COURT OF APPEAL OF ALBERTA

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COURT OF APPEAL FILE NUMBER:	2101-0085AC
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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:	APPELLANT
RESPONDENTS:	PRENTICE CREEK CONTRACTING LTD., RIVERSIDE FUELS LTD. and ALBERTA ENERGY REGULATOR
STATUS ON APPEAL:	RESPONDENTS
DOCUMENT:	**FACTUM OF THE APPELLANT**

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Appeal from the Order of
The Honourable Madam Justice B.E.C. Romaine
Dated the 24th day of March, 2021
Filed the 10th day of June, 2021

FACTUM OF THE APPELLANT

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OVERVIEW

1 The Receiver and Manager (**Receiver**) of Manitok Energy Inc. (**Manitok**) appeals a decision of the Honourable Madam Justice B.E.C. Romaine (**Chambers Justice**) relating to the entitlement to certain holdbacks (**Disputed Lien Holdbacks**) from the net proceeds of a sale of oil and gas assets by the Receiver.

2 The Chambers Justice ruled in her decision (**Chambers Decision**)[1] that the Disputed Lien Holdbacks should be used to satisfy certain lien claims, if valid, in preference to funding abandonment and reclamation obligations (**ARO**). This ruling was made despite a significant ARO shortfall in the Manitok estate, and was premised on the fact that the Disputed Lien Holdbacks were established from the net proceeds of a receivership sale that closed before the Alberta Energy Regulator (**AER**) issued abandonment orders regarding Manitok's remaining, unsold (and unsaleable) assets.[2]

3 Respectfully, the Chambers Decision was made in error and should be overturned. The Chambers Decision is premised on an erroneously narrow interpretation of what is indisputably the governing case from the Supreme Court of Canada: *Redwater*.[3] *Redwater* is not meaningfully distinguishable from this case. The Chambers Justice erred by ignoring the fundamental tenet of *Redwater*, being that a receivership estate must comply with valid regulatory laws, including by using estate resources to satisfy the ARO associated with unsold oil and gas assets. This obligation exists independently of whether (or when) abandonment orders are issued by the AER. The cost of complying with regulatory obligations is a public duty and the associated costs must be borne from the estate in priority to the payment of all provable claims of creditors, whether secured by liens or otherwise.

4 The Disputed Lien Holdbacks represent a portion of the net proceeds from the Receiver's sale of Manitok assets, as approved by the Court. They are an asset of the Manitok estate. Like all

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[1] Reasons for Decision of Justice Romaine, filed March 24, 2021, *Manitok Energy Inc Re*, 2021 ABQB 227, 25 Alta LR (7th) 412 [**Chambers Decision**] [Appeal Record of the Appellant, filed July 26, 2021 (**Appeal Record)** at **111-118**].

[2] Chambers Decision, *supra* note 1 at paras 39-43 [**Appeal Record at 116**].

[3] *Orphan Well Association v Grant Thornton Ltd,* 2019 SCC 5, [2019] SCJ No 5 (QL) [***Redwater***] [Appellant Book of Authorities (**Authorities)** at **Tab 1**].

other assets of the Manitok estate, the Disputed Lien Holdbacks cannot be distributed to creditors in satisfaction of their provable claims unless and until the estate's ARO shortfall is funded in full. As there are insufficient other funds in the Manitok estate to satisfy the ARO shortfall, the Disputed Lien Holdbacks should be released.

PART 1 – FACTS

A. Pre-Receivership builders' liens

5 Manitok was an oil and gas producer. It purchased goods and services from various parties, including Prentice Creek Contracting Ltd. (**Prentice**) and Riverside Fuels Ltd. (**Riverside**). Prentice and Riverside (together, the **Lien Claimants**) were not kept current by Manitok. As such, they registered builders' liens (**Liens**) and filed claims (**Lien Claims**).[4]

6 Prentice registered its Liens on December 7, 2017, in the amount of $392,106.27, plus interest and costs. It filed a Statement of Claim and Certificates of *Lis Pendens* (**CLPs**) on May 29, 2018. The Statement of Claim was amended by Prentice on June 1, 2018.[5]

7 Riverside registered its Liens on January 12, 2018, in the amount of $105,636.06, plus interest and costs. Riverside filed a Statement of Claim and CLPs on July 9, 2018. In February 2019, Riverside revised the amount of its claim down to $85,563.31, plus interest and costs. It did not make a corresponding amendment to its pleadings.[6]

B. The Receivership and the Receiver's sale to Persist

8 Manitok filed a notice of intention to make a proposal (**NOI**) under Division I of the *Bankruptcy and Insolvency Act* (**BIA**)[7] on January 10, 2018. The NOI proceedings failed. On February 20, 2018 (**Receivership Date**), Manitok was adjudged bankrupt. The Receiver was appointed concurrently by the Court, on application by Manitok's senior secured creditor, National Bank of Canada (**NBC**).

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[4] Fifteenth Report of the Receiver, dated September 18, 2020, filed September 21, 2020, at para 18 [**Fifteenth Report**] [Extracts of Key Evidence (**Extracts) at 008**]. The Extracts of Key Evidence include various Reports of the Receiver. Certain appendices were removed from such reports due to their length.

[5] *Ibid* at paras 19, 20, Appendix A [**Extracts at 008, 012**].

[6] *Ibid* at para 21, Appendix B [**Extracts at 008-009, 023**].

[7] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [not included].

