Court of Appeal for Saskatchewan

Docket: CACV4169

Citation: *Eye Hill* (*Rural Municipality) v Saskatchewan (Energy and Resources)*, 2023 SKCA 120

Date: 2023-11-01

Between:

Rural Municipality of Eye Hill No. 382

Appellant
(Applicant)

And

His Majesty the King, Saskatchewan (as represented by the Minister of Energy and Resources) and BDO Canada Limited in its capacity as Receiver of Bow River Energy Ltd.

Respondents
(Respondents)

Before:	Leurer C.J.S., Jackson and Caldwell JJ.A.
Disposition:	Appeal dismissed
Written reasons by:	The Honourable Mr. Justice Caldwell
In concurrence:	The Honourable Chief Justice Leurer The Honourable Madam Justice Jackson
On appeal from:	2023 SKKB 52, Regina
Appeal heard:	October 4, 2023

Counsel:	Russell Gregory for the Appellant James Rose and Shawna Sparrow for His Majesty the King, Saskatchewan (as Represented by the Minister of Energy and Resources) Keely Cameron and Adam Williams for BDO Canada Limited in its capacity as receiver of Bow River Energy Ltd.

Caldwell J.A.

[1] This appeal involves a dispute between the rural municipality of Eye Hill No. 382 [RM] and the Ministry of Energy and Resources [Ministry] over certain undistributed proceeds realised by BDO Canada Limited [Receiver] during the receivership of Bow River Energy Ltd. [Bow River]. A Court of King's Bench Chambers judge (ex officio) held that the Ministry has priority to these funds: *Rural Municipality of Eye Hill v Saskatchewan*, 2023 SKKB 52, 6 CBR (7th) 259 [*Decision*]. I would dismiss the RM's appeal against the *Decision* for the reasons that follow.

[2] The RM's claim to the receivership proceeds relates to unpaid property taxes owing by Bow River pursuant to *The Municipalities Act*, SS 2005, c M-36.1. The Ministry's claim arises under licences to extract oil and gas, which it had granted to Bow River on the condition that Bow River assume the end-of-life obligations to abandon its wells by securing them against leakage, removing surface infrastructure and remedying contamination.

[3] In the *Decision*, the Chambers judge ruled that the receivership proceeds were payable to the Ministry in priority to property taxes owing to the RM. The Chambers judge gave several reasons for this result, but the principal or controlling reasons were that: (a) orders made in failed proceedings involving Bow River under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*], did not affect the subsequent receivership proceedings; and (b) the Ministry did not have a claim provable in bankruptcy because it was not a creditor under the analysis set out in *Newfoundland and Labrador v AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 SCR 443 [*Abitibi*], and *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 SCR 150 [*Redwater*]. Although the RM challenges other aspects of the *Decision*, it is only necessary to address these two reasons for the Chambers judge's decision.

[4] Dealing first with the *CCAA* orders, as part of her reasoning the Chambers judge held that the *CCAA* orders "are not applicable to these [receivership] proceedings" and, in any event, "no amounts were required to be paid during the *CCAA* proceedings under the *CCAA* orders relied on [by the RM]" (*Decision* at para 26). Importantly, the Alberta Court of King's Bench, where the *CCAA* matters were initiated and heard, had terminated those proceedings prior to the appointment of the Receiver in Saskatchewan. The termination of the *CCAA* proceedings meant that the orders made within those proceedings had lapsed—i.e., they were, as the Chambers judge remarked, "not

applicable". As part of her analysis of the *CCAA* issue, the Chambers judge agreed with the Receiver that "a creditor should not be permitted to lie in the weeds" by not advancing its claim during the currency of *CCAA* proceedings (at para 35). The RM attacks all parts of the Chambers judge's reasoning on this issue.

[5] In addressing the RM's arguments on the *CCAA* orders, I agree that the orders did not establish a priority regime. I also respectfully conclude that the record does not support the conclusion that the RM may be criticized for not advancing its claim earlier than it did. Nonetheless, these disagreements do not undermine the Chambers judge's principal findings regarding the *CCAA* orders, where she correctly held that they: (a) did not impose a payment obligation on Bow River beyond the statutory requirements of *The Municipalities Act*; and (b) had not established a trust in favour of the RM. In short, there is no error of law in the Chambers judge's overall conclusion that the *CCAA* orders had no bearing on the RM's claim under the receivership.

