁷
- (h) The Sale Approval and Vesting Order regarding the sale agreement between the Receiver and Tallahassee Exploration Inc. was issued on March 29, 2021. The Sale Approval and Vesting Order regarding the sale agreement between the Receiver and Heartland Oil Corporation was also issued on March 29, 2021.
- (i) On March 29, 2021, the Saskatchewan Court of Queen's Bench ordered the Receiver be discharged over all assets located in Saskatchewan that are not the subject of the Sale Approval and Vesting Orders issued the same day.
- (j) On March 31, 2021, the MER issued an Abandonment Order related to Bow River's end-of-life obligations (the "**Abandonment Order**").
- (k) Following the First Report, several municipalities contacted the Receiver in regards to outstanding municipal taxes that arose prior and since the Receivership.⁸
- (l) The R.M. of Eye Hill No. 382 has made an application for an Order declaring that the outstanding municipal taxes have a priority over the MER (the "**Eye Hill Application**").

III. ISSUES

- 7. MER submits, for the purpose of this brief, the following issues require determination by this Honourable Court:
 - (a) Should the R.M. of Senlac No 411, R.M. Grasslake No. 381 and the R.M. of Frenchman Butte No. 501 be given standing to participate in the within proceedings? No.
 - (b) Is the MER asserting a provable claim in regard to the end-of-life obligations? No.

⁶ First Report at para 35.

⁷ First Report at para 49.

⁸ Supplement to the First Report of BDO Canada Limited, in its Capacity as Receiver and Manager of Bow River Energy Ltd at para 2 [Supplement to First Report].

- (c) Is the MER's priority limited by ss. 14.06(7) and (8) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA]? No.
- (d) Is cross-examination of Candy Dominique of the MER warranted in the present circumstances? No.

IV. LAW & ARGUMENT

A. ***The R.M. of Senlac No 411, R.M. Grasslake No. 381 and the R.M. of Frenchman Butte No. 501 do not have standing to participate in the within proceeding***

8. Paragraph 12 of the March 29, 2021 D&D Order reads as follows:

Provided no application is filed with the Court on or before April 28, 2021 with respect to the distribution of an Residual Proceeds ("**Distribution Application**"), the Receiver is authorized and directed to distribute the Residual Proceeds to Her Majesty the Queen, Saskatchewan, as represented by the Ministry of Energy and Resources to be deposited into the Saskatchewan Oil and Gas Orphan Fund as partial satisfaction of the Debtor's outstanding environmental obligations. In the even a Distribution Application is filed, the Receiver shall hold on to the Residual Proceeds until further directed by the Court.

9. The Eye Hill Application was filed by Eye Hill by the date prescribed in the D&D Order. R.M. Senlac No. 411, R.M. Grasslake No. 381, and R.M. Frenchman Butte No. 501 did not apply within the prescribed time nor did they seek leave to be added as parties to the Eye Hill Application. Given that R.M. Senlac No. 411, R.M. Grasslake No. 381, and R.M. Frenchman Butte No. 501 did not apply within the prescribed time and given that they failed to obtain leave to participate in the present application, they have no standing and should therefore be removed as parties in the within proceeding.

B. ***The MER is not asserting a provable claim in bankruptcy in regards to the end-of-life obligations***

10. The MER submits that the Applicants have mischaracterized the MER's "orphan well priority" as a "provable claim" as per *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67 [Abitibi] at paragraph 48 of their Brief.
11. In *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5, 430 DLR (4th) 1 [Redwater], the Supreme Court affirmed that in order for an environmental obligation to be considered a claim provable in bankruptcy, the three requirements set out at para 26 of *Newfoundland and Labrador v AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 SCR 443 [Abitibi] must be met: first, there must be a debt, liability or obligation to a creditor; second, the debt, liability or obligation must have arisen before the debtor becomes bankrupt; and third, it must be possible to attach a monetary value to the debt, liability or obligation (at para 119) (the "Abitibi test").