9 As at the Receivership Date, Manitok was the AER licensed operator of 907 wells, 137 facilities, and additional pipeline segments, which had an aggregate deemed ARO of approximately $72.2 million.[8]

10 The Receiver negotiated four sales that were approved by the Court in October and November 2018 and closed.[9] It then negotiated a sale (**Persist Sale**) of nearly all of the Manitok estate's remaining saleable assets (**Purchased Assets**) to Tantalus Energy Corp. (referenced throughout as Persist because Persist Oil & Gas Inc. and Tantalus Energy Corp. amalgamated on March 11, 2019). Under the sale agreements for the Persist Sale and the Receiver's prior sales, the purchasers assumed the ARO associated with the assets they were purchasing.[10]

11 Despite the Persist Sale and the sales that preceded it, a significant amount of licensed and operated property could not be sold by the Receiver.[11] This unsold property included hundreds of licensed oil and gas assets that were uneconomic due to their substantial associated ARO.

12 The Court granted a sale approval and vesting order for the Persist Sale on January 18, 2019 (**Persist SAVO**).[12] The Persist SAVO was principally based on the Alberta template form of sale approval and vesting order from the Court of Queen's Bench of Alberta—Commercial List.[13] As is standard, the Persist SAVO contemplated that, upon closing:

(a) the Purchased Assets would vest absolutely in the name of Persist, free and clear of and from any and all Claims and Encumbrances, excepting Permitted Encumbrances;[14] and

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[8] Affidavit of Laura Chant, sworn October 7, 2020, filed October 8, 2020, at para 3 [**Chant Affidavit**] [**Extracts at 035].**

[9] Fifteenth Report, *supra* note 4 at para 11 [**Extracts at 007**]. A Sale Approval and Vesting Order was granted and filed on October 17, 2018 and three more were granted on November 5 and filed on November 8, 2018 [orders not included].

[10] *Ibid* [**Extracts at 007**]; See also Sixth Report of the Receiver, dated January 7, 2019, filed January 8, 2019, at Appendix "A", Cl 6.2: Purchase and Sale Agreement for the Persist Sale **[Sixth Report]** [**Extracts at 121**] whereby Persist agreed to be solely liable and responsible for, and to indemnify and release the Receiver from all Environmental Liabilities and Abandonment and Reclamation Obligations.

[11] Chant Affidavit, *supra* note 8 at paras 7-16 [**Extracts at 035-037**]; Ninth Report of the Receiver, dated and filed June 25, 2019, at para 21 [**Ninth Report**] [**Extracts at 263-264**].

[12] Approval and Vesting Order of Justice Romaine pronounced and filed January 18, 2019 [**Persist SAVO**] [**Appeal Record at 027-050**].

[13] Court of Queen's Bench of Alberta, "Alberta Template Approval and Vesting Order and Receivers Certificate", online: *Commercial Practice Templates and Forms* <https://albertacourts.ca/qb/areas-of-law/commercial/templates-and-forms> [**Template SAVO**] [**Authorities at Tab 2**].

[14] *Ibid* at para 3 [**Authorities at Tab 2**]; Persist SAVO, *supra* note 12 at para 4 [**Appeal Record at 028-029**].

(b) the net proceeds from sale would:

(i) be held by the Receiver in an interest bearing trust account until further Order of the Court; and

(ii) "stand in the place and stead of the Purchased Assets" and, post-closing, all Claims and Encumbrances would "attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale…"[15]

13 Additionally, under paragraph 12 of the Persist SAVO, holdbacks (**Holdbacks**) were to be established from the net proceeds, as follows:

> 12. Subject to any Application that may be made to reduce the amount held in trust by the Receiver as contemplated in paragraph 11 hereof [i.e. the net proceeds from the sale], the amount to be so held shall include at least the following with respect to the following contingent or disputed claims:
>
> (a) $119,093.08 in relation to the builders' lien claims filed by Riverside Fuels Ltd. in relation to certain Purchased Assets;
>
> (b) $462,685.40 in relation to builders' lien claims filed by Prentice Creek Contracting Ltd. in relation to certain Purchased Assets; and
>
> (c) $3,385,891.04 in relation to unpaid property tax claims, which amount shall include
>
> (i) $1,625,553.51 which was a holdback amount established by an order, pronounced on February 14, 2018, as amended by a further order pronounced on June 22, 2018; and
>
> (ii) $1,760,337.53 relating to municipal taxes owing by Manitok in relation to all of its properties.
>
> and for further clarity, this Order is not intended to and does not create, enhance, defeat, alter or amend any party's entitlement to, or any priority of, the disputed or contingent claims set forth in this paragraph 12 or otherwise.[16]

14 The Holdbacks under subparagraphs 12(a) and (b) of the Persist SAVO are the Disputed Lien Holdbacks.

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[15] Template SAVO, *supra* note 13 at para 8 [**Authorities at Tab 2**]; Persist SAVO, *supra* note 12 at para 11(a) [**Appeal Record at 032**].

[16] Persist SAVO, *supra* note 12 at para 12 [emphasis added] [**Appeal Record at 032-033**]. The Chambers Decision mistakenly attributes this content to the purchase and sale agreement between the Receiver-Persist. See Chambers Decision, *supra* note 1 at para 9 [**Appeal Record at 116**]. It is truly from the Persist SAVO.

C. *Redwater* and its impact on the Receivership

15 *Redwater* was released on January 31, 2019, after the Persist SAVO was granted but before the Persist Sale could close. In *Redwater*, the Supreme Court of Canada majority overturned the 2017 majority decision of this Court.[17] The closing of the Persist Sale was delayed so *Redwater* could be digested by the interested parties.

