

COURT FILE NUMBER **Q.B.G. No. 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.

BOW RIVER ENERGY LTD.

IN THE MATTER OF THE RECEIVERSHIP OF BOW RIVER ENERGY INC.

**BENCH BRIEF OF THE 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**

TABLE OF CONTENTS

Part I – Introduction	3
Why We’re Here	3
What are the Unresolved Issues Affecting Priority?.....	5
Relief Sought	5
Part II – Summary of Facts	6
Brief Factual Chronology	6
Part III – Argument	8
Issue One: Cross-Examination of Candy Dominique.....	8
The Law	8
Application.....	9
Issue Two: Accounting	12
Why Disclosure of MER’s Accounting Data is Necessary	12
Why Obtaining Documents from the Receiver is Necessary.....	13
Part IV – Relief Sought	14
Contact Information and Address for Service	15
Part V – Table of Authorities	16

PART I – INTRODUCTION

Why We're Here

1. This Bench Brief is submitted on behalf of the originally named Applicant, R.M. of Eye Hill No. 382 and supported and joined by R.M. Senlac No.411, R.M. Grasslake No.381, and R.M. Frenchman Butte No. 501 (the foregoing jointly referred to herein as the “Applicant”), who dispute the Minister of Energy and Resources’ (“MER”) priority claim to residual proceeds arising from the Receiver’s pending application in respect of Bow River Energy Ltd. (“Bow River”).

2. The Receiver has advised that, as at December 31, 2020, the affected municipalities in Saskatchewan are collectively owed \$2,230,449.22.¹ Notwithstanding these facts, the Receiver says that,

- pursuant to *Orphan Well Association v. Grant Thornton Ltd.*,² an insolvent oil and gas company remains liable to satisfy environmental obligations; and
- that the proceeds from the sale of its assets must first be used to address those obligations.³

3. Accordingly, the Receiver has expressed the view that the MER’s \$20,286,375 claim ranks in priority to the claims of all creditors, including all affected municipalities in Saskatchewan.

4. The Receiver’s view depends on the answer to a number of practical questions. However, without access to the underlying accounting data in the possession of the Receiver and the MER, this Honourable Court cannot resolve the dispute with respect to the MER’s priority claim.

5. Municipal taxes have a lien, pursuant to ss. 317 and 320 of the *Municipalities Act*, against both the production and assets of Bow River. Further, and unless the MER’s claim demonstrably falls within the specific statutory categories set out in the *Bankruptcy and Insolvency Act*, the

¹ Supplement to the First Report of the Receiver (SK) March 25, 2021 at para. 6.

² *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5. [*Redwater*].

³ Supplement to the First Report of the Receiver (SK) March 25, 2021 at para. 8.

Applicant's municipal taxes have priority over the MER's "orphan well" claim pursuant to Orders granted by the Court of Queen's Bench⁴ and s. 136(1)(e) of the *Bankruptcy and Insolvency Act*.⁵

6. The Supreme Court of Canada's decision in *Redwater* does not govern the application of Saskatchewan's *Oil and Gas Conservation Regulations*,⁶ nor does it obviate the need for the MER to exercise its discretion with due consideration for Bow River's creditors, including the Applicant and other affected municipalities in Saskatchewan.

7. The *Redwater* decision dealt with the intersection of Alberta's "orphan well" regulatory scheme and the *Bankruptcy and Insolvency Act*. It is submitted that the result in *Redwater* is not directly transposable in Saskatchewan.

8. This is the first time the *Redwater* decision has been applied to Saskatchewan's *Oil and Gas Conservation Regulations*. The designation of Bow River's property as an abandoned "orphan well" was a matter falling within the operational discretion of the MER.⁷ As such, the Applicant requests that the Receiver and MER produce the documents relevant for determining the priority of claims and make its deponent, Ms. Candy Dominique, available for cross-examination.