12. In *Abitibi*, Newfoundland and Labrador (the “Province”) had issued five orders under the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 requiring AbitibiBowater Inc. to submit remediation action plans for five industrial sites it had occupied and to complete the remediation actions. Three of the industrial sites had already been expropriated by the Province. The Province argued that the environmental protection orders were not claims under the *Companies’ Creditors Arrangement Act*. RSC 1985, c. C-35 [CCAA]. The Supreme Court agreed with the CCAA judge’s conclusion that, in issuing the orders, the Province was laying the groundwork for monetary claims against AbitibiBowater to be used as an offset in connection with the company’s own NAFTA claims for compensation (at para 51). Accordingly, the Supreme Court concluded that the Province was acting as a creditor rather than a “detached regulator or public enforcer issuing an order for the public good” (at para 57).
13. In *Redwater*, Wagner, C.J. emphasized that the unique factual matrix of *Abitibi* had to be considered (at para 127). Wagner, C.J. concluded that *Abitibi* was distinguished from the Redwater receivership because, in seeking to enforce Redwater’s end-of-life obligations, the AER was acting in a *bona fide* regulatory capacity and that there was no ulterior motive or “colourable attempt by the Regulator to recover a debt” as there was in *Abitibi* (at para 128).
14. The factual matrix of the Bow River Receivership is more akin to that in *Redwater* than it is to *Abitibi*. Like the AER in *Redwater*, the MER is seeking to enforce statutory end-of-life obligations with respect to Bow River’s licensed wells, facilities, and pipeline segments in Saskatchewan. The MER is acting in a *bona fide* regulatory capacity and does not stand to benefit financially. The MER’s ultimate goal is to have the environmental and end-of-life obligations of Bow River satisfied to the fullest extent possible.
15. In *Redwater*, Chief Justice Wagner emphasized that in enforcing end-of-life obligations, the AER is acting in the public interest:

[122] ...On a proper understanding of the “creditor” step, it is clear that the Regulator acted in the public interest and for the public good in issuing the Abandonment Orders and enforcing LMR requirements and that it is, therefore, not a creditor of Redwater. It is the public, not the Regulator or the General Revenue Fund, that is the beneficiary of those environmental obligations; the province does not stand to gain financially from them.
16. Chief Justice Wagner’s comments about the AER apply equally to the MER. The MER operates in the same manner as the AER in exercising its regulatory obligations, pursuant to very similar legislation. Subsection 17.01(b) of *The Oil and Gas Conservation Act*, RSS 1978, c O-2 [OGCA] authorizes the MER to make orders for suspension, abandonment and reclamation “for the

purposes of public safety or the safety of any person, for the protection of property or the environment or for any other prescribed purpose”.

17. The MER could have pursued other avenues to address Bow River’s end-of-life obligations. However, all of these alternatives presented difficulties. For example, the MER initially instructed the Receiver to pursue negotiations that Bow River had embarked upon with certain parties regarding its Saskatchewan assets.⁹ However, the sales and investment solicitation process during the CCAA Proceedings did not result in any *en bloc* offers for the Saskatchewan Assets.¹⁰
18. Alternatively, the MER could have required the Receiver to post security in order to improve the Licensee Liability Rating (“LLR”) for the unsold assets pursuant to s. 115(2). However, there were not enough funds to do so. Another possible course of action was for the MER to issue the Abandonment Order earlier in order to require the Receiver to carry out the abandonment work. However, this would likely have resulted in the Receiver seeking discharge without selling any assets because there were not enough funds in the estate to cover the approximately \$26 million of abandonment and reclamation liabilities. In such circumstances, the most reasonable course of action was for the MER to assume care and custody of the unsold properties through the Orphan Program upon the discharge of the Receiver.
19. As in *Redwater*, the purpose of the Abandonment Order is to ensure the remediation work is done and not to seek a financial benefit. Therefore, in regards to the end-of-life obligations, the MER is not asserting a claim as a creditor, but is rather seeking to enforce a regulatory obligation.

C. Subsections 14.06(7) and (8) of the BIA do not apply to the Bow River Receivership

20. At paragraph 48 of their Brief, the Applicants assert the MER’s “orphan well” priority is limited by ss. 14.06(7) and (8) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA], which provide priority to claims for costs remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor. As such, the Applicants contend that disclosure of the accounting data is necessary in order to verify whether Bow River’s assets are “real property” within the meaning of ss. 14.06(7) and (8) of the BIA.
21. Respectfully, ss. 14.06(7) and (8) are not engaged because the provisions only apply to claims provable in bankruptcy:

⁹ First Report of the Receiver, March 18, 2021 at para 27 (“First Report”).