16 In light of *Redwater*, the Receiver and Persist negotiated amendments to the Persist Sale and the Persist SAVO. These amendments included the removal of certain assets from the Persist Sale.[18] An amended Persist SAVO was granted on April 12, 2019.[19] The amendments to the Persist SAVO did not impact its Holdback terms.[20]

17 Additionally, the AER and NBC negotiated a confidential distribution agreement (**Distribution Agreement**) to resolve issues between themselves surrounding the allocation of sale proceeds and revenues between NBC's secured claims, ARO, and the Receiver's fees and costs.[21]

18 The amended Persist Sale closed on April 15, 2019,[22] at which time the Liens were vested off and the Purchased Assets were acquired "free and clear" by Persist (subject only to the Permitted Encumbrances) pursuant to the Persist SAVO. The Receiver established the Holdbacks from the net proceeds.[23] An additional portion of the net proceeds was distributed to the AER and NBC in accordance with the Distribution Agreement.[24] The funds distributed to the AER are being held in trust by the AER and applied against the costs incurred by the Orphan Well Association

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[17] *Redwater*, *supra* note 3 [**Authorities at Tab 1**]; *Orphan Well Association v Grant Thornton Ltd*, 2017 ABCA 124, 50 Alta LR (6th) 1 [***Redwater* ABCA**] [**Authorities at Tab 3**].

[18] Eighth Report of the Receiver, dated April 4, 2019, filed April 5, 2019, at paras 23, 24 [**Eighth Report**] [**Extracts at 281-282**].

[19] Amending Order of Justice Romaine, pronounced and filed January 18, 2019 [**Appeal Record at 053-087**].

[20] Additional post-closing amendments to the Persist SAVO also did not impact the Holdback terms in the original Persist SAVO.

[21] Ninth Report, *supra* note 11 at para 18 [**Extracts at 262**]; Eleventh Report of the Receiver, dated and filed September 12, 2019, at para 19 [**Eleventh Report**] [**Extracts at 290**]; Chant Affidavit, *supra* note 8 at para 17 [**Extracts at 037**]

[22] Ninth Report, *supra* note 11 at paras 10(c), 11 [**Extracts at 259, 261**]. The Persist SAVO was further amended, post-closing, on May 22, 2020 [not included]. The post-closing amendments also did not impact any of the Holdbacks.

[23] Fifteenth Report, *supra* note 4 at paras 17, 19, 21 [**Extracts at 008-009**].

[24] Chant Affidavit, *supra* note 8 at para 11 [**Extracts at 036**]; Eleventh Report, *supra* note 21 at paras 19-20 [**Extracts at 290**]; Order (Third Interim Distribution) of Justice Romaine pronounced October 16, 2019 [**Third Interim Distribution**] [**Extracts at 317**]; Order (Fourth Interim Distribution) of Justice Romaine pronounced October 16, 2019, filed October 17, 2019 [**Fourth Interim Distribution**] [**Appeal Record at 098-099**].

(the **OWA**) in abandoning and reclaiming the orphaned oil and gas assets from the Manitok estate.[25]

C. The disclaimer order, orphan designations, and abandonment orders

19 On July 9, 2019, the Court granted an order pursuant to which the Receiver could disclaim and be discharged over most of the remaining unsold oil and gas assets in the Manitok estate (**Disclaimer Order** and **Disclaimed Assets**).[26] In consultation with the AER, the Receiver agreed that certain oil and gas assets (defined in the Disclaimer Order as "Retained Assets") would be excluded from the category of Disclaimed Assets because they were potentially saleable by the Receiver, on non-accretive or marginally accretive terms, to reduce the Manitok estate's unfunded ARO burden. The Court approved the Disclaimer Order over objections from certain working interest partners of Manitok: Husky, Encana and Canadian Natural Resources.[27]

20 The Receiver followed the procedures from the Discharge Order to give it effect.[28]

21 Shortly thereafter, the AER began to address the ARO associated with unsold licensed assets in the Manitok estate. The AER (i) designated 232 wells, 36 facilities and 101 pipelines segments as orphans on August 1, 2019; (ii) issued an environmental protection order on August 12, 2019; (iii) issued an abandonment order on August 21, 2019; (iv) designated a further 411 wells and 58 facilities as orphans on August 30, 2019; (v) issued an environmental protection order on January 29, 2020; and (vi) issued an environmental protection order and an abandonment order on April 9, 2020.[29] An asset was only designated by the AER as an orphan if there was no "responsible party" (i.e. a solvent working interest partner) to either take over the AER license or satisfy the associated ARO.[30]

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[25] Chant Affidavit, *supra* note 8 at para 17.

[26] Order (Partial Discharge) of Justice Romaine pronounced and filed July 9, 2019 [**Appeal Record at 088-097**].

[27] *Ibid* [**Appeal Record at 088-097**]; Ninth Report, *supra* note 11 at paras 10(h), 17-20, 24, 28-31 [**Extracts at 260, 262-266**]; *Manitok Energy Inc (Re)*, 2019 ABQB 520 at para 31 [**July 2019 Decision**] [**Authorities at Tab 4**].

[28] Eleventh Report, *supra* note 21 at para 9 [**Extracts at 287-288**]; Twelfth Report of the Receiver, dated and filed November 4, 2019, at paras 15, 22 [**Twelfth Report**] [**Extracts at 323-325**].

[29] Chant Affidavit, *supra* note 8 at paras 9-15 [**Extracts at 036-037**]. The Chambers Decision states that abandonment orders were issued on August 1, 12, 21 and 30, which is not entirely correct. See Chambers Decision, *supra* note 1 at para 12 [**Appeal Record at 113**].