9. By granting the relief sought by the Applicant, this Honourable Court can allow the parties herein an opportunity to determine:

- whether the Receiver is correct in its position that MER's "orphan well" claim ranks in priority to the claims of the Applicant and other affected municipalities in Saskatchewan;
- whether the MER has appropriately exercised its discretion in accordance with ss. 44 and 115-117 of the *Oil and Gas Conservation Regulations*; and

⁴ CCAA Initial Order – June 1, 2020; Amended and Restated CCAA Initial Order – June 10, 2020.

⁵ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

⁶ *Oil and Gas Conservation Regulations 2012*, RRS c O-2 Reg 6.

⁷ See, for example, *Oil and Gas Conservation Regulations 2012*, RRS c O-2 Reg 6, s. 44(4).

- whether the MER acted in a manner which has unlawfully deprived the Applicant, together with the other affected municipalities in Saskatchewan, property taxes owing and outstanding by Bow River.

10. The purpose of this Application is to ensure that MER's claim to priority is supported by the accounting data in its possession and accounting data in the possession of the Receiver. Further, this Application provides a basis for the Applicant to determine whether the MER's operational decision (i.e. its decision to designate Bow River's assets as abandoned "orphan wells" pursuant to s. 44 of the *Oil and Gas Conservation Regulations*) was taken appropriately and with due consideration for the rights of affected creditors in Saskatchewan.

What are the Unresolved Issues Affecting Priority?

11. It is submitted that a number of fundamental questions remain unanswered and undetermined in this matter, including:

- Does the MER's "orphan well" Order have retroactive effect?
- Does the MER's "orphan well" Order only apply as against Bow River's real property *per* s. 14.06(7) of the *Bankruptcy and Insolvency Act*?⁸
- Does the Sale Approval and Vesting Order (SK)⁹ affect "real property" – are Bow River's licenses real property?
- What proceeds held by the Receiver are real property and what is not?
- Is the priority different for different asset classes held by the Receiver?

Relief Sought

12. Pursuant to the Notice of Application dated April 26, 2021, the Applicant is applying for an Order:

⁸ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

⁹ Sale Approval and Vesting Order (SK) (re: Heartland) – March 29, 2021; Sale Approval and Vesting Order (SK) (re: Tallahassee) – March 29, 2021.

- a) pursuant to Rule 6-13 of the Saskatchewan Queen’s Bench Rules,¹⁰ that Candy Dominique, deponent from the MER, submit to cross-examination on her Affidavit sworn March 19, 2021;
- b) directing Ms. Dominique and/or MER to provide all accounting data relevant for making its determination that Bow River was an “orphan well” under the *Oil and Gas Conservation Regulations*; and
- c) directing the Receiver to provide:
 - i. a full accounting of the Saskatchewan assets and liabilities of Bow River as at June 1, 2020;
 - ii. a full accounting of the production income and liabilities paid from June 1, 2020 to October 19, 2020 (the “CCAA Period”); and
 - iii. as at October 20, 2020, a full accounting of the production income and liabilities paid from October 20, 2020 to the conclusion of the sales contemplated in the Orders of March 29, 2021 (the “Receivership Period”).

PART II – SUMMARY OF FACTS

Brief Factual Chronology

13. Bow River is a corporation in the business of exploration and production of oil and gas. It operated 29 wells and 1 facility within the jurisdiction of the Applicant.¹¹

¹⁰ *The Queen's Bench Rules*, Sask Gaz December 27, 2013, 2684.

¹¹ Supplement to the First Report of the Receiver (SK) March 25, 2021 at para. 6.

14. On June 1, 2020, an Order was granted by the Court of Queen’s Bench of Alberta pursuant to the *Companies Creditors Arrangement Act* (“CCAA”).¹²

15. The Order imposed a stay of proceedings against Bow River and its assets, and appointed BDO Canada Limited as Monitor.¹³

16. The Court of Queen’s Bench of Alberta also directed the priority of the proceeds from the sale of Bow River’s operations.¹⁴ The priority of proceeds specifically required that municipal taxes be paid.¹⁵

17. Notwithstanding this Order, municipal taxes to the Applicant and other affected municipalities were not paid and remain outstanding.

