In the Court of Appeal of Alberta

Citation: Manitok Energy Inc (Re), 2022 ABCA 117

Date: 20220330
Docket: 2101-0085AC
Registry: Calgary

Between:

Alvarez & Marsal Canada Inc. in its capacity as the Court-appointed receiver and manager of Manitok Energy Inc.

Appellant

- and -

Prentice Creek Contracting Ltd., Riverside Fuels Ltd. and Alberta Energy Regulator

Respondents

- and -

Stettler County, Woodlands County and Orphan Well Association

Intervenors

The Court:

The Honourable Justice Frans Slatter
The Honourable Justice Ritu Khullar
The Honourable Justice Jolaine Antonio

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice B.E.C. Romaine
Dated the 24th day of March, 2021
Filed on the 10th day of June, 2021
(2021 ABQB 227, Docket: 25-2332583; 25-2332610; 25-2335351)

Memorandum of Judgment

The Court:

[1] The issue underlying this appeal, as stated by consent under R. 7.1(2), is:

> 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.

This issue engages the reach of the Supreme Court of Canada's ***Redwater*** decision: ***Orphan Well Association v Grant Thornton Ltd.***, 2019 SCC 5, [2019] 1 SCR 150.

Facts

[2] Manitok Energy Inc. was an oil and gas company that became insolvent. This appeal deals with the priority in which the Receiver must allocate the remaining funds in the estate.

[3] The specific issue relates to two builders' liens filed against property of Manitok. The respondent Prentice Creek Contracting provided equipment and services to Manitok related to the reclamation and cleanup of certain oil and gas well sites. The respondent Riverside Fuels provided fuel and lubricants to Manitok. When they were unpaid, both filed builders' liens prior to Manitok's bankruptcy on February 20, 2018.

[4] The essential priority issue in this appeal is between the two builders' liens and Manitok's "abandonment and reclamation" obligations. After an oil and gas well has been fully exploited, the licensee operating it must "abandon" the well, by sealing it off in an environmentally safe way. It must then "reclaim" the surface of the land: ***Redwater*** at para. 16. These "end of life" obligations, which are mandated by regulation, are inherent in oil and gas properties, and can be very financially onerous and beyond the means of insolvent corporations.

[5] Like many insolvent oil and gas companies, Manitok had some assets that had remaining value, but it also had a number of assets that had no remaining net value because they were burdened with inherent and inchoate abandonment and reclamation obligations. The Receiver identified some of the valuable assets and arranged their sale. Four sales were approved by the court and closed. The Receiver then negotiated a sale of a bundle of assets to Persist Oil & Gas, under which Persist was to assume the abandonment and reclamation obligations with respect to the assets it was purchasing. While the Alberta Energy Regulator has subsequently issued

abandonment orders to the Receiver, none of those orders relate to the assets that were sold to Persist.

[6] The Persist sale was approved by the court. The Sale and Vesting Order provided that the net proceeds would be held "in an interest bearing trust account" by the Receiver, and those sale proceeds would "stand in the place and stead of the Purchased Assets", without affecting in any way the priorities or interests of the various claimants in those assets. The Sale and Vesting Order stipulated particular holdbacks to cover the amounts of the two builders' liens and certain unpaid property taxes. However, before the Persist sale could close, the Supreme Court rendered its ***Redwater*** decision on January 31, 2019. Because of the ***Redwater*** decision, the parties amended the Persist sale agreement, but the holdback provisions were not changed. The Persist sale then closed, and the Receiver received the proceeds.

[7] After the various sales negotiated by the Receiver, the Manitok estate still owned a number of oil and gas assets with aggregate assumed abandonment and reclamation obligations of about $44.5 million, far in excess of the assets in the estate. The Receiver intended to "disclaim" those assets, that is, it intended to "abandon, dispose of or otherwise release" the bankrupt estate's interest in these properties: ***Redwater*** at para. 44. As a result, any reclamation obligations would likely fall on the Orphan Well Association.

The Reasons of the Chambers Judge

[8] When a dispute arose as to whether the ***Redwater*** decision was applicable to the facts of the Manitok bankruptcy, the parties stated an issue for the court as set out *supra*, para. 1. The chambers judge concluded that ***Redwater*** was distinguishable, and that the builders' lien claimants were entitled to be paid out of the proceeds of the Persist sale: ***Manitok Energy Inc (Re)***, 2021 ABQB 227, 25 Alta LR (7th) 412.