[30] Chant Affidavit, *supra* note 8 at paras 8, 9 [**Extracts at 035-036**].

22 Orphaned assets from the Manitok estate will ultimately be abandoned and reclaimed by the OWA.[31]

23 As of October 7, 2020, the deemed liability associated with the unsold and disclaimed oil and gas assets from the Manitok estate was estimated at $44.5 million,[32] which is substantially more than the Receiver's total realizations from all of its sales and operations.[33]

D. Distribution of the Municipal Holdback

24 By orders dated October 16, 2019, and July 10, 2020, portions of the Holdback for unpaid property tax claims (**Municipal Holdback**) under paragraph 12(c) of the Persist SAVO were distributed to five municipalities, with the municipalities' support. These distributions were related to post-receivership municipal taxes on operated and sold properties, which were accepted as constituting operating expenses of the Receivership.[34] No distributions were made based on pre-Receivership municipal tax arrears, which were accepted by the relevant municipalities and the Court as being subordinate to the Manitok estate's unfunded ARO under *Redwater*, notwithstanding the statutory "special lien" that secures municipal claims for non-linear property tax arrears.[35]

25 By order, the distributions to the five municipalities were made by the Receiver in full and final satisfaction of their claims.[36]

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[31] *Ibid* at para 8 [**Extracts at 035**].

[32] *Ibid* at para 17 [**Extracts at 037**].

[33] Eleventh Report, *supra* note 21 at para 28 [**Extracts at 292**]; Fifteenth Report, *supra* note 4 at para 16 [**Extracts at 007-008**].

[34] Third Interim Distribution and Fourth Interim Distribution, *supra* note 24 [**Extracts at 317**] and [**Appeal Record at 098-099**]. See paras 2 and 3 of the Fourth Interim Distribution, whereby a portion of the Persist Sale proceeds was distributed to NBC and the AER and a portion retained by the receiver pending further order for distribution; Order of Justice Romaine pronounced and filed July 10, 2020 [**Municipal Distribution Order**] [**Appeal Record at 108-110**]. See para 2, whereby distributions were made to the municipalities.

[35] Fourteenth Report of the Receiver, dated and filed June 22, 2020, at paras 14-28 [**Fourteenth Report**] [**Extracts at 336-339**]; Fifteenth Report, *supra* note 4 at para 30(c) [**Extracts at 011**]. Regarding the "special lien" on property taxes, see the *Municipal Government Act*, RSA 2000, c M-26, s 348(d) and *Northern Sunrise County v Virginia Hills Oil Corp*, 2019 ABCA 61, 82 Alta LR (6th) 97 [not included].

[36] Municipal Distribution Order, *supra* note 34 at para 3 [**Appeal Record at 109**].

E. The Chambers Decision

26 A consensual resolution for the distribution of the Disputed Lien Holdbacks could not be reached between the Receiver and the Lien Claimants. The Receiver identified the relative priorities of the ARO in the Manitok estate and the Liens as a discrete and potentially determinative issue. Accordingly, the Receiver sought and obtained the Lien Claimants' consent to define the following preliminary issue for resolution under Rule 7.1(2) of the *Alberta Rules of Court*:[37]

> Whether end of life obligations associated with the abandonment and reclamation of unsold oil and gas properties must be satisfied by the Receiver from Manitok's estate in preference to satisfying what may otherwise be first-ranking builders' lien claims based on services provided by the lien claimants before the receivership date.[38]

27 In defining this issue, the Receiver expressly did not concede (and has not conceded) the validity, enforceability or quantum of the Liens or Lien Claims.

28 As part of its requested relief, the Receiver sought an order approving the release of the Disputed Lien Holdbacks so they would become general estate funds. This relief was sought by the Receiver because the ARO shortfall in the Manitok estate was greater than the total proceeds that will be realized by the Receiver.[39]

29 On March 24, 2021, the Chambers Justice ruled in favour of the Lien Claimants. She reasoned that the ARO shortfall in the Manitok estate did not have to be satisfied by the Receiver using "assets unrelated to the environmental condition or damage represented by the abandonment orders [the AER] has issued."[40] The Chambers Justice accepted this result as flowing from the fact that, unlike in *Redwater*, the Persist Sale closed before any abandonment orders were issued by the AER: "This change in ownership occurred prior to any action by the AER, so that the orders a) do not apply to property over which the respondents claim a lien, and b) do not apply to contiguously owned property at the time."[41]

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[37] Alta Reg 124/2010 [**Authorities at Tab 5**].
[38] Application of the Receiver, filed September 21, 2020 at para 1 [**Receiver's Application**] [**Appeal Record at 006**].
[39] *Ibid* at paras 4, 5 [**Appeal Record at 007**].
[40] Chambers Decision, *supra* note 1 at para 39 [**Appeal Record at 116**].
[41] *Ibid* [**Appeal Record at 116**].

30 The Chambers Justice found that, because the abandonment orders were issued after the Persist Sale closed, the Disputed Lien Holdbacks were "trust funds relating to the proceeds of sale of property to which the debtors no longer have the status of 'owner, party in control, or licensee' at the time the [abandonment orders] were issued".[42] She went on to find that *Redwater* does not apply if "property unrelated to property that is affected by an environmental condition is sold to a new licensee before any abandonment or reclamation orders are made" and "the AER is not at risk for any current costs of reclamation of the transferred property."[43]

31 The Chambers Justice concluded that the Disputed Lien Holdbacks "are not property of the estate, and would not become part of the estate unless the [Lien Claims] are denied." [44] Thus, if the Liens are valid, the Lien Claims have priority to the Disputed Lien Holdbacks, despite the ARO shortfall in the Manitok estate. As such, the Chambers Justice declined to authorize the release of the Disputed Lien Holdbacks.

