KING'S BENCH FOR SASKATCHEWAN

Citation: **2023 SKKB 52**

Date: **2023 03 07**
Docket: QBG-RG-01705-2020
Judicial Centre: Regina

BETWEEN:

RURAL MUNICIPALITY OF EYE HILL

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

Counsel:

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

JUDGMENT
March 7, 2023

McCREARY J.A.
ex officio

I. OVERVIEW

[1] This judgment rises from the matter of the receivership of Bow River Energy Ltd. [Bow River]. The applicant, Rural Municipality of Eye Hill [RM], applies

for adjudication of the issue of priority distribution of residual proceeds from the sale of the assets of Bow River.

[2] BDO Canada Limited is the court-appointed receiver [BDO or Receiver] in the Alberta and Saskatchewan receivership proceedings of Bow River.

[3] Bow River is an Alberta-based oil and gas company with assets in Alberta and Saskatchewan. Bow River was granted licences to extract oil and gas in Saskatchewan on the basis that it assumed the end-of-life environmental obligations to abandon the wells so that they do not leak, remove surface infrastructure and remedy any contamination [Environmental Obligations].

[4] The Bow River receivership proceedings followed failed proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*]. Bow River ceased operations after its regulators would not agree to proposed transactions, which would have left several oil and gas assets unsold and millions of dollars in Environmental Obligations unaddressed. To prevent these Environmental Obligations from falling to the Saskatchewan Oil and Gas Orphan Fund [Orphan Fund], the respondent, the Minister of Energy and Resources [MER], sought the appointment of the Receiver over Bow River's Saskatchewan assets.

[5] The Receiver completed its mandate, selling the assets it could. It now seeks to distribute the residual proceeds in the estate. At the Receiver's application for approval of the transactions and discharge, the Receiver proposed to distribute the proceeds to the MER to offset the unaddressed Environmental Obligations associated with the unsold oil and gas assets. The costs associated with addressing these obligations were estimated by the MER to be approximately $20 million, well in excess of the residual proceeds. It is the position of the Receiver and MER that distribution of

the residual proceeds to the MER is consistent with the Supreme Court of Canada's decision in *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5 at para 159, [2019] 1 SCR 150 [*Redwater*]. In that case, the court found that the receiver of an Alberta oil and gas company was bound to address environmental obligations before any distribution to a creditor.

[6] The RM, supported by the Rural Municipalities of Senlac No. 411, Grass Lake No. 381, Frenchman Butte No. 501, and Beaver River No. 622, disputes the applicability of *Redwater* in Saskatchewan, and in the circumstances of this receivership. The RM seeks, among other things, a declaration that the funds in the estate should be paid to address Saskatchewan municipal taxes owed by Bow River, in priority to monies owed to any other party by virtue of orders granted during the Alberta *CCAA* proceedings [*CCAA* Proceedings].

[7] Two issues arise from the RM's application:

(a) Is the RM entitled to $648,305.05 [*CCAA* Proceeds] as a result of the orders granted during the *CCAA* Proceedings?

(b) Are the residual proceeds required to be used to address Bow River's Environmental Obligations?

(i) Is the MER asserting a provable claim in bankruptcy in regard to its end-of-life obligations?

(ii) Does the timing of the issuance of the MER's order dated March 31, 2021 [Abandonment Order], impact priority?

(iii) Do municipal taxes owing to the RM create a lien pursuant to *The Municipalities Act*, SS 2005, c M-36.1, and, if a lien exists, does the Crown take priority over the RM pursuant to s. 320 of *The Municipalities Act*?

[8] For the reasons that follow, the RM's application is dismissed. The orders issued under the terminated *CCAA* Proceedings in Alberta do not apply to this receivership and, even if they did, no amounts were required to be paid to the RM or any other municipality during the *CCAA* Proceedings. Further, the MER's claim is not a claim provable in bankruptcy. Finally, any claim that the RM has does not attach to the assets of Bow River generally but, in the absence of further actions to enforce the debt, is limited to the statutory lien provided under s. 320 of *The Municipalities Act*. That provision provides for a priority in relation to the property to which the taxes relate, over all claims but those of the Crown. Crown claims are estimated at $2,151,301.81, which exceed the funds available for distribution. This all means that the Environmental Obligations must be satisfied by the Receiver from Bow River's estate in preference to satisfying what may otherwise be first-ranking claims by the RM.

