

Holding the Bag: Re Redwater and the Road Ahead

Alberta | Environmental Law | Insolvency & Restructuring | Insolvency law | Litigation | Litigation & Dispute Resolution

22 June 2016

I'll leave the proselytizing on the Fort McMurray wildfires and notions of karma to the pundits. What I want to talk about is the insolvency scene in Alberta's oil and gas industry.

There must be about 50 different ways one could look at the recent decision of the Alberta Court of Queen's Bench in *Re Redwater Energy Corp.*, 2016 ABQB 278. But one thing is clear: the soul-searching on the "three Es" (energy, environment and economy... I may have just made that up, but it sounds good, right?) in Alberta is only just beginning and the world of bankruptcy and insolvency is taking part in its own endearingly pedantic way.

For those who haven't read the decision and would prefer not to, allow me to give you the high points. Redwater Energy Corp – a smaller oil and gas enterprise with assets in Alberta – was put into receivership under the provisions of the *Bankruptcy and Insolvency Act* ("BIA") in May 2015. It is a truism that not all assets are created equal and oil wells are no different. Some of Redwater's oil well assets looked good and marketable; others, not so much. The Receiver, with its mandate to maximize return to the company's creditors, employees, shareholders, etc, chose to renounce rather than possess Redwater's uneconomic wells. The choice was an entirely rational one. If you can't sell it, why bother?

Well, the Receiver's decision nonetheless "bothered" the Alberta Energy Regulator and the Orphan Well Association. Presumably there are also environmentalists somewhere in Alberta and it probably bothered them too. Why? Abandoned well assets are environmental basket cases. Unmanaged, they (like any petroleum hydro carbon asset) could become the source of environmental contamination.

Why should a Receiver be allowed to cherry pick its assets when it is supposedly appointed as receiver "of all of the Debtor's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof"?

The answer, according to Justice Wittmann of the Alberta Court of Queen's Bench, is: because the BIA says so.

Justice Wittmann ruled that although the Alberta Energy Regulator was properly entitled to make clean-up orders applicable to "licensees" under its Licensee Liability Rating ("LLR") Program, including Receivers in place of companies, there was an operational conflict between provincial legislation (the *Oil and Gas Conservation Act*) and federal legislation (the BIA) and therefore the constitutional principle of federal paramountcy won out. Under section 14.06 of the BIA, Receivers do in fact have the ability to renounce assets in this way.

Not shockingly, the Alberta Energy Regulator and the Orphan Well Association have recently taken steps to appeal the Queen's Bench decision.

And so, the soul-searching is set to continue.

I won't comment here on their chances of success on appeal. But let's be clear on the heart of the issue. This is not really a question about environmental responsibility vs. irresponsibility. This is about the identity of who gets left holding the bag. Should it be the creditors, employees or shareholders of the insolvent company? Or should the Alberta energy community as a whole shoulder the burden?

The answer to that question may depend on your politics. I'll leave that to the pundits as well.

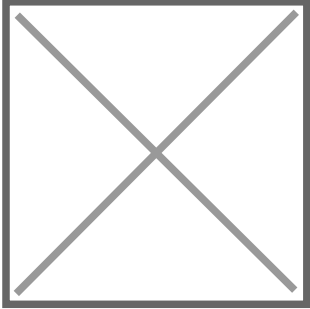
(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

Gardiner Roberts

Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com

Author



Tim Duncan