[9] The chambers judge acknowledged the ruling in ***Redwater*** that end of life obligations are not provable in bankruptcy, and that trustees in bankruptcy are required to respect valid provincial laws of general application. Generally speaking, trustees are not personally liable for environmental obligations, but the bankrupt estate remains liable: reasons at paras. 33-37. The chambers judge, however, distinguished ***Redwater*** based on comments made in para. 159 of that decision:

> 159 Accordingly, the end-of-life obligations binding on [the Receiver] GTL are not claims provable in the Redwater bankruptcy, so they do not conflict with the general priority scheme in the BIA. This is not a mere matter of form, but of substance. Requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the BIA. In crafting the priority scheme set out in the BIA, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or

> damage in order to fund remediation (see s. 14.06(7)). Thus, the BIA explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage. Although the nature of property ownership in the Alberta oil and gas industry meant that s. 14.06(7) was unavailable to the Regulator, the Abandonment Orders and the LMR [Liability Management Rating] replicate s. 14.06(7)'s effect in this case. Furthermore, it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the BIA - rather, it facilitates them. (Emphasis added by the chambers judge)

The chambers judge particularly relied on the reference to "assets unrelated to the environmental condition or damage".

[10] The chambers judge's analysis was:

> 39 It is here [in the emphasized passage in para. 159] that the distinction between the facts of Redwater and the facts in this case becomes apparent. In this case, the AER is seeking to require Manitok to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage represented by the abandonment orders it has issued, assets over which Manitok no longer has ownership or control. 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.

The proper interpretation of para. 159 of ***Redwater*** is discussed *infra*, paras. 20-31.

[11] The chambers judge held that the key distinguishing features were:

(a) ***Redwater*** only extends environmental obligations to contaminated property, or property contiguous to it: reasons at paras. 39, 40.

(b) The Persist assets had been sold, before the Alberta Energy Regulator issued any enforcement orders, and Persist had assumed the abandonment and reclamation obligations with respect to them. The Alberta Energy Regulator was no longer at risk with respect to the Persist assets: reasons at paras. 39, 41-42.

(c) The proceeds of sale being held in trust arose from the Persist assets, which were no longer a part of the Manitok estate. ***Redwater*** did not extend to assets of which

the bankrupt company was no longer an owner or licensee: reasons at paras. 39, 41-42.

(d) The builders' liens were on property sold to Persist which was "unrelated" to the contaminated property, so the proceeds of that sale were not subject to the ***Redwater*** ruling: reasons at paras. 39, 44.

(e) The sale proceeds were being held in trust by court order which preserved the rights of the builders' lien holders. Those funds were no longer a part of the estate and so the trustee did not have to use them to discharge abandonment and reclamation obligations: reasons at para. 43.

Having thus distinguished ***Redwater***, the chambers judge held that the builders' liens were entitled to be paid from the funds held in trust.

[12] On appeal, the Receiver and the Alberta Energy Regulator argue that there are reviewable errors in the chambers decision:

(a) it misinterprets the scope of the ***Redwater*** decision.

(b) it concludes that ***Redwater*** only requires that the proceeds of sale of valuable assets be applied to the reclamation and abandonment obligations of "related" assets.

(c) it incorrectly relied on the timing of the enforcement orders issued by the Alberta Energy Regulator.

(d) it concluded that the court had created a "trust" over the sale proceeds of the Persist assets, which enhanced the claim of the builders' lien holders.

The Orphan Well Association intervened in support of the appellant. The respondent builders' lien holders support the chambers decision, as do the intervenor municipalities.

The ***Redwater*** decision

[13] The central issue in this appeal is therefore the application of the ***Redwater*** decision to the facts underlying the Manitok Energy bankruptcy.