II. BACKGROUND

1. The *CCAA* Proceedings

[9] On June 1, 2020, on Bow River's application to the Court of Queen's Bench of Alberta [Alberta Court], the Alberta Court granted an initial order pursuant to the *CCAA* [*CCAA* Initial Order]. Pursuant to the *CCAA* Initial Order, BDO was appointed monitor [Monitor].

[10] On June 10, 2020, the Alberta Court granted an Amended and Restated *CCAA* Initial Order [ARIO] (and, together with the *CCAA* Initial Order) [*CCAA* Orders], which included, among other things, at para. 9(c):

> A direction that the Applicant shall remit, in accordance with legal requirements or pay:
>
> ...
>
> Any amount payable to the Crown in Right of Canada or any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature of kind which are entitled at law to be paid in priority to claims of secured creditors and that are attributable to or in respect of the carrying on of the Business by the Applicant.

[11] Tax notices for 2020 were issued on July 27, 2020 (Beaver River), July 31, 2020 (Frenchman Butte), August 26, 2020 (Eye Hill) and August 31, 2020 (Senlac). Each of these notices allowed Bow River until December 31, 2020, to remit payment.

[12] Bow River, in cooperation with Sayer Energy Advisors and the Monitor, carried out a sales and investment solicitation process [SISP]. In total, the SISP resulted in offers on 98% and 95% of Bow River's producing properties in Alberta and Saskatchewan, respectively. The offers that were received would have left Environmental Obligations unaddressed, which led both Alberta and Saskatchewan regulators to express concerns.

[13] On October 6, 2020, the Alberta Court granted an order further extending the stay to October 30, 2020. At this time, Bow River expressed concerns with its financial position and its ability to carry on business in the ordinary course. It warned that it may have to stop restructuring efforts and wind-down its affairs in both Alberta

and Saskatchewan. Bow River also advised that it was not paying Saskatchewan property taxes, which were largely not due until December 31, 2020.

[14] On October 13, 2020, the Saskatchewan Ministry of Justice and Attorney General wrote to Bow River advising that because of the unaddressed Environmental Obligations, the MER would not support any potential transaction in respect of Saskatchewan assets arising from SISP. The decision of the Alberta Energy Regulator [AER] and Orphan Well Association [OWA] in Alberta and the MER in Saskatchewan caused Bow River to advise that it had exhausted all reasonable restructuring efforts and that it would cease operations in Alberta and Saskatchewan.

[15] On October 29, 2020, the Alberta Court approved the discharge of the Monitor following filing of a Monitor's certificate and authorized the repayment of the interim facility utilized to fund the *CCAA* Proceedings, as well as the break fee and deposit to the company that had advanced a stalking horse bid under the sales process.

[16] The Monitor filed the Monitor's certificate on November 9, 2020, officially ending the *CCAA* Proceedings.

2. The Receivership Proceedings

[17] On October 28, 2020, this Court granted an order for the appointment of BDO as receiver over the Saskatchewan assets of Bow River [Receivership Order]. A similar application was made by the Alberta OWA with respect to the Alberta assets, and an order was granted in Alberta on October 29, 2020.

[18] After the commencement of the receivership proceedings in Alberta and Saskatchewan, the Receiver received cash from Bow River's accounts in the amount of $2,091,306.57. The existence of these funds was first reported on November 23, 2020,

in the Receiver's first report in the Alberta receivership proceedings, which was served on both the Alberta and Saskatchewan service lists and posted on the Receiver's website. The funds were apportioned on a *pro rata* basis, allocating 69% ($1,443,001.53) to Alberta proceedings and 31% ($648,305.05) to Saskatchewan proceedings. Receipt of the $648,305.05 was included in the Receiver's first report.

