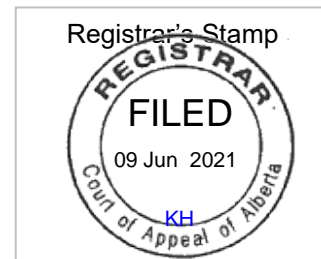


COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER: 2101-0085AC

TRIAL COURT FILE NUMBER /
ESTATE NUMBERS 25-2332583
25-2332610
25-2335351

REGISTRY OFFICE:
CALGARY



APPLICANT: ALVAREZ & MARSAL CANADA
INC. in its capacity as the Court-
appointed receiver and manager
of MANITOK ENERGY INC.

STATUS ON APPEAL: PROPOSED APPELLANT
STATUS ON APPLICATION: APPLICANT

RESPONDENTS: PRENTICE CREEK
CONTRACTING LTD.,
RIVERSIDE FUELS LTD. and
ALBERTA ENERGY
REGULATOR

STATUS ON APPEAL: PROPOSED RESPONDENT
STATUS ON APPLICATION: RESPONDENT

DOCUMENT: **MEMORANDUM OF ARGUMENT
OF THE RESPONDENT
ALBERTA ENERGY REGULATOR**

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Part I – Overview

1. This Memorandum of Argument is submitted by the Alberta Energy Regulator (**AER**) in support of the Application brought by Alvarez & Marsal Canada Inc., in its capacity as receiver (**Receiver** or **Applicant**) of Manito Energy Inc. (**Manitok**) for an order confirming that it has a right of appeal without leave under subsection 193(c) of the *Bankruptcy and Insolvency Act* (**BIA**)¹ of the Reasons for Judgment of the Honourable Madam Justice B.E.C. Romaine (**Chambers Judge**) entered March 24, 2021 (**Chambers Decision**),² or, if leave is required, for leave to pursue the appeal of the Chambers Decision under subsection 193(e) of the BIA (**Receiver's Application**).³
2. In relation to the Receiver's Application, the AER acts in its capacity as the single lifecycle regulator of upstream oil and gas development in Alberta and as a stakeholder in the Manitok receivership (**Receivership**), acting "in the public interest and for the public good"⁴ in ensuring the environmental obligations of licensees are met.
3. The AER is a quasi-judicial, administrative tribunal and the provincial body responsible for regulating energy development in Alberta. It was created under the *Responsible Energy Development Act* (**REDA**) with a legislated mandate to, *inter alia*, "provide for the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta".⁵ In carrying out its mandate, the AER establishes rules and issues licences, approvals, orders, decisions and directions in furtherance of the purposes of AER-administered legislation,⁶ and enforces the requirements of its administered legislation, including environmental obligations.
4. As part of the regulatory process involved in carrying out its mandate, the AER issues orders that require licensees to, *inter alia*, abandon licenced assets (*i.e.* abandonment orders), and to reclaim the land used in the operation of those assets.⁷ The AER issues abandonment

¹ RSC 1985, c B-3, s. 193(c) [**AER Authorities TAB 1**].

² *Manitok Energy Inc (Re)*, 2021 ABQB 227 (Chamber Decision) [**AER Authorities TAB 2**].

³ BIA, s. 193(e) [**AER Authorities TAB 1**].

⁴ *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 (*Redwater SCC*) [**AER Authorities TAB 3**].

⁵ SA 2012, c R-17.3, s. 2 [**AER Authorities TAB 4**].

⁶ The AER-administered legislation that relates to this matter, in addition to REDA, are the *Oil and Gas Conservation Act*, RSA 2000, c O-6 (OGCA) [**AER Authorities TAB 5**], *Pipeline Act*, RSA 2000, c P-15 (*Pipeline Act*) and the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12.

⁷ As set out in *Manitok Energy Inc (Re)*, 2021 ABQB 227 (Brief of the Respondent, Alberta Energy Regulator) (**AER's Brief of Law**) filed with the Court of Queen's Bench for this matter, paras 8 and 9. [**AER Authorities TAB 6**].

orders for various reasons, including when it "considers that it is necessary to do so in order to protect the public or the environment."⁸ The environmental obligations of the Manitok estate that are engaged in this matter are the abandonment and reclamation obligations of its AER-licensed oil and gas assets.⁹

Part II – Facts

5. The AER adopts the facts as stated in the Memorandum of Argument of the Applicant (**Applicant's Memorandum**), as well as those set out in the AER Brief of Law and the accompanying Affidavit of Laura Chant filed October 8, 2020 with the Alberta Court of Queen's Bench, as Respondent to the Receiver's Queen's Bench Application which was considered in the Chambers Decision.¹⁰
6. The AER states that all of the purchased assets¹¹ from the Manitok estate that were sold in the Persist Sale¹² are AER-licensed assets. Pursuant to its mandate, the AER has regulatory jurisdiction over the licences of all of the purchased assets in the Persist Sale, including the final approval of the transfer of licences from one party to another. The AER exercised its regulatory discretion in approving the transfer of the licences in the Persist Sale.¹³
7. Additionally, the AER states that all of the unsold oil and gas assets from the Manitok estate¹⁴ are AER-licensed assets.

