COURT OF APPEAL OF ALBERTA

Form AP-5
[Rule 14.87]

COURT OF APPEAL FILE NUMBER:	2101-0085AC
TRIAL COURT FILE NUMBER:	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:	APPELLANT
RESPONDENTS:	PRENTICE CREEK CONTRACTING LTD., RIVERSIDE FUELS LTD. and ALBERTA ENERGY REGULATOR
STATUS ON APPEAL:	RESPONDENTS
INTERVENORS:	STETTLER COUNTY, WOODLANDS COUNTY and ORPHAN WELL ASSOCIATION

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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

REPLY FACTUM OF THE APPELLANT

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OVERVIEW

1 The Receiver of Manitok is appealing a decision of the Chambers Justice relating to the availability of Lien Holdbacks to partially satisfy the estate's unfunded ARO.

2 Stettler County and Woodlands County (together, the **Municipalities**) and the Orphan Well Association (**OWA**) were granted permission to intervene in this Appeal after the Receiver filed its Appellant's Factum. The Receiver was therefore granted permission to file this Reply Factum.[1]

3 The Receiver has no submissions to make in response to the OWA's Intervenor Factum. This Reply Factum is only responsive to the Municipalities' Intervenor Factum.

4 The Receiver adopts all of its defined terms from its Appellant's Factum.

PART 1 – FACTS

5 The Receiver relies on the facts as recited in its Appellant's Factum. In addition, the Receiver highlights the following:

(a) *Redwater SCC* was released on January 31, 2019, after the Persist SAVO was granted but before the Persist Sale closed. The Persist Sale did not close until April 15, 2019, after all parties had 3 ½ months to analyze *Redwater SCC*. The Persist Sale and the Persist SAVO were amended during this period.[2]

(b) Five other municipalities had claims against the Manitok estate for unpaid municipal taxes. A municipal tax holdback was established under the Persist SAVO, a portion of which was later distributed to the five municipalities—but only in respect of post-receivership tax obligations. Pre-receivership tax arrears were accepted as subordinate to the estate's unfunded ARO.[3]

PART 2 – GROUNDS OF APPEAL

6 The grounds of appeal were defined in the Receiver's Appellant Factum.

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[1] Order of Veldhuis JA, granted September 27, 2021, para 3.
[2] Appellant Factum, paras 15, 16, 18.
[3] Appellant Factum, paras 24, 25. The Municipal Distribution Order, para 2 [**Appeal Record at 108-110**] identifies the five recipients of the Municipal Tax Distribution as the counties of Kneehill, Clearwater, Taber, Wheatland and Rockyview.

PART 3 – STANDARD OF REVIEW

7 The Receiver has no reply submissions to make about the standard of review. The correctness standard applies to all grounds of appeal.

PART 4 – ARGUMENT

A. The Receiver's position is fundamentally grounded in the *Abitibi* test

8 The Municipalities argue that the Receiver's position is based on an out-of-context reading of paragraph 160 of *Redwater SCC*.[4] That is not the case. The Receiver's position is based on the Supreme Court of Canada's application of the *Abitibi*[5] test in *Redwater SCC*, as articulated at paragraphs 115-161 of *Redwater SCC*.[6] Through its application of the *Abitibi* test, the Supreme Court of Canada held that satisfying ARO is a regulatory obligation and a public duty that exists apart from the BIA's priority hierarchy for provable claims.[7]

9 The Supreme Court of Canada's analysis in this regard is fundamentally ignored by the Municipalities, who instead analogize ARO to secured claims by referencing creditor-debtor concepts, such as charges,[8] priorities[9] and super-priorities.[10] These arguments by the Municipalities are substantially similar to arguments that were rejected in *Redwater SCC*. The Supreme Court of Canada did not identify any conflict between the treatment of ARO as a public duty (not a provable claim) and any aspect of the BIA, including its priority scheme for provable claims.[11] To the contrary: "[R]ecognizing 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."[12]

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[4] Municipalities' Factum, paras 8-10; *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5, [2019] SCJ No 5 (QL) [***Redwater SCC***].
[5] *Newfoundland and Labrador v AbitibiBowater Inc*, 2012 SCC 67, [2012] 3 SCR 443 at para 26 [***Abitibi***].
[6] *Redwater SCC*, paras 115-161.
[7] *Redwater SCC*, paras 159-160.
[8] Municipalities' Factum, paras 11, 15.
[9] Municipalities' Factum, paras 12, 13, 14, 16, 20, 25,
[10] Municipalities' Factum, paras 15, 17, 28(a).
[11] *Redwater SCC*, paras 117-118, 122, 148, 159, 160.
[12] *Redwater SCC*, para 159.