[19] In order to minimize costs and because a sales process with respect to Saskatchewan assets had recently been conducted during the *CCAA* Proceedings, the Receiver, at the request of the MER, pursued negotiations with previously interested parties rather than undertaking a full remarketing program. The Receiver subsequently reached an agreement with Heartland Oil Corporation, who had expressed an interest during the *CCAA* Proceedings, and the Tallahassee Exploration Inc., who provided an offer in the receivership proceedings which was pursued after an agreement was not reached with a previously identified bidder, collectively [Proposed Transactions].

[20] Along with the cash consideration to be paid by the purchasers, the consummation of the Proposed Transactions would result in the purchasers assuming responsibility for an estimated total of approximately $6 million of environmental liabilities, which would otherwise become the responsibility of the MER's Orphan Fund. This left approximately $20 million in environmental liabilities unaddressed.

[21] Following service of the Receiver's application materials for approval of the transactions, discharge and distribution of residual proceeds in the estate to offset Bow River's remaining environmental liabilities, the Receiver became aware that certain municipalities were asserting entitlement to the funds in the estate. This included three municipalities that were not impacted by the Proposed Transactions.

[22] On March 29, 2021, this Court granted the following distribution and discharge orders at the request of the Receiver [D&D Order]:

(a) sale approval and besting orders approving the Proposed Transactions; and

(b) an order providing for, *inter alia*:

(i) the sealing of the confidential supplement;

(ii) immediately discharging the Receiver in respect of the unsold assets;

(iii) the approval of the Receiver's accounts without the necessity of a formal passing of accounts;

(iv) approval and ratifying the activities and actions of the Receiver to date;

(v) authorizing the Receiver to distribute the residual proceeds to the MER, provided no application was filed opposing that distribution, by April 28, 2021; and

(vi) the full discharge of the Receiver upon the filing of the Receiver's certificate.

[23] On March 31, 2021, MER issued an Abandonment Order related to Bow River's end-of-life obligations on its remaining oil and gas assets.

[24] On April 28, 2021, the RM filed this application.

III. ANALYSIS

1. The RM is not entitled to monies as a result of the *CCAA* Orders made in Alberta

[25] The RM asserts a claim to funds received by the Receiver following commencement of the receivership based on orders issued in the *CCAA* Proceedings in Alberta.

[26] I find that the RM is not entitled to those funds. This is because the *CCAA* Orders are not applicable to these proceedings and, in the alternative, no amounts were required to be paid during the *CCAA* Proceedings under the *CCAA* Orders relied on.

[27] Simply put, the provision the RM relies upon in the *CCAA* Orders to support its argument that it is entitled to monies pursuant to those orders is irrelevant in this receivership proceeding. Bow River's receivership in Saskatchewan is governed by different legislation in a different province than the *CCAA* Proceedings. Even if the *CCAA* Orders had created a priority with respect to the funds in Bow River's accounts, any such priority would be superseded by s. 17 of the Receivership Order, which grants a priority to the Receiver over "all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4) and 81.6(2)" of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3. The exceptions set out in ss. 14.06(7), 81.4(4) and 81.6(2) do not apply to municipal taxes.

[28] I further find that no amount was required to be paid by Bow River during the *CCAA* Proceedings. While the RM relies on para. 9(c) of the ARIO to support its entitlement to the Saskatchewan portion of the receivership funds, this paragraph does

not assist it. Para. 9(c) states that Bow River shall remit, in accordance with legal requirements, or pay:

> Any amount payable to the Crown in Right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and that are attributable to or in respect of the carrying on of the Business by the Applicant.

[29] Read as a whole, para. 9 contemplates any amount payable to: first, the Crown in Right of Canada; second, the Crown in Right of any Province; and third, the claims of municipalities. This order of priorities accords with, and is specifically contemplated in *The Municipalities Act*. Section 320(1)(b) of that *Act* grants a lien for the taxes due on a property, which "are collectable by action or distraint in priority to every claim, privilege, lien or encumbrance, except that of the Crown". Paragraph 9 of the ARIO makes it clear that the intent is for Bow River to comply with "legal requirements"; it does not create new requirements.

[30] In addition, during the *CCAA* Proceedings, there were no amounts required at law to be paid. The 2020 tax bills were issued during the *CCAA* Proceedings and the amounts due were not required to be paid until December 31.