[14] ***Redwater***, like this appeal, involved a priority battle. In ***Redwater*** the prime secured creditor, Alberta Treasury Branches, asserted its right as a secured creditor to be paid in priority to the other claims against the bankrupt estate. The trustee in bankruptcy argued that the abandonment and reclamation obligations were claims provable in bankruptcy and would be extinguished by the bankruptcy process like all other unsecured claims. The Alberta Energy

Regulator and the Orphan Well Association argued that any net proceeds in the estate had to be set aside and applied first to the satisfaction of abandonment and reclamation obligations. The Alberta Energy Regulator issued Abandonment Orders and advised that it would not issue licences to any purchaser of the valuable assets unless it was satisfied the abandonment and reclamation obligations would be discharged.

[15] ***Redwater*** noted that abandonment and reclamation obligations are an inherent component of the value of oil and gas assets: ***Redwater*** at para. 157. The Alberta regulatory regime adopts a "polluter-pays principle":

> . . . The Licensee Liability Rating Program essentially requires licensees to apply the value derived from oil and gas assets during the productive portions of the lifecycle of the assets to the inevitable cost of abandoning those assets and reclaiming their sites at the end of those lifecycles" . . .
>
> . . . [Alberta's] solution is a licensing regime that depresses the value of key industry assets to reflect environmental costs, backstopped by a levy on industry in the form of the orphan fund. Alberta intended that apparatus to continue to operate when an oil and gas company is subject to insolvency proceedings: ***Redwater*** at paras. 29-30.

The Alberta regime was not in constitutional conflict with the federal bankruptcy regime. The *Bankruptcy and Insolvency Act* sections engaged were primarily directed at the personal liability of trustees, not the liability of the bankrupt estate.

[16] The ***Redwater*** decision confirmed at paras. 119, 122 that the reclamation and abandonment obligations were not "claims provable in bankruptcy", because they were not associated with any "creditor". Environmental duties are owed to the public: ***Redwater*** at paras. 134-35. Further, there was insufficient certainty in the quantum of those obligations to make them provable in bankruptcy: ***Redwater*** at paras. 145, 149, 154.

[17] Since claims that were not "provable in bankruptcy" were not extinguished by the bankruptcy process, the abandonment and reclamation obligations remained binding on the bankrupt estate:

> 160 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. . . .

Even if the trustee disclaimed the worthless assets, the abandonment and reclamation obligations remained an obligation of the bankrupt estate: ***Redwater*** at paras. 93, 98. Accordingly, the proceeds of the sale of Redwater's assets had to be used to address its "end-of-life" obligations before any distributions were made to creditors: ***Redwater*** at paras. 160-63.

The Application of ***Redwater*** to the Manitok Bankruptcy

[18] In 2015 Redwater Energy Corporation was in much the same position as Manitok Energy finds itself today. Both were insolvent oil and gas companies. Both had some producing assets that had value, but both also had a number of assets in which the abandonment and reclamation obligations far exceeded any market value. In both, the trustee or receiver had disclaimed the worthless assets and sold off the valuable assets, with the sale proceeds being held pending the court's directions on distribution. In ***Redwater***, the Supreme Court of Canada concluded that the receiver was obliged to satisfy the abandonment and reclamation obligations before making any distribution to the secured creditor, Alberta Treasury Branches.

[19] In the present appeal, the prime secured creditor of Manitok Energy (the National Bank) has come to an agreement with the Receiver. Here the two builders' lien holders claim to have a secured position that must be satisfied in priority to other claims. As in ***Redwater***, the Alberta Energy Regulator and the Orphan Well Association argue that abandonment and reclamation obligations must be satisfied first. They argue that the proceeds of the Persist sale presently held by the Receiver must be applied first to the satisfaction of those obligations before there can be any distribution to the builders' lien claimants or any other creditors.

"Assets Unrelated"

[20] The parties engaged the comments in ***Redwater*** about s. 14.06(7) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3:

> 14.06(7) Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security
>
> (a) is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and

> (b) ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

Redwater holds at para. 159 that this provision does not apply to abandonment and reclamation obligations in the oil and gas industry, but ***Redwater***, it is argued, applied it by analogy: ". . . the Abandonment Orders and the LMR [Liability Management Rating] replicate s. 14.06(7)'s effect in this case" (emphasis added).

[21] All the parties to this appeal referred to para. 159 of ***Redwater***, which is reproduced here again for convenience.