18. On October 29, 2020, the Court granted an Order terminating the CCAA proceedings and discharging the Monitor.¹⁶

19. According to Ms. Candy Dominique, deponent for the MER, October 29, 2020 is also the date Bow River was “deemed an orphan in Saskatchewan”.¹⁷

20. Notwithstanding the express concerns of numerous municipalities, including the Applicant herein, the Receiver has taken the view that MER’s \$20,286,375 priority claim to the residual proceeds arising from the sale of Bow River’s assets ranks ahead of the claims of all creditors.¹⁸

21. Simply put, if the Receiver is correct in its view, then the MER’s operational decision to deem Bow River as an orphan in Saskatchewan has effectively barred these municipalities’ from recovering approximately \$2,230,449.22 in unpaid tax revenues. The Applicant brings this Application to obtain confirmation that:

¹² *Companies' Creditors Arrangement Act*, RSC 1985, c C-36; CCAA Initial Order – June 1, 2020.

¹³ CCAA Initial Order – June 1, 2020.

¹⁴ CCAA Initial Order – June 1, 2020; Amended and Restated CCAA Initial Order – June 10, 2020.

¹⁵ Amended and Restated CCAA Initial Order – June 10, 2020 at para. 9.

¹⁶ Order re: Discharge of Monitor – October 29, 2020.

¹⁷ Affidavit of Candy Dominique dated March 19, 2021 at para. 5.

¹⁸ Supplement to the First Report of the Receiver (SK) March 25, 2021 at para. 8.

- the Receiver’s assessment of the MER’s priority claim is correct; and
- to ensure the MER followed the appropriate procedure, as outlined in the *Oil and Gas Conservation Regulations*.

PART III – ARGUMENT

Issue One: Cross-Examination of Candy Dominique

The Law

22. Pursuant to Rule 6-13(1), the Court *may* order the attendance for cross-examination of the person making the affidavit.¹⁹

23. It is settled law that a party does not have an automatic or inherent right to cross-examine an affiant on his or her affidavit.²⁰

24. As recently affirmed by the Court of Appeal in *Ter Keurs Bros Inc.*, granting Leave to cross-examine on an affidavit is a discretionary remedy.²¹ The party making the request must establish cross-examination will assist in resolving the issue before the Court and not result in an injustice.²²

25. In *Ter Keurs Bros.*, the Court of Appeal noted that whether to permit cross-examination is a case-specific decision, guided by factors including the proportionality principle expressed in Rule 1-3(4):

1-3(4) Resolving a claim justly in a timely and cost effective way includes, so far as is practicable, conducting the proceeding in ways that are proportionate to:

- (a) the amount involved in the proceeding;
- (b) the importance of the issues in dispute; and

¹⁹ *The Queen's Bench Rules*, Sask Gaz December 27, 2013, 2684, Rule 6-13(1).

²⁰ See, for example: *Wallace v Canadian National Railway*, 2009 SKQB 178; *Crown & Hand Pub Ltd. v Bank of America Corporation*, 2013 SKQB 348.

²¹ *Ter Keurs Bros. Inc. v Last Mountain Valley (Rural Municipality)*, 2019 SKCA 10 (CanLII) at para. 27.

²² *Ter Keurs Bros. Inc. v Last Mountain Valley (Rural Municipality)*, 2019 SKCA 10 (CanLII) at para. 27; *Wallace v Canadian National Railway*, 2009 SKQB 178.

(c) the complexity of the proceeding.²³

26. The Court of Appeal further observed “the need to allow for exploration of specific issues” as a relevant factor bearing on the decision to grant Leave to cross-examine.²⁴

27. In *Wallace v. Canadian Pacific Railway*, the Court of Queen’s Bench similarly found that a Court may grant Leave to cross-examine “where there is a sincere and legitimate need for clarification of the information deposed to and that information is solely within the knowledge of the affiant.”²⁵

Application

28. It is submitted that, in this case, there is a “sincere and legitimate need for clarification” of Ms. Dominique’s Affidavit dated March 19, 2021. Moreover, as this is the first case considering the interaction between Saskatchewan’s “orphan well” regulations (as set out in the *Oil and Gas Conservation Regulations*) and the *Bankruptcy and Insolvency Act* following the *Redwater* decision, ordering the attendance of Ms. Dominique for cross-examination would serve a significant public purpose.