32 The Receiver's application for permission to appeal the Chambers Decision was granted by the Honourable Mr. Justice J.D.B. MacDonald on June 17, 2021.[45]

PART 2 – GROUNDS OF APPEAL

33 The Receiver's grounds of appeal are:

(a) the Chambers Justice erred by ignoring and failing to give effect to the fundamental holding of *Redwater*; specifically, that a receiver must use estate resources to comply with all provincial regulatory laws of general application that are not reduced to provable claims, despite the resulting expense to the estate;

(b) the Chambers Justice erred in distinguishing Manitok based on the timing of when the Persist Sale closed relative to when abandonment orders were issued by the AER; and

[42] *Ibid* at para 41 [**Appeal Record at 116**].
[43] *Ibid* at para 42 [**Appeal Record at 116**].
[44] *Ibid* at para 43 [**Appeal Record at 116**].
[45] Order (Permission to Appeal) of Justice McDonald pronounced June 17, 2021, filed June 21, 2021 [**Appeal Record at 127-130**].

(c) the Chambers Justice erred by holding that the Disputed Lien Holdbacks were not part of the Manitok estate and were therefore unavailable to satisfy the estate's ARO shortfall.

PART 3 – STANDARD OF REVIEW

34 Findings of law are reviewable for correctness. Findings of fact are reviewable for palpable and overriding error. Findings of mixed fact and law "lie along a spectrum."[46] Extricable legal issues are reviewable for correctness, whereas findings that are inseparably intertwined with findings of fact are subject to deferential review.[47]

35 The standard of review that applies to all of the Receiver's grounds of appeal is correctness. The defined issue at the heart of the Chambers Decision was crafted to avoid any factual disputes—and, indeed, the Receiver's understanding is that no factual findings are in dispute.

36 This Court applied a correctness standard when it was tasked with reviewing the original *Redwater* chambers decision, stating:

> The issues in these appeals are the priority of environmental claims, and whether a receiver or trustee in bankruptcy must satisfy the contingent liability inherent in the remediation of the worthless wells in priority to the claims of secured creditors. There are no material facts in dispute, and the questions of law raised by these appeals are reviewed for correctness.[48]

37 A correctness standard is applicable in this appeal for the same reasons. All of the grounds of appeal relate to a central legal issue: the relative priority of ARO versus secured claims in insolvency.

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[46] *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235, at paras 28, 36 [***Housen***] [**Authorities at Tab 6**].

[47] *Ibid* at paras 8, 10, 23, 28, 33, 36 [**Authorities at Tab 6**]; *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd,* 2019 ABCA 49, 86 Alta LR (6th) 240, at para 9 [**Authorities at Tab 7**].

[48] *Redwater* ABCA, *supra* note 17 at para 10 [**Authorities at Tab 3**]. The Supreme Court of Canada did not address the standard of review in *Redwater*.

PART 4 – ARGUMENT

A. The obligation under *Redwater* is to comply with provincial regulatory laws of general application

38 The fundamental holding of the Supreme Court of Canada majority in *Redwater* is that an insolvency professional must cause the insolvent estate to comply with provincial regulatory laws of general application that cannot be reduced to provable claims, even if there is expense to the estate and resulting prejudice to secured (or other) creditors:

> Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non-monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the *BIA*, notwithstanding the consequences this may have for the bankrupt's secured creditors. The Abandonment Orders and the [Liability Management Rating] requirements are based on valid provincial laws of general application — exactly the kind of valid provincial laws upon which the *BIA* is built. As noted in *Moloney*,[49] the *BIA* is clear that "[t]he ownership of certain assets and the existence of particular liabilities depend upon provincial law" (para. 40). End-of-life obligations are imposed by valid provincial laws which define the contours of the bankrupt estate available for distribution.[50]

39 In oil and gas insolvencies, the obligation of an insolvency professional under *Redwater* is not just to have the insolvent estate comply with any abandonment orders that may be issued by the AER. Instead, the insolvent estate must be made to comply with all provincial regulatory laws of general application.[51]

40 In Alberta, the production, processing, and transportation of oil and gas is governed principally by the *Environmental Protection and Enhancement Act* (**EPEA**),[52] the *Oil and Gas Conservation Act* (**OGCA**),[53] the *Pipeline Act*,[54] and various regulations and directives thereunder. The regulatory regime defines who may engage in regulated activities. Only licensees may

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[49] *Alberta (Attorney General) v Moloney*, 2015 SCC 51, [2015] 3 SCR 327 [not included].
[50] *Redwater*, *supra* note 3 at para 160 [emphasis added] [**Authorities at Tab 1**].
[51] *Ibid* [**Authorities at Tab 1**].
[52] RSA 2000, c E-12 [**Authorities at Tab 8**].
[53] RSA 2000, c O-6 [**Authorities at Tab 9**].
[54] RSA 2000, c P-15 [**Authorities at Tab 10**].

undertake drilling or producing, injecting, or facility operations.[55] The definition of "licensee" includes receivers and trustees in bankruptcy,[56] such that insolvency professionals in those capacities may operate licensed assets and transfer licences to purchasers through sales (subject to the satisfaction of Liability Management Rating requirements).