[6] I turn next to the Chambers judge's analysis under *Abitibi* and *Redwater*. In brief terms, the reasoning in those two cases is used to determine when environmental obligations constitute a claim provable in bankruptcy. Here, the RM first argues that *Redwater*, which interpreted an Alberta regulatory scheme, does not translate to Saskatchewan as easily as the Chambers judge thought. This is a long-bow argument that does not reach its target. While there are minor differences, the Ministry is responsible for a regulatory scheme established under *The Oil and Gas Conservation Act*, RSS 1978, c O-2, that is the equivalent of the Alberta regime considered in *Redwater*. At salient points, the two regimes are nearly identical—e.g., the regulator has the power to enforce a licensee's environmental obligations as against its receiver or trustee in bankruptcy. Therefore, the reasoning in *Redwater* is, in my view, readily applicable in Saskatchewan, just as the Chambers judge concluded.

[7] In terms of the application of *Abitibi* and *Redwater* to the facts of this matter, I find that the Chambers judge correctly interpreted *Redwater* as applying in the circumstances of the receivership; its ratio as being: "for an environmental obligation to be considered a claim provable in bankruptcy, the three requirements set out in [*Abitibi*] must be met" (*Decision* at para 45). In simple terms, the *Abitibi* requirements are these:

(a) there must be a debt, a liability or an obligation to a creditor;

(b) the debt, liability or obligation must have been incurred before the time of bankruptcy; and

(c) it must be possible to attach a monetary value to the debt, liability or obligation.

[8] Relevant to this appeal, the majority of the Supreme Court in *Redwater* found that the first part of the *Abitibi* test—a debt, liability or obligation owing to a creditor—was not met in the context of an Alberta regulator's claim for unfulfilled end-of-life environmental obligations owing by an oil-and-gas-well licensee that was subject to bankruptcy proceedings:

> [122] In my view, both concerns raised by the Regulator have merit. As I will demonstrate, *Abitibi* should not be taken as standing for the proposition that a regulator is always a creditor when it exercises its statutory enforcement powers against a debtor. 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 the [Liability Management Rating] 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. Although this conclusion is sufficient to resolve this aspect of the appeal, for the sake of completeness, I will also demonstrate that the chambers judge erred in finding that, on these facts, there is sufficient certainty that the Regulator will ultimately perform the environmental work and assert a claim for reimbursement. To conclude, I will briefly comment on why the *effects* of the end-of-life obligations do not conflict with the priority scheme in the [*Bankruptcy and Insolvency Act*, RSC 1985, c B-3].
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> (Emphasis in original)

[9] This analysis translates directly into the facts of this case. On this basis, there is no error in the Chambers judge's conclusion that the Ministry is not a creditor of Bow River. As in *Redwater*, the Ministry is acting in a regulatory capacity and exercising its powers in the public interest to enforce the fulfillment of the public duties Bow River assumed when it obtained oil and gas well licences from the Ministry. The Court in *Redwater* held that a regulator exercising a power to enforce a public duty is not a creditor of the person who is subject to that duty. Similarly, while it may receive funds through its enforcement efforts, the Ministry, like the regulator in *Redwater*, does not stand to gain financially from enforcing *The Oil and Gas Conservation Act* and regulations thereunder. As the Chambers judge concluded, the Ministry is not a "creditor" within the meaning of the first part of the *Abitibi* test.

[10] Since the Ministry is not a creditor, its claim is not provable in bankruptcy. This means there is no basis to set aside the *Decision*. As occurred in *Redwater*, the conclusion under the first part of the *Abitibi* test is sufficient to resolve the RM's appeal. In short, the Chambers judge's determinations that the Ministry's claim is not provable in bankruptcy and that the Ministry therefore ranked in priority to the RM withstand appellate scrutiny.

[11] In the result, I would dismiss the appeal largely for the reasons of the Chambers judge on the issues of the nature and scope of the *CCAA* orders and under the first part of the *Abitibi* test. There is no need to examine the RM's criticism of other parts of the *Decision*. I would make no order as to costs.

"Caldwell J.A."

Caldwell J.A.

I concur.

"Leurer C.J.S."

Leurer C.J.S.

I concur.

"Jackson J.A."

Jackson J.A.