> 159 Accordingly, the end-of-life obligations binding on [the Receiver] GTL are not claims provable in the Redwater bankruptcy, so they do not conflict with the general priority scheme in the BIA. This is not a mere matter of form, but of substance. Requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the BIA. In crafting the priority scheme set out in the BIA, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation (see s. 14.06(7)). Thus, the BIA explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage. Although the nature of property ownership in the Alberta oil and gas industry meant that s. 14.06(7) was unavailable to the Regulator, the Abandonment Orders and the LMR [Liability Management Rating] replicate s. 14.06(7)'s effect in this case. Furthermore, it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the BIA - rather, it facilitates them. (Emphasis added)

This paragraph is found under the heading "Conclusion on the *Abitibi* Test", a reference to the previous leading case of ***Newfoundland and Labrador v AbitibiBowater Inc,*** 2012 SCC 67, [2012] 3 SCR 443.

[22] The wording in para. 159 of ***Redwater*** does present interpretative challenges. It notes that s. 14.06(7) cannot apply to oil and gas assets, because of the inherent nature of those assets. It then appears to recognize a non-statutory analogous concept, "replicated" by the Alberta Energy Regulator's enforcement actions. This analogous concept however is said not to extend to "assets

unrelated to the environmental condition or damage". The meaning of this proviso creates the issue in this appeal.

[23] The chambers judge relied on parts of para. 159 to distinguish ***Redwater***.

(a) Parliament intended to permit regulators to place a charge on property if it was affected by an environmental condition;

(b) The activities of the Alberta Energy Regulator in ***Redwater*** "replicated" the effect of s. 14.06(7) of the *Bankruptcy and Insolvency Act*;

(c) Redwater's only "substantial assets" were affected by an environmental condition, so the Alberta Energy Regulator orders did not extend to "assets unrelated to the environmental conditions".

The chambers judge also noted that ***Redwater*** confirmed at para. 114 that the trustee only has a duty to remediate "to the extent that assets remain in the . . . estate".

[24] The chambers judge essentially concluded that because the Persist assets, along with their abandonment and reclamation obligations, had been sold to Persist, they were "assets unrelated" to the rest of the oil and gas properties owned by Manitok. Those were the assets the Receiver had disclaimed and which were likely to become orphaned.

[25] Section 14.06(7) creates a super-priority for reclamation expenses which ***Redwater*** stated at para. 159 was unavailable to the Regulator due to ". . . the nature of property ownership in the Alberta oil and gas industry". This may be a reference to the fact that oil and gas rights are a *profit à prendre*, although security interests can exist in them. Further, as a matter of fact, the super-priority created by the section assumes that there will be some residual value in an asset after it has been remediated. Take the example of a service station site which has been contaminated because its fuel tanks leaked over a long period of time. After the property is remediated, the site would have some continuing value against which the super-priority security interest could attach. That is not the case with orphaned oil and gas properties, which by their nature have little or no value even if they are properly abandoned and reclaimed.

[26] The Receiver argues that para. 159 merely addresses an argument (emphatically endorsed by the dissent at para. 286) that using estate assets for remediation would be inconsistent with the *Bankruptcy and Insolvency Act*. The Receiver argues that para. 159 must be read as follows:

> 159 Accordingly, the end-of-life obligations binding on [the Receiver] GTL are not claims provable in the Redwater bankruptcy, so they do not conflict with the general priority scheme in the *BIA*. . . .

> Thus, the *BIA* explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage. . . .
>
> In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* - rather, it facilitates them.

The intervening discussion in the paragraph (including the reference to "replicate" and "assets unrelated") is only intended to illustrate this consistency with the *Bankruptcy and Insolvency Act*, not to create a separate class of "unrelated" assets.

[27] The Alberta Energy Regulator agrees, arguing that para. 159 is part of the discussion on constitutional paramountcy. That paragraph is not intended to override or qualify the other statements in the decision about the obligation of trustees and receivers to discharge publicly owed environmental obligations of the bankrupt estate before making distributions to creditors.