41 A licensee must satisfy the ARO associated with its licensed assets.[57] There is no circumstance in which a licensed asset may be drilled or built without a licensee being bound to satisfy the associated ARO in the future.[58] A licensee must abandon a licensed asset not only when an abandonment order is issued by the AER, but also when it is otherwise required to do so by the regulatory regime. As examples, the abandonment of a well or facility is required upon the termination of a mineral lease, surface lease or right of entry, when the AER cancels or suspends a licence, or where the AER notifies the licensee that a well or facility may constitute an environmental or safety hazard.[59] The *Pipeline Act* requires a licensee to abandon pipelines in similar situations.[60] The EPEA also establishes a broad duty of operators to reclaim.[61]

42 The Supreme Court of Canada and this Court have both made the following two observations about ARO. First, ARO are "inherent" and "inchoate" in all licensed oil and gas assets. They exist from the moment of drilling—and they do not only come into existence upon the issuance of abandonment orders.[62] Accordingly, all licenses are subject to the obligation to satisfy ARO.[63] Second, the duty to abandon and reclaim licensed assets is of a public nature. The

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[55] *Redwater, supra* note 3 at para 12 [**Authorities at Tab 1**].

[56] EPEA, *supra* note 52, s 134(b) [**Authorities at Tab 8**]; OGCA, *supra* note 53, s 1(cc) [**Authorities at Tab 9**]; Pipeline Act, *supra* note 54, s 1(1)(n) [**Authorities at Tab 10**]; *Redwater*, *supra* note 3 at paras 21, 47, 69, 76, 104-105, 107, 111, 113, 114 [**Authorities at Tab 1**].

[57] If the licensee is a receiver or trustee in bankruptcy, ARO are to be satisfied using estate resources.

[58] *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABCA 16, [2021] AJ No 84, at para 86 [***Perpetual***] [**Authorities at Tab 11**].

[59] *Oil and Gas Conservation Rules*, Alta Reg 151/1971, s 3.012 [**Authorities at Tab 12**].

[60] *Pipeline Act*, *supra* note 54, s 23 [**Authorities at Tab 10**].

[61] EPEA, *supra* note 52, s 137 [**Authorities at Tab 8].**

[62] *Redwater, supra* note 3 at para 29; *Perpetual*, *supra* note 58 at paras 86-87 [**Authorities at Tab 11**]; *PanAmericana de Bienes y Servicios SA v Northern Badger Oil & Gas Ltd*, 1991 ABCA 181, 81 Alta LR (2d) 45, at paras 32-33, [***Northern Badger***] [**Authorities at Tab 13**].

[63] *Redwater, supra* note 3 at para 15 [**Authorities at Tab 1**]; *Perpetual*, *supra* note 58 at para 86 [**Authorities at Tab 11**].

AER is tasked by statute with enforcing a "public duty" owed by licensees. It is not a creditor with a provable claim, to whom a debt is owed.[64]

43 *Redwater* confirms that the Receiver was deemed to be the licensee of all licensed oil and gas assets in the Manitok estate upon its appointment on the Receivership Date, and that, at that time—not later, when abandonment orders were issued—estate resources had to be allocated to satisfy the ARO associated with the licensed assets in the estate. The Receiver succeeded in transferring some licenses to other responsible operators through a series of sales, including the Persist Sale; however, the majority of Manitok's licensed assets were unsaleable. The sales only reduced the ARO burden in the Manitok estate from $72.2 million to $44.5 million.[65] The latter amount is allocable to not less than 838 licensed assets that were designated as orphans by the AER.[66] This ARO shortfall continues to burden the Manitok estate. It must be satisfied to the extent possible by the Receiver, as Court officer and licensee, using estate resources.

44 The Chambers Justice erred in law by ignoring and failing to give effect to the Receiver's public duty to comply with provincial regulatory laws of general application that cannot be reduced to provable clams; specifically, the regulatory obligation to satisfy ARO.

45 The Chambers Justice also erred by concluding that the proceeds of saleable assets should not be allocated to the ARO associated with the unsaleable assets left in the insolvent estate. In oil and gas insolvencies, the ARO associated with unsaleable assets are the only ARO that need to be satisfied from the estate because the ARO associated with all sold assets are assumed by purchasers. *Redwater* would be rendered meaningless if net proceeds from asset sales in insolvency cannot be used to satisfy the ARO associated with unsaleable assets. Indeed, in *Redwater*, proceeds from the receiver's sale of valuable assets were held in trust pending the outcome of the litigation that culminated in the Supreme Court of Canada decision. Those proceeds were ultimately ordered to be released to satisfy the ARO associated with unsold assets that were left behind in the receivership estate.[67]

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[64] *Redwater*, *supra* note 3 at paras 122, 128, 130, 134-135 [**Authorities at Tab 1**]; *Northern Badger*, *supra* note 62 at para 33 [**Authorities at Tab 13**]; *Perpetual*, *supra* note 58 at para 87 [**Authorities at Tab 11**].

[65] Chant Affidavit, *supra* note 8 at paras 3, 17 [**Extracts at 035, 037**].

[66] 838 is the number of licensed assets in the Manitok estate that were designated as orphans (see para 21 above).

[67] *Redwater, supra* note 3 at para 163 [**Authorities at Tab 1**].