Part III – Law and Application

A. Appeal as of Right, without Leave

8. The AER supports the Receiver's application for an appeal as of right, without leave as set out in the Applicant's Memorandum.¹⁵

⁸ OGCA, s. 27(3) [AER Authorities TAB 5].

⁹ An overview of the AER's administered legislation and related processes for this matter is set out in the copy of the AER's Brief of Law, paras 6-13 [AER Authorities TAB 6], with reference to *Manitok Energy Inc (Re)*, 2021 ABQB 227 (Brief of the Respondent, Alberta Energy Regulator, Affidavit of Laura Chant) (**Affidavit of Laura Chant**), paras 2, 8 and 18 [**AER Authorities TAB 7**], filed by the AER on October 8, 2020 with the Alberta Court of Queen's Bench as Respondent to the Receiver's Queen's Bench Application that was decided in the Chambers Decision.

¹⁰ Together, the "**AER's Application Materials**" [AER Authorities TAB 6 and TAB 7].

¹¹ As described in the Applicant's Memorandum, paras 11-13.

¹² As defined in the Applicant's Memorandum, para 11.

¹³ Affidavit of Laura Chant, para 6 [AER Authorities TAB 7].

¹⁴ As described in the Applicant's Memorandum, paras 14-16.

¹⁵ Applicant's Memorandum, paras 20-25.

B. Leave to Appeal

9. If there is no appeal as of right, the AER adopts the argument of the Applicant as set out in the Applicant's Memorandum¹⁶ and submits that the factors overwhelmingly favour granting leave for the Receiver's appeal.

- i. The Appeal is of Significance to the Practice

10. In addition to the arguments raised in the Applicant's Memorandum, the AER submits the following points regarding the significance of this appeal to the practice and in support of the merits of the Receiver's application.
11. The Chambers Decision is one of only a few decisions that considers the application of *Redwater SCC*¹⁷ to the question of which estate assets are available to satisfy an estate's environmental obligations. The AER is aware of two other applications for the distribution of estate funds that have been adjourned or delayed pending the outcome of the Receiver's Application.¹⁸ The question of under what circumstances priority is to be given to the satisfaction of environmental obligations in preference to the claims of other creditors is of significance to the practice.
12. If left unchallenged, the Chambers Decision, has the potential to significantly limit the funds available in an estate to address an insolvent licensee's environmental obligations. This in turn could have a significant impact on the public interest in ensuring that a licensee's environmental obligations are met.¹⁹
13. To mitigate this outcome, the Chambers Decision effectively imposes a requisite chronology in which the AER must issue abandonment orders against all of the assets of an insolvent licensee at the outset of an insolvency in order to have the sale proceeds of any of such assets subsequently sold available to address the environmental liability of an insolvent licensee's estate.²⁰

¹⁶ Applicant's Memorandum, paras 26-36.

¹⁷ *Redwater SCC* [AER Authorities TAB 3].

¹⁸ *Orphan Well Association v. Bow River Energy Ltd.*, Queen's Bench of Alberta Court file no. 2001-13391 and *Orphan Well Association v. Trident Exploration Corp. et al*, Queen's Bench of Alberta Court file no. 1901-06244.

¹⁹ *Redwater SCC*, para 122 [AER Authorities TAB 3].

²⁰ Chambers Decision, paras 39-42. The Chambers Judge seeks to distinguish *Redwater SCC* on the basis that the AER had not issued abandonment or reclamation orders against the Manito estate's unpurchased assets before the purchased assets were sold in the Persist Sale.