[31] On September 28, 2020, Bow River informed the Alberta Court in the *CCAA* Proceedings, through an affidavit, that its cash flow forecasts assumed:

> 34 (c)…the Company will only pay the pro-rated portion of the post-filing non-linear property taxes on producing properties in Alberta, excepting where the property taxes are so immaterial that the Company will nonetheless emit payment of them. It generally does not account for payment of Saskatchewan property taxes, which largely are not due until December 31, 2020.
>
> [Affidavit No. 4 of Daniel G. Belot]

[32] According to the Alberta Template Orders Committee, para. 7 of the template *CCAA* Initial Order requires (para. 9 in the ARIO):

> The Applicant to remit or pay statutory deemed trust amounts in favour of the Crown, sales taxes, and any amounts payable to the Crown or other taxation authority in respect of municipal or other taxes ranking ahead of secured creditors. This paragraph applies only to amounts arising or to be remitted after the Order, unless otherwise ordered by the Court.

[33] The Alberta Court had been advised that Bow River was not paying most Saskatchewan municipal taxes during the *CCAA* Proceedings. The RM also knew this, or should have known this; no rural municipality in Saskatchewan, including the RM, sought an order for payment from the Alberta Court.

[34] There were two applications for distribution of funds made during the *CCAA* Proceedings: one pertaining to a settlement agreement between Bow River and Husky Energy Inc., and the other to the payment of the 2270943 Alberta Ltd.'s stalking horse break fee in the *CCAA* Proceedings. These two applications were ultimately granted. Neither the RM, nor any other rural municipality in Saskatchewan, asserted any claim to these funds.

[35] I agree with the Receiver that a creditor should not be permitted to lie in the weeds, waiting for the most appropriate moment to raise a claim to try to gain an advantage not available to other creditors: see, *Enron Canada Corp. v National Oil-Well Canada Ltd.*, 2000 ABCA 285 at para 18, 193 DLR (4th) 314. If the RM believed it was entitled to funds during the *CCAA* Proceedings, it should have advanced the claim at that time. The RM is seeking to assert a trust claim over funds that have long since been spent to fund receivership proceedings initiated for the benefit of all stakeholders.

[36] The RM argues that the *CCAA* Proceeds were impressed with a trust to be dealt with in accordance with the *CCAA* Orders and therefore were not available to pay receivership fees and expenses. However, I find that neither the *CCAA* Orders nor *The Municipalities Act* created a trust with respect to the funds in Bow River's account.

[37] For a trust to exist, there must be certainty of intent, of subject matter and of object: *Air Canada v M & L Travel Ltd.*, [1993] 3 SCR 787 at 803–804. I find that these requirements are not present in the circumstances of this receivership.

[38] First, there is no certainty of intent or object. The Receiver says, and I accept, that it was unaware of any such trust being in existence in relation to the funds. The *CCAA* Orders do not establish a trust; they simply require that the debtor comply with the law regarding payments.

[39] Second, there is no certainty of subject matter. Funds were distributed during the *CCAA* Proceedings and the funds in Bow River's bank accounts were co-mingled with no distinction between Saskatchewan and Alberta operations. Consequently, there cannot be certainty as to which funds the RM's trust claim would attach.

[40] The RM contends that a constructive trust has arisen which entitles it to proceeds from the *CCAA* Proceedings. However, it is key that the fundamental purpose of a constructive trust is to redress unjust enrichment: see, *Pettkus v Becker*, [1980] 2 SCR 834. In this case, the funds in question were used to fund a receivership for the benefit of all stakeholders. The result of this was the sale of certain assets, which enabled continued oil and gas production which, in turn, enabled the RM to levy further taxes. There is no evidence that there has been unjust enrichment on these facts.

[41] I also find that, at most, the RM has a lien specific to the property to which the taxes relate. Section 320 of *The Municipalities Act* provides:

> **Lien for taxes**
>
> **320**(1) The taxes due on any property:
>
> (a) are a lien against the property; and
>
> (b) are collectable by action or distraint in priority to every claim, privilege, lien or encumbrance, except that of the Crown.
>
> (2) A lien, and its priority, mentioned in this section are not lost or impaired by any neglect, omission or error of any employee of the municipality.