B. The timing of abandonment orders is irrelevant

46 The Chambers Justice erred in law by holding that *Redwater* was factually distinguishable from the case before her because (unlike in *Redwater*) the AER only issued abandonment orders for the unsold assets in the Manitok estate after the Persist Sale.[68]

47 The Chambers Justice supported her analysis by quoting from part of paragraph 159 of the *Redwater* majority decision;[69] however, she omitted the part of paragraph 159 that actually addresses timing. In a part of paragraph 159 not quoted in the Chambers Decision, the Supreme Court of Canada majority wrote: "Requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme in the *BIA*."[70]

48 In *Redwater*, the Supreme Court of Canada majority attributed no significance to the relative timing of abandonment orders and asset sales. It instead attributed significance to the relative timing of satisfying ARO and making distributions to creditors. Any ARO shortfall must be funded "before" distributions are made to creditors.[71]

49 The Supreme Court of Canada majority in *Redwater* expressly affirmed and applied this Court's decision in *Northern Badger*.[72] As with Manitok, an abandonment order was only issued in the receivership of Northern Badger after the receiver had sold all of the valuable assets in the Northern Badger estate.[73] Yet, in *Northern Badger*, this Court directed the receiver to comply with the abandonment order by satisfying the ARO associated with the unsold assets, even if "less money will be available for distribution" as a consequence.[74] No concern was expressed by this Court in *Northern Badger* about when the abandonment order was issued relative to the receiver's sale, nor about the sale proceeds being "unrelated to the environmental condition or damage

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[68] Chambers Decision, *supra* note 1 at para 39 [**Appeal Record at 116**].
[69] *Ibid* at para 38 [**Appeal Record at 115-116**].
[70] *Redwater, supra* note 3 at para 159 [emphasis added] [**Authorities at Tab 1**].
[71] *Ibid* [**Authorities at Tab 1**].
[72] *Ibid* at paras 130-136 [**Authorities at Tab 1**].
[73] *Northern Badger, supra* note 62 at paras 17-18 [**Authorities at Tab 13**].
[74] *Ibid* at para 63 [**Authorities at Tab 13**].

represented by the [abandonment order]."[75] *Northern Badger* is indistinguishable from Manitok—and it was expressly affirmed by the Supreme Court of Canada majority in *Redwater*.

50 It is implicit in the analysis of the Chambers Justice that ARO do not exist until an abandonment order is issued; however, this Court held otherwise in *Perpetual.* In that case, a unanimous Court of Appeal stated that "[ARO] are inherent in any oil well, from the moment it is drilled and comes into production" and "[ARO] exist whether or not abandonment notices have been issued by the [AER]."[76] In this way, ARO are only "contingent" in the sense that it is uncertain when, not if, they will have to be satisfied.[77] Additionally, in *Northern Badger*, this Court stated that ARO are "inchoate from the day the wells were drilled" and "inherent in the nature of the properties themselves".[78] There is always an obligation to abandon and reclaim a licensed asset. ARO are priority obligations, taking the form of a public duty, independently of whether (or when) any abandonment orders are issued.

51 The Chambers Justice herself issued a written decision in the Manitok insolvency proceedings in which she recognized the primacy of ARO, albeit in *obiter dicta*. In particular, the Chambers Justice wrote the following in her reasons for granting the Disclaimer Order: "[T]he AER is a significant stakeholder in the estate of these debtors as a result of the decision in *Redwater*, having priority to the assets from the debtors' estates to be used to satisfy provincial regulatory obligations."[79] This statement was made (and the Disclaimer Order was granted) by the Chambers Justice after the Persist Sale but before any abandonment orders were issued. If ARO only arise upon the issuance of an abandonment order, which is not the case, the AER would not have been a significant stakeholder in the Manitok receivership when the Disclaimer Order was granted.

[75] Chambers Decision, *supra* note 1 at para 39 [**Appeal Record at 116**].
[76] *Perpetual, supra* note 58 at paras 86, 87 [**Authorities at Tab 11**].
[77] *Ibid* at para 86 [**Authorities at Tab 11**].
[78] *Northern Badger*, *supra* note 62 at paras 32, 33 [**Authorities at Tab 13**].
[79] July 2019 Decision*, supra* note 27 at para 13 [**Authorities at Tab 4**].

52 Similarly, a majority of the Municipal Holdback was released to become general estate funds, by order of the Chambers Justice, based on the understood priority of ARO over secured and unsecured pre-Receivership claims by municipalities for property tax arrears.[80]

53 The Chambers Decision fundamentally upsets current practices for administering the estates of insolvent oil and gas companies. One of the practical effects of the Chambers Decision is requiring the AER to issue abandonment orders early in every insolvency proceeding, before the start of any sale process, to safeguard the priority of ARO. The early issuance of abandonment orders would interfere with insolvency professionals' revenue-generating operations and diminish the realizable value of licensed assets, which are undesirable results for all stakeholders. The negative impacts on operations and realizations would not only prejudice the AER and the public interest that it represents, but also all creditors with provable claims. As a matter of public policy, the AER should not be required to safeguard the priority of ARO by issuing pre-sale abandonment orders to the detriment of all stakeholders.

54 The Chambers Justice erred in law by relying on the relative timing of sales and abandonment orders as a distinguishing fact that justified a different result in Manitok than was achieved in *Redwater*.

C. The Disputed Lien Holdbacks are part of the Manitok estate

55 In error, the Chambers Justice held that the Disputed Lien Holdbacks were removed from the Manitok estate when they were established from the net proceeds of the Persist Sale. She wrote: "As the funds have been held in trust in accordance with the order and the purchase and sale agreement pending resolution of the claims, they are not property of the estate, and would not become part of the estate unless the claims are denied."[81]

56 Based on a fair and proper reading of the Persist SAVO, the Disputed Lien Holdbacks were not removed from the Manitok estate upon being established from the net proceeds of the Persist

[80] Municipal Distribution Order, *supra* note 34 at paras 2-4 [**Appeal Record at 109**]; Fourteenth Report, *supra* note 35 at paras 14-28 [**Extracts at 336-339**]; Fifteenth Report, *supra* note 4 at para 30(c) [**Extracts at 011**].
[81] Chambers Decision, *supra* note 1 at para 43 [**Appeal Record at 116**].