¹⁰ First Report at para 28.

Priority of claims

(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 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 the 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 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 provision of this Act or anything in any other federal or provincial law.

Claim for clean-up costs

(8) Despite subsection 121(1), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.

22. As set out above, in issuing the Abandonment Order, the MER is not advancing a claim in bankruptcy for costs for the abandonment work but is simply seeking to enforce a regulatory obligation. Subsections ss. 14.06(7) and (8) would apply in a situation where the MER was advancing a claim to *recover* the costs and expenses already incurred pursuant to carrying out the Abandonment Order under s. 17.03 of the Saskatchewan *OGCA*. As affirmed by the Yukon Court of Appeal in *Yukon (Government of) v Yukon Zinc*, 2021 YKCA 2 at para 83, ss. 14.06(7) does not create a charge for anticipated or future costs. Rather, the charge arises when a government incurs costs to remediate an environmental condition or damage. The MER is making no such claim. Rather, the Receiver is proposing to distribute the residual proceeds to the MER to partially address Bow River's outstanding end-of-life obligations.¹¹ The proceeds would go towards abandonment work to be carried out under the Orphan Fund Procurement Program when possible.

¹¹ First Report at para 49.

D. Cross-examination is not warranted as the process for designating orphans is clearly set out in legislation

23. At paragraph 29 of their Brief, the Applicants maintain that the cross-examination of Candy Dominique is necessary in order to “clarify the process by which the MER designated Bow River an orphan”. The MER submits no such clarification is necessary as the process is clearly set out in the *Oil and Gas Conservation Regulations, 2012*, RSS c O-2 Reg 6 (the “**Regulations**”) and in Candy Dominique’s affidavit.

24. Subsection 114(c) of the Regulations defines an “orphan” as the following:

(c) “orphan” means a well, facility or associated flowline, or their respective sites, if in the opinion of the minister, a person responsible for the well, facility, associated flowline, well site or facility site:

(i) does not exist;

(ii) cannot be located; or

(iii) does not have the financial means to contribute the costs of meeting the obligations pursuant to the Act, those regulations, any orders made pursuant to the Act or any terms and conditions of a licence;

(Emphasis added)

25. On October 15, 2020, Bow River’s counsel advised the MER that the Company would be forced to cease operations on October 29, 2020 because its efforts to source alternative funding had been exhausted.¹² Bow River further advised that it would only continue to maintain care and custody of its assets until October 29, 2020.¹³ On October 29, 2020, the MER deemed Bow River an orphan in Saskatchewan.¹⁴ Considering that all of Bow River’s employees were terminated, all officers and directors resigned, it was, subject to any Residential Proceeds which are wholly insufficient, entirely reasonable for the MER to conclude Bow River did not have the financial means to contribute to the costs of meeting its end-of-life obligations.

26. Section 44 of the Regulations sets out the procedure for the plugging and abandonment of well:

44(1) Subject to subsection (4), no well shall remain unplugged or uncased after it is no longer used for the purpose for which it was drilled or converted.

(2) If, in the opinion of the minister, the operations with respect to a well have been discontinued or delayed for an unreasonable period, the minister shall notify the

¹² First Report at para 15.

¹³ First Report at para 15.

¹⁴ Affidavit of Candy Dominique, sworn March 19, 2021 at para 5.

licensee that the licensee shall abandon it within 90 days after the notice is sent, unless sufficient cause why it should not be abandoned is shown to the satisfaction of the minister.

(3) The minister may have a well abandoned at the expense of the licensee or take any other action that the minister considers advisable if within 90 days after the notice mentioned in subsection (2) is sent:

(a) a well is not abandoned by the licensee; and

(b) the licensee fails to show cause to the satisfaction of the minister why the well should not be abandoned.

(4) The minister may extend the time for abandonment of any well on any terms and conditions that the minister considers advisable.

(5) Before any work to abandon a well is commenced, the licensee shall apply for approval pursuant to section 6, to abandon the well.

(6) Abandonment operations mentioned in subsection (5) are not to be commenced until the minister approves the abandonment program or the minister has witnessed and approved the plugging of the well.

(7) **Repealed.** 21 Sep 2018 SR 65/2018 s26.