[42] The definition of "property" under s. 2(1)(gg) of *The Municipalities Act* is "land or improvements or both". It does not include proceeds. The RM therefore has no priority claim to the Saskatchewan funds in the receivership.

[43] Finally, the D&D Order did not provide that just any application could be made regarding the *CCAA* Proceeds. In my July 5, 2021 fiat, I confirmed that the D&D Order allowed applications in regard to the **residual proceeds**, as that term is defined at para. 40 of the First Report of the Receiver. Thus, the RM's claim regarding the *CCAA* Proceeds also fails because the claim falls outside the permissible applications under the D&D Order.

[44] In summary on this issue, I find that the RM is not entitled to any monies in this receivership proceeding as a result of orders made in the Alberta *CCAA* Proceedings.

2. The funds must be used to address Bow River's Environmental Obligations

(a) The MER is not asserting a provable claim in bankruptcy in regard to its end-of-life obligations

[45] In *Redwater*, the majority of the Supreme Court of Canada held that for an environmental obligation to be considered a claim provable in bankruptcy, the three requirements set out in *Newfoundland and Labrador v AbitibiBowater Inc.*, 2012 SCC 67 at para 26, [2012] 3 SCR 443, must be met [*Abitibi* test]. The test requires: "[f]irst, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation" (*Redwater* at para 119, emphasis in original). The Supreme Court clarified that the third prong of the test is generally called the "sufficient certainty" step and focuses on whether the regulator will ultimately perform the environmental work and assert a monetary claim for reimbursement (*Redwater* at para 121). Each of the three parts of the test must be satisfied to find that the Environmental Obligations constitute a claim provable in bankruptcy.

[46] I find the reasoning in *Redwater* clearly applies to the circumstances of this receivership and that none of the three parts of the test are met in this case.

[47] *Redwater* is relevant and applicable to this case because Saskatchewan's *The Oil and Gas Conservation Act*, RSS 1978, c O-2 [*Act*], is based on Alberta's regime, which was the subject of the *Redwater* decision. As with Alberta's regime, the *Act* defines "licensee" to include a trustee or receiver-manager (s. 2(1)(h.2)), requires licensees to be responsible for abandonment and reclamation of obligations (s. 15), requires ministerial approval to transfer a license (s. 9.2), and permits the MER to

collect security where a transfer would negatively impact a party's liability management rating (see: *Directive PNG025: Licensee Liability Rating (LLR) Program*, ver. 2.0 (Government of Saskatchewan, June 2019) at 4.2 (now: *Directive PNG025: Financial Security Requirements*, ver. 3.0 (Government of Saskatchewan, January 2023) at 3.0). The Alberta provisions upon which the Saskatchewan provisions are based were discussed at length in *Redwater* at para 124.

[48] Of course, the Receiver must comply with valid provincial laws during an insolvency that cannot be reduced to provable claims: *Redwater* at paras 21, 47, 69, 76, 104, 105, 107, 111, 113 and 114.

[49] The *Abitibi* test, as clarified in *Redwater*, should be applied to determine whether Bow River's Environmental Obligations constitute provable claims. The MER has two types of claims it is asserting: (1) claims as a creditor related to amounts owing to the MER in respect of levies of $46,946.23; and (2) claims related to the unaddressed Environmental Obligations associated with the unsold assets. The focus of this application is on the Environmental Obligations claim, the magnitude of which would render it unnecessary to conduct a claims process as there would be no funds available for creditors.

(i) The MER is not a creditor

[50] Turning to the first part of the test, I find that the MER is not a creditor.

[51] In *Redwater* at para 124, the Supreme Court found that a regulator exercising a power to enforce a public duty is not a creditor of the individual or corporation subject to that duty. The court noted that in attempting to enforce Redwater Energy Corporation's environmental obligations, the regulator was acting in a *bona fide* regulatory capacity and did not stand to benefit financially: *Redwater* at para 128. Just

as in *Redwater*, the MER does not own property and does not stand to benefit financially by enforcing the Environmental Obligations. As such, it is clear that the MER is not a creditor of Bow River.