14. The requirement to issue abandonment orders at the outset of an insolvency, even where there are no immediate public safety & environmental risks to be mitigated, could constrain the AER's discretion in issuing these orders, and may influence insolvency professionals' decisions whether to operate or sell those assets.
15. Based on the foregoing, the AER submits that the potential impact of the Chambers Decision on its regulatory processes, insolvency professionals, and the practice of insolvency law are significant.

ii. The Appeal is Significant to the Action Itself

16. As the Receiver has set out in the Applicant's Memorandum,²¹ if granted, the Appeal would conclusively determine that the Holdbacks²² must be used in partial satisfaction of the Manitok estate's environmental obligations, which would also determine that the Holdbacks are unavailable to satisfy the Lien Claims.²³ Accordingly, the Appeal is potentially determinative of the action itself.

iii. The Appeal is *Prima Facie* Meritorious

17. The AER adopts the submissions of the Applicant that the appeal is *prima facie* meritorious and that the Chambers Judge erred in law "by adopting an unnaturally narrow interpretation of the Supreme Court of Canada's decision in *Redwater SCC*."²⁴
18. To expand briefly on some of the errors in the Chamber Decision identified in the Applicant's Memorandum, the AER submits that:
 - a. The Chambers Judge erred in failing to correctly apply the central finding in *Redwater SCC* that insolvent estates must comply with ongoing environmental obligations of the estate that are not provable claims in bankruptcy,²⁵ and that those obligations must be discharged in priority to paying secured creditors.²⁶

²¹ Applicant's Memorandum, para 30.

²² As defined in the Applicant's Memorandum at para 1.

²³ As defined in the Applicant's Memorandum at para 7.

²⁴ Applicant's Memorandum, para 33.

²⁵ *Redwater SCC*, para 162 [AER Authorities TAB 3]. As this Court identified in *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABCA 16 (*Perpetual*), at para 92, the non-constitutional issue in *Redwater* was focused on whether or not the reclamation obligations were a provable claim in bankruptcy [AER Authorities TAB 8].

²⁶ *Redwater SCC*, para 163 [AER Authorities TAB 3] and as summarized by this Court in *Perpetual*, paras 94 and 95 [AER Authorities TAB 8].

- b. The Chambers Decision erred in mischaracterizing the nature of the Manitok estate's environmental obligations as only coming into effect at the time that the abandonment orders were issued. As this Court recently held in *Perpetual*, "[abandonment and reclamation obligations] exist whether or not abandonment notices have been issued by the Alberta Energy Regulator."²⁷ Abandonment orders do not create the environmental obligations of a licensee of AER-licensed assets; abandonment orders are the statutory tool for the enforcement of existing environmental obligations.
- c. The Chambers Judge erred by taking out of context select portions of *Redwater SCC* that concern the issue of constitutional paramountcy, the personal liability of trustees²⁸ and the priority for environmental claims provable in bankruptcy affecting real property or an immovable,²⁹ and relying on them to limit the obligations of an insolvent estate to comply with its environmental obligations that are not provable claims.³⁰ The doctrine of constitutional paramountcy, the personal liability of trustees and priority for provable environmental claims affecting real property or an immovable are not at issue in the Manitok Receivership.
- d. Additionally, even if these select portions of *Redwater SCC* were relevant, the Chambers Judge erred by misconstruing *Redwater SCC* by isolating and relying on select and partial statements without adequate consideration of the facts or issues being considered therein in order to restrict the central finding of *Redwater SCC*.
- e. The Chambers Judge erred in finding that the Holdbacks were not part of the estate for the purposes of addressing the environmental obligations of the estate.³¹ As the Applicant notes,³² the proceeds from the sale of the estate assets were to "stand in the place and stead" of those assets in the SAVO.³³ The use of sale proceeds of AER-licensed assets held in trust pending the resolution of claims to those funds for the purposes of addressing an insolvent estate's environmental obligations is expressly directed in *Redwater SCC*.³⁴

²⁷ *Perpetual*, para 87 [AER Authorities TAB 8].

²⁸ BIA, ss. 14.06(2) and 14.06(4) [AER Authorities TAB 1].

²⁹ BIA, s. 14.06(7) [AER Authorities TAB 1].

³⁰ Chambers Decision, paras 33-42 [AER Authorities TAB 2].

³¹ Chambers Decision, paras 43-44 [AER Authorities TAB 2].

³² Applicant's Memorandum, para 33(d).

³³ As defined in the Applicant's Memorandum at para 11.

³⁴ *Redwater SCC*, para 163 [AER Authorities TAB 3].

iv. No Undue Delay

19. The AER is also agreeable to having the Appeal heard on an expedited basis to avoid any delay beyond what is absolutely necessary.

Part IV – Relief Sought

20. The AER respectfully requests a determination that the Applicant may pursue its proposed Appeal as of right, or alternatively a determination granting it leave to do so.

ALL OF WHICH IS SUBMITTED THIS 9th DAY OF JUNE, 2021.



Maria Lavelle, Legal Counsel, Alberta Energy Regulator