(8) A well drilled into or below the Prairie Evaporite in a commercial potash area designated by the minister pursuant to section 27 must be abandoned in accordance with the provisions of clause 27(2)(c).

(9) Notwithstanding any other provision of these regulations, the minister may, on application pursuant to section 6, approve or substitute in whole or in part any abandonment program.

27. While the Applicants emphasize the discretionary language in ss. 44(2) through ss. 44(4) at para 35 of their Brief, they have completely overlooked the mandatory language in ss. 44(1) which provides that "no well shall remain unplugged or uncased after it is no longer used for the purpose for which it was drilled or converted" (emphasis added). Bow River was deemed an orphan pursuant to s. 44(1) of the Regulations.¹⁵ As indicated above, Bow River only undertook to maintain care and custody of its assets until October 29, 2020. From that time on, the inactive wells would no longer be used for the purpose for which they were drilled or converted.

28. Moreover, even if the decision to deem Bow River an orphan was discretionary as the Applicants argue, the decision was a reasonable exercise of the discretion conferred in s. 44 of the Regulations. Had the sites not been orphaned, they would not be under any party's care or control

¹⁵ Affidavit of Candy Dominique, sworn March 19, 2021 at para 2.

as of October 29, 2020. It was therefore necessary for the purposes of public safety, and for the protection of property and the environment for the MER to deem Bow River an orphan. The Regulations do not obligate the MER to justify the exercise of the discretion granted in s. 44 or to consider potential creditors when deeming a facility an orphan.

V. Conclusion

29. For the forgoing reasons, Her Majesty the Queen (as represented by The Minister of Energy and Resources) respectfully submits that:

- a. the R.M. Senlac No. 411, R.M. Grasslake No. 381, and R.M. Frenchman Butte No. 501 be removed as parties to the Eye Hill Application;
- b. that the relief sought at paragraphs 1(b), 1(c), 1(g) of the Eye Hill Application be dismissed; and
- c. a date and time be set for the hearing of the priority distribution of Residual Proceeds issue along with fixed timelines for filing materials in support of said hearing.

ALL OF WHICH is respectfully submitted at Regina, Saskatchewan, this 24th day of June, 2021.

MLT Aikins LLP

Per:  _____

K. James Rose, Counsel for Her Majesty the Queen
(as represented by The Minister of Energy and Resources)

CONTACT INFORMATION AND ADDRESS FOR SERVICE

If prepared by a lawyer for the party:

Name of firm:	MLT AIKINS LLP
Name of lawyer in charge of file:	K. James Rose
Address of legal firms:	Suite 1500, 1874 Scarth St. Regina, Saskatchewan S4P 4E9
Telephone number:	(306) 352-8000
Fax number (if any):	(306) 352-5250

VI. List of Authorities

Case Law	Citation	Legal Principles	Para
<i>Newfoundland and Labrador v AbitibiBowater Inc.</i>	2012 SCC 67, [2012] 3 SCR 443	The Province is acting as a creditor rather than a public enforcer issuing an order for the public good when seeking a financial benefit.	57
<i>Orphan Well Association v Grant Thornton Ltd.</i> ,	2019 SCC 5, 430 DLR (4 th) 1	In order for an environmental obligation to be considered a claim provable in bankruptcy the three requirements set out in the "Abitibi test" must be met: first, there must be a debt, liability or obligation to a creditor; second, the debt, liability or obligation must have arisen before the debtor becomes bankrupt; and third, it must be possible to attach a monetary value to the debt, liability or obligation.	119
		in enforcing end-of-life obligations, a Regulator is acting in the public interest	122
<i>Yukon (Government of) v Yukon Zinc</i> , at para 83,	2021 YKCA 2	Subsection. 14.06(7) does not create a charge for anticipated or future costs. Rather, the charge arises when a government incurs costs to remediate an environmental condition or damage	83

Legislation

<i>Bankruptcy and Insolvency Act</i> ,	RSC 1985, c B-3	ss. 14.06(7) and (8)
<i>The Oil and Gas Conservation Act</i>	RSS 1978, c O-2	ss. 17.01(b)
<i>The Oil and Gas Conservation Regulations</i> ,	2012, RSS c O-2 Reg 6	s. 44, s. 114(c)