(ii) Bow River's Environmental Obligations arose upon issuance of the licence

[52] The second part of the test considers the timing in which the obligation arose. The debt, liability or obligation must be incurred before the debtor becomes bankrupt. The RM asserts that the obligation arose after the receivership through the issuance of the Abandonment Order. However, I do not accept that argument. I find that Bow River's Environmental Obligations were incurred from the date its licences for the wells were granted.

[53] In *Redwater*, the Supreme Court affirmed the decision in *PanAmericana de Bienes y Servicios v Northern Badger Oil & Gas Limited*, 1991 ABCA 181 at para 32, 81 DLR (4th) 280 [*Northern Badger*], which held that environmental obligations were "inchoate from the day the wells were drilled, for their ultimate abandonment". At para. 143 of *Redwater*, Wagner C.J.C. cited *Northern Badger* with approval and later confirmed that end-of-life obligations form a part of the licence from its grant:

> [157] ... All licences held by Redwater have been received by it subject to the end-of-life obligations that would one day arise. These end-of-life obligations form a fundamental part of the value of the licensed assets, the same as if the associated costs had been paid up front. Having received the benefit of the Renounced Assets during the productive period of their life cycles, Redwater cannot now avoid the associated liabilities. ...

[54] Accordingly, in this case, the Abandonment Order did not create the obligation; it simply established the timing for the obligation to be performed. Bow

River's duty to perform end-of-life obligations was embedded in its licence. Licencing requirements predate bankruptcy and apply to all licensees: *Redwater* at para 158. As a result, the date of the Abandonment Order does not impact Bow River's duty to perform end-of-life obligations.

[55] Further, in *Manitok Energy Inc. (Re)*, 2022 ABCA 117, 468 DLR (4th) 434 [*Manitok*], which was issued after this application was heard, the Alberta Court of Appeal followed the above-noted reasoning in *Redwater* and overturned the decision of the chambers judge in *Manitok Energy Inc. (Re)*, 2021 ABQB 227, [2021] 7 WWR 557, finding it was directly contrary to *Redwater*, which was binding on it. The Alberta Court of Appeal concluded as follows:

> [41] In summary, neither the existence of enforcement orders nor the sequence in which enforcement action is taken is relevant to the Receiver's duty to discharge public environmental obligations. It is irrelevant that no enforcement orders were ever issued with respect to the Persist assets, because the proceeds of the sale of those assets are still a part of the Manitok bankruptcy estate. Contrary to what is implied in the reasons at paras. 39, 42 [of the Chambers judge's decision], the fact that the Persist assets were sold before any enforcement orders were issued is not relevant.

[56] I adopt the reasoning of the Alberta Court of Appeal and similarly conclude that the date of the Abandonment Order is irrelevant to the Receiver's duty to discharge public environmental obligations. Bow River's Environmental Obligations existed from the issuance of its license.

(b) It is not sufficiently certain the abandonment and reclamation work will be carried out

[57] The third part of the *Abitibi* test says that it must be possible to attach a monetary value to the debt, liability or obligation. This is the "sufficient certainty"

portion of the test which considers whether it is adequately definite that the regulator will perform the environment work and seek reimbursement: *Redwater* at para 140.

[58] The RM argues that the Bow River receivership is distinguishable from the facts of *Redwater* because there is a real and sufficient certainty that the MER will perform the work, and will seek reimbursement. The RM further maintains that the differences between the Alberta and Saskatchewan regulatory regimes also makes the Bow River receivership distinguishable from *Redwater*.

[59] However, it is my view that the only notable difference between the regulatory regimes of Alberta and Saskatchewan is that, in Alberta, the AER has delegated to the OWA its statutory authority to abandon and reclaim orphan wells. In Saskatchewan, the MER has a dual function: (1) as a creditor who collects the orphan levy; and (2) as a regulator who enforces the regulatory obligations of Bow River for the protection of the public. In Saskatchewan and Alberta, the abandonment and reclamation work is funded by the Orphan Fund. I accept, as the MER submits, that nothing significant turns on this distinction as it relates to the "sufficiently certain" test. While Wagner C.J.C. noted the OWA's independent, non-profit status, he declined to decide whether the *Abitibi* test always requires the environmental work be carried out by the organization itself (*Redwater* at para 147). Thus, the third prong of the *Abitibi* test employed in *Redwater* did not turn on OWA's degree of independence from the AER. Rather, it turned on whether it was sufficiently certain that the OWA would perform the abandonments and advance a claim for reimbursement:

> [153] ... In sum, the chambers judge erred in failing to consider whether the OWA can be treated as the regulator and in failing to appreciate that, even if it can, it is not sufficiently certain that the OWA will in fact perform the abandonments and advance a claim for reimbursement.