29. In particular, cross-examination of Ms. Dominique would:

- provide the affected municipalities, including the Applicant, an opportunity to ensure they have not been unfairly deprived of municipal taxes owing and outstanding; and
- clarify the process by which the MER designated Bow River an “orphan in Saskatchewan”.

30. Cross-examination is required here to ensure that the procedure briefly outlined in Ms. Dominique’s affidavit dated March 19, 2021 was, in fact, applied correctly. If the process was not

²³ *The Queen's Bench Rules*, Sask Gaz December 27, 2013, 2684, Rule 1-3(4).

²⁴ *Ter Keurs Bros. Inc. v Last Mountain Valley (Rural Municipality)*, 2019 SKCA 10 (CanLII) at para. 33; see also *Regional Tire Distributors (Saskatchewan) Inc. v Quality Tire Service Ltd.*, 2016 SKQB 411 (CanLII)

²⁵ *Wallace v Canadian Pacific Railway*, 2009 SKQB 178 at para. 5.

applied correctly, then the affected municipalities, including the Applicant, may be entitled to a greater share of the proceeds of sale.

31. Further, cross-examination is the only means by which the Applicant and other affected municipalities can determine the extent to which the MER took their interests into consideration when exercising discretion under the *Oil and Gas Conservation Regulations*.

32. According to Ms. Dominique, Bow River was deemed an orphan in Saskatchewan “because the company was insolvent and no longer had the financial means to meet its obligations under the OGCA, including its abandonment and reclamation responsibilities”.²⁶

33. Ms. Dominique further asserts that s. 44 of the *Oil and Gas Conservation Regulations* “requires” licensees to abandon wells “if the well is no longer used for the purpose for which it was drilled”.²⁷

34. It is important to bear in mind that, contrary to Ms. Dominique’s as-yet untested assertion, the designation of Bow River’s assets as an “orphan well” pursuant to s. 44 is not an automatic, “required” procedure.

35. Instead, s. 44 of the *Oil and Gas Conservation Regulations* confers wide discretion for the Minister to take into account the interests of affected parties, including the Applicant:

General plugging and abandonment provisions

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 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.

²⁶ Affidavit of Candy Dominique dated March 19, 2021 at para. 5.

²⁷ Affidavit of Candy Dominique dated March 19, 2021 at para. 2.

(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.²⁸

36. Importantly, the MER has failed to provide copies of any orders deeming Bow River's assets as "orphan wells" to the Court, the Receiver, or any creditor in these proceedings. As such, the Applicant and other affected municipalities have no means of determining whether the MER exercised its discretion appropriately.

37. This application for Leave to cross-examine Ms. Dominique represents the best opportunity for the Applicant and other affected municipalities in Saskatchewan to explore specific issues in this case, including whether the MER's internal process for designating Bow River as an "orphan well" appropriately balanced the interests of MER against those of other creditors, including the Applicant.

38. Ms. Dominique's affidavit states that, at the time Bow River was deemed an orphan, it "held licences for 825 wells and 30 facilities which had a total associated liability of \$26,307,575" under the Licensee Liability Rating ("LLR") Program.²⁹ However, no supporting documentation is provided to confirm whether Bow River's operations within the Applicant's jurisdiction *should* have been deemed an "orphan".

²⁸ *Oil and Gas Conservation Regulations*, 2012, RRS c O-2 Reg 6. [Emphasis added].

²⁹ Affidavit of Candy Dominique dated March 19, 2021 at para. 5.

39. If Ms. Dominique's affidavit is the only supporting document herein, it is submitted the MER has failed to demonstrate that it appropriately exercised its duty of care with respect to the Applicant and other affected municipalities in Saskatchewan.

Issue Two: Accounting

Why Disclosure of MER's Accounting Data is Necessary

40. According to Ms. Dominique, the MER maintains an "orphan fund", pursuant to which Bow River was obligated to regularly contribute money.³⁰ Part XVI of the *Oil and Gas Conservation Regulations* outline the procedure by which the MER collects security deposits, and includes provisions which require licensees to pay an annual orphan fund levy.