[28] The reasons under appeal here imply that the "assets unrelated" phrase requires that a distinction be made between various kinds of assets in the bankrupt estate. The disclaimed Manitok assets remain in the bankrupt estate and are encumbered with abandonment and reclamation obligations. Assets such as those sold to Persist become "unrelated" to the assets burdened by those obligations. Since Persist had assumed the abandonment and reclamation obligations on the assets it purchased, these were now "assets unrelated" to the contaminated disclaimed assets. Looking at it in another way, once the Persist assets are sold, they are converted to cash proceeds, which are said to be unencumbered by abandonment and reclamation obligations because those obligations cannot be attached to "assets unrelated". This concept of "unrelated" assets is however inconsistent with the ***Redwater*** decision, which accepted at para. 18 the approach of the Alberta Energy Regulator to treat all the assets of an oil and gas company as a "package".

[29] This interpretation would render ***Redwater*** meaningless. If the proceeds of the sale of the bankrupt corporation's valuable assets can not be used to reclaim "unrelated assets" there would never be any proceeds available to satisfy public abandonment and reclamation obligations. The assets that are going to be disclaimed by a receiver or trustee because they are overwhelmed by abandonment and reclamation obligations are always going to be "unrelated" under this approach. The disclaimed and orphaned assets cannot, by definition, be sold because of their abandonment and reclamation obligations. Unless the sale proceeds of the valuable assets are available to satisfy those obligations, they can never be satisfied.

[30] There is nothing in the Alberta regulatory regime, the *Bankruptcy and Insolvency Act*, or ***Redwater*** that permits a licensee to avoid its abandonment and reclamation obligations by converting valuable licensed assets into cash before an enforcement order can be issued. On this interpretation there would rarely, if ever, be any "related" proceeds in an insolvency available to

satisfy abandonment and reclamation obligations. The whole point of ***Redwater***, however, is that the proceeds of the sale of the valuable assets must be applied towards reclamation of the worthless orphaned assets.

[31] Another noted aspect of para. 159 is the statement that "Redwater's only substantial assets were affected by an environmental condition or damage". Redwater (like Manitok) had some valuable properties, and some that were overwhelmed by their inherent abandonment and reclamation obligations and were to be disclaimed and orphaned. Redwater's trustee (like Manitok's) had sold the valuable assets and was holding the proceeds in trust. Those proceeds had to be used by Redwater's trustee to satisfy abandonment and reclamation obligations before any distribution to secured creditors. The point is that the outcome of ***Redwater*** demonstrates that the Supreme Court of Canada did not treat Redwater's assets as falling into different pools. All of the oil and gas assets were treated collectively as being contaminated, and they all had to answer for the abandonment and reclamation obligations attached to the disclaimed assets. None of the oil and gas assets were "assets unrelated" to the other oil and gas assets. Manitok is in exactly the same position. The "substantial assets" of Manitok are the same as the "substantial assets" of Redwater.

[32] Further, the outcome in ***Redwater*** confirms that assets in the estate do not cease to be available to discharge abandonment and reclamation obligations because they are sold by the trustee and converted to cash. Both the assets in ***Redwater***, and the assets sold to Persist have been converted to cash. That, however, does not relieve the trustee of the obligation to satisfy Manitok's public abandonment and reclamation duties.

Non-Oil and Gas Assets

[33] The intervenor municipalities argue that the reference to "assets unrelated to the environmental condition or damage" means that the proceeds or value of non-oil and gas assets are not available for the satisfaction of abandonment and reclamation obligations. They argue that the ruling in ***Redwater*** that the trustee must discharge those obligations is limited to the value in the estate arising from "licensed assets, falling within the AER's regulatory authority".

[34] This issue was identified by the majority of this Court in ***Grant Thornton Ltd v Alberta Energy Regulator***, 2017 ABCA 124 at para. 102, 50 Alta LR (6th) 1:

> 102 Secondly, the Regulator does not insist that all of the assets in the bankrupt estate be applied towards environmental liabilities. It only insists on the oil and gas assets being used for that purpose. Thus, if Redwater had valuable non-oil and gas assets (for example, valuable real estate or shareholdings) the Regulator would not insist that the Receiver or Trustee use those assets to meet Redwater's environmental obligations. But again, if the Regulator is correct in its position, it could insist on all of the assets in the bankrupt estate being applied towards the

> "public duty" to perform the environmental cleanup. For example, if s. 14.06 only deals with personal liability of trustees, there would be no reason to limit the obligation to discharge environmental liabilities to the oil and gas assets themselves. Resort to all the assets in the estate appears to be authorized by the provisions of the *Environmental Protection and Enhancement Act*, RSA 2000, c. E-12, s. 240(3).