[60] It follows that the determinative point is whether it is sufficiently certain that the work will be performed.

[61] The MER's evidence is that it "fully intends to carry out Bow Rivers [*sic*] closure work and Environmental Obligations as required under the [*Act*]": Affidavit of Candy Dominique, sworn February 18, 2022 [*Dominique Affidavit #2*] at para. 8. However, the MER has also noted several constraints that may impact its ability to do so, including limited funds, availability of service providers and risk of further insolvencies.

[62] The MER also provided evidence that the timing of the abandonment and reclamation work is subject to constraints such as available service providers to carry out the work and available funds and that it will take "several years" to carry out the work: see *Dominique Affidavit #2* at para. 8. The MER's evidence was that there are currently 95 orphaned licensees in Saskatchewan, with associated closure work costs of approximately $39 million. However, as of January 31, 2022, the Orphan Fund held $5,304.351. As of February 18, 2022, the Orphan Fund had approximately 500 wells in the queue for abandonment work: *Dominique Affidavit #2* at paras. 8-10. Because the orphan program typically only has the capacity to abandon between 40 and 80 wells per fiscal year, I accept the MER's contention that it will take a number of years to carry out the work. The timeline suggested by the MER is similar to that in *Redwater,* where it was estimated that it would take approximately ten years to clear the backlog of orphan wells (*Redwater* at para 151). Chief Justice Wagner determined that, given the ten-year timeline, it was difficult to predict anything with sufficient certainty (*Redwater* at para 152).

[63] Here, the evidence demonstrates that the MER's current intention is to complete the closure work. However, it is much less clear whether and when such work

will occur. Even if MER is able to eventually complete the work, its evidence is that while it can seek reimbursement from a licensee for costs should it address the Environmental Obligations, "[d]ue to the insolvency of Bow River and the resignation of all directors and officers, there is no means to collect these environmental costs": Affidavit of Candy Dominique, sworn February 18, 2022 at para. 9.

[64] Based on all this evidence, I find that due to the various constraints and the scheduling timeline, it is not sufficiently certain the abandonment and reclamation work will be carried out.

[65] In the result, none of the three elements of the *Abitibi* test are made out. As such, the MER claim is not a claim provable in bankruptcy.

(c) Regardless of whether the RM has a lien pursuant to *The Municipalities Act*, it does not alter the preference of the MER's claim

[66] The RM argues that, pursuant to *The Municipalities Act*, municipal taxes on resource production equipment create a lien. It relies on the Alberta Court of Queen's Bench chambers decision in *Manitok*, for the proposition that lien holders have priority. However, on appeal from that decision, the Alberta Court of Appeal determined that even if a claimant's lien survives in proceeds held in trust, it is to be dealt with in accordance with the *Redwater* principles (*Manitok* at para 42). The fact that a lien exists and monies are held in trust through a trust order in a receivership does not reorder the priorities in an insolvency.

[67] Given this finding, which I adopt, it is unnecessary for me to consider whether the RM actually has a lien.

[68] Further, and in any event, if a lien exists, I find that the Crown takes priority over the RM pursuant to s. 320 of *The Municipalities Act*, which requires that the RM's claim would be subject to the claim of the Crown. Section 136 of the *Bankruptcy and Insolvency Act*, is of no assistance to the RM on this issue as it only applies in respect of bankruptcies, not receiverships.

IV. CONCLUSION

[69] For all these reasons, the RM's application is dismissed. The residual proceeds held by the Receiver (as that term is defined at para. 40 of the First Report of the Receiver) should be distributed to the MER.

[70] The MER is entitled to the costs of this application, on Column II.

J.A.
M.R. McCREARY
ex officio