Sale. Like all other net proceeds from the Persist Sale, they are part of the estate—and they continue to be available to satisfy the ARO shortfall.

57 The Persist SAVO states that the net proceeds of the Persist Sale were "to be held in an interest bearing trust account" and were "to stand in the place and stead of the of the Purchased Assets" without altering the priority of any "Claims or Encumbrances" attaching thereto.[82] By having the net proceeds from sale "stand in the place and stead of the Purchased Assets" without altering the relative priorities, the Persist SAVO was meant to preserve the *status quo*. This is a standard mechanism, consistent with the Court of Queen's Bench of Alberta—Commercial List template, to deal with claims against assets that are sold during insolvency proceedings.[83] It does not create a trust that removes the sale proceeds from the estate. Indeed, the Persist SAVO specifically confirms that: "this Order is not intended to and does not create, enhance, defeat, alter or amend any party's entitlement to, or any priority of, the disputed or contingent claims" set forth in that Order.

58 Under the Persist SAVO, the Holdbacks were allocations of the net sale proceeds, to be held pending the resolution of certain contingent and disputed claims, including the Lien Claims.[84] Like the remainder of the net proceeds, the Holdbacks were always part of the Manitok estate.

59 The Chambers Justice erred in law by interpreting the Persist SAVO as altering the *status quo*. She held that the Persist SAVO removed the Disputed Lien Holdbacks from the Manitok estate, thereby making the Disputed Lien Holdbacks available to satisfy the Lien Claims in priority to ARO. In the result, the Persist SAVO improved the priority of the Liens Claims, rather than maintaining the priority they had against the Purchased Assets before the Persist Sale, "as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale."[85] Thus, as interpreted by the Chambers Justice, the Persist SAVO altered the relative priorities of the Lien Claims and ARO.

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[82] Persist SAVO, *supra* note 12 at para 11(a) [**Appeal Record at 032**].
[83] Template SAVO, *supra* note 13 at para 8 [**Authorities at Tab 2**].
[84] Persist SAVO, *supra* note 12 at paras 11, 12 [**Appeal Record at 032, 033**].
[85] *Ibid* at para 11(a) [**Appeal Record at 032**].

60 Interpreting the Persist SAVO as establishing a trust in favour of the Lien Claimants also results in an absurdity by prioritizing the Lien Claims over all other secured claims against the liened assets by NBC or others, even though no determination has yet been made about inter-creditor priorities.

61 Consistent with common practice, in *Redwater*, the net proceeds of a sale of licensed assets were deposited in an interest bearing trust account pending a final judicial determination of the relative priorities of secured claims and ARO. Those sale proceeds were not removed from the Redwater estate and made unavailable to satisfy ARO because they were deposited in a trust account.

62 The Supreme Court of Canada majority in *Redwater* ordered a release of sale proceeds from trust so they could be used to satisfy the remaining ARO in the Redwater estate.[86] The Chambers Justice erred by reaching a different conclusion in the case that was before her.

63 The Disputed Lien Holdbacks were (and still are) property of the Manitok estate. They should be released from trust based on the priority obligation of satisfying the Manitok estate's ARO.

PART 5 – RELIEF SOUGHT

64 The Manitok estate's unfunded ARO burden is greater than total realizations. The Disputed Lien Holdbacks must therefore be released based on the priority of ARO over the Lien Claims, even if the Lien Claims are otherwise first-ranking.

65 Accordingly, the Receiver respectfully requests an order:

(a) allowing this appeal;

(b) setting aside the Chambers Decision and the resulting order of the Chambers Justice;

(c) authorizing the Receiver to release the Disputed Lien Holdbacks to the Manitok estate; and

[86] *Redwater*, *supra* note 3 at para 163 [**Authorities at Tab 1**].

(d) granting costs to the Receiver for this appeal and the proceedings below.

Estimate of time required for the oral argument: 45 minutes.

TABLE OF AUTHORITIES

Tab	Style of Cause/Document Name	Citation and Pinpoint
1	*Orphan Well Association v Grant Thornton Ltd*	2019 SCC 5 at paras 12, 15, 21, 29, 47, 69, 76, 104-105, 107, 111, 113, 114, 122, 128, 130-136, 159, 160, 163
2	*Alberta Template Approval and Vesting Order and Receivers Certificate*	Online at paras 3, 8
3	*Orphan Well Association v Grant Thornton Ltd*	2017 ABCA 124 at para 10
4	*Manitok Energy Inc (Re)*	2019 ABQB 520 at para 13, 31
5	*Alberta Rules of Court*	Alta Reg 124/2010 at Rule 7.1(2)
6	*Housen v Nikolaisen*	2002 SCC 33 at paras 8, 10, 23, 28, 33, 36
7	*Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*	2019 ABCA 49 at para 9, 86
8	*Environmental Protection and Enhancement Act*	RSA 2000, c E-12 at s. 134(b), s. 137
9	*Oil and Gas Conservation Act*	RSA 2000, c O-6 at s. 1(cc)
10	*Pipeline Act*	RSA 2000, c P-15 at s. 1(1)(n), s. 23
11	*PricewaterhouseCoopers Inc v Perpetual Energy Inc*	2021 ABCA 16 at paras 86-87
12	*Oil and Gas Conservation Rules*	Alta Reg 151/1971 at s. 3.012
13	*PanAmericana de Bienes y Servicios SA v Northern Badger Oil & Gas Ltd*	1991 ABCA 181 at paras 17-18, 32-33, 63