This was the decision overturned by the Supreme Court of Canada in ***Redwater***, but the Supreme Court did not directly address this particular issue.

[35] One could read para. 159 of ***Redwater*** as excluding resort to "unrelated" non-oil and gas assets to cover abandonment and reclamation costs. However, as was pointed out by the Orphan Well Association, the reasons in ***Redwater*** refer repeatedly to the "assets of the estate", without drawing any such distinction: see for example ***Redwater*** at paras. 76, 102, 107, 114. Further, there is no clear boundary between licensed assets and other assets. For example, the sale to Persist (like many similar sales) included not only licensed assets but oil and gas rights, royalty rights, intellectual property, seismic data, vehicles and other chattels. ***Redwater*** gives no support to the municipalities' argument.

[36] In the final analysis, the assets sold to Persist appear to be indistinguishable from the type of assets that the trustee in ***Redwater*** sold. ***Redwater*** confirms that the proceeds of the sale of those assets must be applied first towards the satisfaction of abandonment and reclamation obligations. To the extent that there is any issue about it, the status of assets completely unrelated to the oil and gas business can be left for another day.

Enforcement Action by the Alberta Energy Regulator

[37] Paragraph 159 of ***Redwater*** states: ". . . the Abandonment Orders and the LMR [Liability Management Rating] replicate s. 14.06(7)'s effect in this case". The respondents argue this means that the outcome in ***Redwater*** was driven by the fact that the Alberta Energy Regulator had issued Abandonment Orders. The absence or timing of such enforcement orders is said to be critical to the outcome.

[38] It is clear, however, that reclamation and abandonment obligations are inherent in oil and gas properties from the minute extraction of the resource commences: ***Redwater*** at para. 29; ***PricewaterhouseCoopers Inc v Perpetual Energy Inc***, 2021 ABCA 16 at paras. 86-87; ***Panamericana De Bienes Y Servicios (Receiver of) v Northern Badger Oil & Gas Ltd***, 1991 ABCA 181 at para. 32, 81 Alta LR (2d) 45, 117 AR 44. Abandonment and reclamation obligations are inchoate, but that does not mean that they do not arise until enforcement action is taken by the Alberta Energy Regulator. The public duty on the Receiver to use the assets of the Manitok estate to discharge Manitok's abandonment and reclamation obligations existed independently of any enforcement action taken by the Alberta Energy Regulator.

[39] The respondents point out that in ***Redwater*** the Alberta Energy Regulator had issued abandonment orders after the receivership but before the bankruptcy. In the Manitok insolvency, abandonment and reclamation orders were issued in August 2019, after the date of bankruptcy, but that is not a reason to distinguish ***Redwater***. Abandonment and reclamation obligations are imposed by statute on all licensees. As noted in ***Redwater*** at paras. 160, 212:

> . . . a persuasive distinction cannot be drawn between liability for an environmental condition or environmental damage . . . and liability for failure to comply with an order to remedy such a condition or such damage . . . :

Abandonment and reclamation obligations exist independently of the issuance of abandonment orders, which are merely an enforcement mechanism: ***Redwater*** at para. 92; ***Perpetual Energy*** at para. 87. There is also no reason to think that a receiver or trustee in bankruptcy would not discharge a statutory obligation on the estate in the absence of an enforcement order. It would be artificial to have the outcome of a priority dispute like this depend on whether the Alberta Energy Regulator had sufficient information to issue abandonment orders before, as opposed to after the insolvency event.

[40] The use of the word "replicate" in para. 159 can best be understood by comparing the French text "reproduisent l'effet". Read in context, para. 159 is merely saying that recognizing the validity of the Alberta Energy Regulator's enforcement of environmental obligations in an insolvency is no more inconsistent with the *Bankruptcy and Insolvency Act* than s. 14.06(7), which also gives priority to the enforcement of environmental obligations.

[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, the fact that the Persist assets were sold before any enforcement orders were issued is not relevant.