41. It is submitted that, pursuant to the *Oil and Gas Conservation Regulations*, the MER would have had reliable metrics to determine the solvency of Bow River on an interim basis. For example, at paras. 3-5 of her affidavit, Ms. Dominique makes reference to the Licensee Liability Rating or "LLR" formula.

42. At para. 3, Ms. Dominique asserts "there was no security deposit collected regarding Bow River because its LLR was greater than one at the time that it became insolvent".

43. The LLR formula is outlined at s. 117 of the *Oil and Gas Conservation Regulations*. It is submitted that, pursuant to s. 117, the MER would have been provided detailed accounting information allowing it to make the calculations required to determine Bow River's LLR. However, the Applicant and other affected municipalities have not been provided any relevant documentation to show,

- what data was used by MER in calculating Bow River's LLR; and
- whether the calculations were made appropriately.

44. Without disclosure of the accounting particulars used by MER to determine Bow River should be designated as an "orphan well", fundamental questions remain unanswered, including

³⁰ Affidavit of Candy Dominique dated March 19, 2021 at para. 4.

whether the MER exercised its discretion pursuant to s. 44 of the regulations in a manner consistent with its obligation to downstream creditors, including the affected municipalities.

45. It is submitted that the only way to determine whether the MER appropriately designated Bow River as an “orphan well” is to access the relevant accounting data relied upon by the MER and alluded to in Ms. Dominique’s affidavit.³¹

Why Obtaining Documents from the Receiver is Necessary

46. Pursuant to Rule 68 of the *Bankruptcy and Insolvency General Rules*, the Receiver is required to hold accounting records relevant for determining whether MER’s claim does in fact rank in priority to the Applicant’s claim.³²

47. The appointment of the Receiver was made pursuant to s. 65(1) of the *Queen’s Bench Act*.³³ As confirmed by the Receivership Order, the Receiver herein was empowered, during the receivership period, to take possession of and exercise control over Bow River’s property and any and all proceeds, receipts and disbursements arising from that property.³⁴ Section 3(n) of the Receivership Order explicitly permits the Receiver share this information.³⁵

48. In asserting that MER’s claim ranks ahead of the Applicant and other affected municipalities in Saskatchewan, the Receiver herein has failed to distinguish between the various asset classes of Bow River. The MER’s “orphan well” priority is a “provable claim”³⁶ limited by ss. 14.06(7) and (8) of the *Bankruptcy and Insolvency Act* to the costs of remedying “environmental condition or environmental damage affecting real property or an immovable of the debtor”.³⁷

³¹ Affidavit of Candy Dominique dated March 19, 2021 at para. 5.

³² *Bankruptcy and Insolvency General Rules*, CRC, c 368.

³³ *The Queen’s Bench Act*, 1998, SS 1998, c Q-1.01.

³⁴ Receivership Order (SK) – October 28, 2020.

³⁵ Receivership Order (SK) – October 28, 2020.

³⁶ *As per Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67.

³⁷ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3. [Emphasis added].

49. Without disclosure of the accounting data in the possession of the Receiver, it is impossible to verify whether Bow River's assets are exclusively "real property", and, as such, whether the MER's claim ranks ahead of the Applicant's and other affected municipalities in the Province.

PART IV – RELIEF SOUGHT

50. The Applicant, R.M. Eye Hill No. 382, seeks Orders on the terms proposed substantially in the form submitted with the Notice of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Regina, Saskatchewan this 17th day of June, 2021.

Russell Q. Gregory

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PART V – TABLE OF AUTHORITIES

1. *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5.
2. *Wallace v Canadian National Railway*, 2009 SKQB 178.
3. *Crown & Hand Pub Ltd. v Bank of America Corporation*, 2013 SKQB 348.
4. *Ter Keurs Bros. Inc. v Last Mountain Valley (Rural Municipality)*, 2019 SKCA 10 (CanLII).
5. *Regional Tire Distributors (Saskatchewan) Inc. v Quality Tire Service Ltd.*, 2016 SKQB 411 (CanLII).
6. *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67.