<u>The Effect of the Trust and Holdback</u>

[42] The chambers judge reasoned at paras. 41, 44 that the proceeds of the sale to Persist were paid into trust, and therefore were not captured by the ***Redwater*** decision. It is true that the physical oil and gas assets sold to Persist were no longer a part of the Manitok estate, because they had vested in Persist. This appeal, however, is not concerned with those physical assets, but rather with the proceeds resulting from the sale of those assets. Those proceeds are very much a part of the Manitok estate, even though they are held "in an interest bearing trust account". Under the Sale and Vesting Order they were specifically to stand in place of the physical assets that had been sold, without affecting in any way the priorities and claims of various claimants. The claims of the two

respondent builders' lien claimants survive in those proceeds, but they are to be dealt with in accordance with the ***Redwater*** principles.

[43] The respondents argue that this case is distinguishable from ***Redwater*** because the ***Redwater*** decision "changed the law". They argue that ***Redwater*** does not apply, because the Persist assets had been sold effective as of a date prior to the "seismic shift" caused by the reasons in ***Redwater***, and the funds were paid into trust by court order. That is not an accurate statement of the legal position. The ***Redwater*** decision did not change the law. It merely stated what the law had always been, despite the opinions of some in the industry to the contrary. The law was always as stated in the *Bankruptcy and Insolvency Act*, ***Northern Badger***, ***Abitibi***, and as confirmed in ***Redwater***. The 2019 ***Redwater*** decision stated the law as of the date that Redwater Energy Corporation became bankrupt four years earlier. The ***Redwater*** decision also stated the law as it existed on the day that Manitok became bankrupt, and it applies fully to these proceedings.

[44] The builders' lien claimants overstate the effect of the "trust" created by the Sale and Vesting Order. The assets of an insolvent corporation belong to the estate of that corporation. Those assets are under the control of the receiver or trustee. The receiver or trustee obviously has no beneficial interest in those assets and would keep them segregated, and in that sense it is not inaccurate to say the assets are held "in trust" or "in an interest bearing trust account". But the "trust" is only to hold the assets for the stakeholders in the insolvency, in the same priority as their interests may appear. Any "trust" does not create any new or enhanced rights in any stakeholder, even if recited in a court order, and even if the assets are sub-segregated into smaller pools of assets. A court cannot by such a "trust order" reorder the priorities in an insolvency.

[45] The Receiver was obviously required to hold the Persist proceeds "in an interest bearing trust account" for the bankrupt estate and its stakeholders, because the Receiver had no beneficial interest in them. The Order, however, did not create any new rights or trust beneficiaries or vary the entitlement of any stakeholder; it essentially provided that the funds were to be held in escrow pending a determination of entitlement: ***Toronto Dominion Bank v 1287839 Alberta Ltd***, 2021 ABQB 205 at para. 17. The Order specifically stated that the funds were deemed to replace the sold real estate, and the claims of all stakeholders would be unaffected. The quantum of the two builders' lien claims was relevant to setting the quantum of the holdback, but the Order neither enhanced nor diminished the substantive priority rights of the builders' lien claimants to the holdback funds. There was no new "trust" created in favour of the builders' lien claimants in the holdbacks by placing them "in an interest bearing trust account", other than the requirement that the funds be held in escrow until the court could rule on entitlement.

[46] In summary, the fact the proceeds of the Persist sale were placed into trust by virtue of a court order does not affect the outcome of this appeal or distinguish this case from ***Redwater***.

Conclusion

[47] In conclusion, the analysis at paras. 39-42 of the reasons under appeal is directly inconsistent with the binding decision in ***Redwater***. The appeal is allowed, and the chambers decision is set aside. The stated question must be answered affirmatively.

Appeal heard on March 10, 2022

Memorandum filed at Calgary, Alberta
this 30th day of March, 2022

Slatter J.A.

Khullar J.A.

Authorized to sign for: Antonio J.A.

Appearances:

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for the Appellant

G.L. Walters
for the Respondent, Prentice Creek Contracting Ltd.

G.S.E. Hamilton
for the Respondent, Riverside Fuels Ltd.

M.E. Lavelle
for the Respondent, Alberta Energy Regulator

G.G. Plester
for the Intervenors, Stettler County and Woodlands County

R. Gurofsky/ G.J. Finegan
J.L. Cameron (no appearance)
for the Intervenor, Orphan Well Association