B. Section 14.06(7) of the BIA was inapplicable in Redwater and is inapplicable now

10 The Municipalities argue that ARO in insolvency must be satisfied using less than all of an estate's assets (i.e. only from licensed assets) because the treatment of ARO must replicate the effect of s. 14.06(7) of the BIA.[13]

11 Section 14.06(7) of the BIA does not apply to unfunded ARO associated with orphaned wells in Alberta, *inter alia*, because (a) ARO are not provable claims,[14] (b) any work to abandon and reclaim orphaned assets is to be completed by the OWA, which is independent,[15] and (c) ARO are not related to real property: "[T]he nature of property ownership in the Alberta oil and gas industry meant that s. 14.06(7) was unavailable."[16] The Municipalities' argument that ARO must be satisfied in a way that replicates an "unavailable" statutory provision is nonsensical.

C. The AER does not regulate how ARO is funded

12 The Municipalities argue that funding ARO in insolvency proceedings using financial resources other than proceeds from sales of licensed assets would exceed the AER's powers.[17] However, the AER does not regulate which financial resources are used by licensees (whether solvent or insolvent) to satisfy ARO. Solvent licensees are permitted to satisfy ARO using any financial resources at their disposal, whether or not they are proceeds from licensed assets. There is no legal basis for treating solvent and insolvent licensees differently by imposing a restriction only on how ARO are satisfied by the latter.

D. The analyses under *Abitibi* and *Redwater SCC* apply to regulatory obligations not involving licenses

13 Not every field of regulation involves the granting of licenses. Even in the absence of a licensing regime, regulatory obligations that cannot be reduced to provable claims must be satisfied from an estate in insolvency.

[13] Municipalities' Factum at paras 9-12.
[14] *Redwater SCC*, paras 122, 128, 130, 134-135, 160.
[15] *Redwater SCC*, paras 23, 148.
[16] *Redwater SCC*, para 159.
[17] Municipalities' Factum at paras 22-24.

14 For example:

(a) If a remediation order is issued against a debtor under *CCAA* protection relating to pre-filing contamination and it is not a provable claim,[18] the debtor must comply at its own cost irrespective of where the contamination occurred (i.e. at a residential property in Calgary versus an AER-licensed well site) or how the clean-up is funded. There is not an applicable licensing regime.

(b) If a securities regulator imposes a monetary penalty that is not a provable claim against an individual who later becomes bankrupt, the penalty must be paid by the bankrupt,[19] without any restriction on how the payment is funded. Again, there is not an applicable licensing regime.

15 The Municipalities' theory that only proceeds from sales of licensed assets should be available to satisfy regulatory obligations is unworkable in relation to regulatory schemes that are not based on licensing.

E. Licensed and non-licensed assets are sold together

16 From a practical perspective, the Municipalities' argument regarding the funding of ARO only from proceeds of sales of licensed assets is unworkable. Asset sales in the oil and gas industry do not only involve licensed assets. Any sale of licensed assets (wells, pipelines and facilities) necessarily involves the sale of associated petroleum and natural gas rights (*profits à prendre*) and surface rights, which are not AER-licensed. That is because a licensed well or facility must be abandoned, *inter alia*, upon the termination of the mineral lease, surface lease or right of entry.[20]

17 A seller and a purchaser may agree, as between themselves, to allocate the purchase price between the petroleum and natural gas rights and other assets for tax purposes. However, if such an allocation were determinative of what proceeds are available to satisfy ARO versus provable claims, every sale of oil and gas assets in insolvency would devolve into litigation about the

[18] *Nortel Networks Corporation (Re)*, 2013 ONCA 599, 368 DLR (4th) 122 paras 1-5, 32, 42-43, 45. In *Redwater SCC*, paras 146, 150, the Supreme Court of Canada affirmatively described the Ontario Court of Appeal's application of the *Abitibi* test in *Nortel*. See also *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, s. 113.
[19] *Wing (Re)*, 2019 ONSC 4063, 2019 CarswellOnt 11453, paras 25, 44, 59.
[20] *Oil and Gas Conservation Rules*, Alta Reg 151/1971, r. 3.012; *Redwater SCC*, para 17.

allocation between the AER and holders of provable claims. That is surely not what was intended by the Supreme Court of Canada.

18 Added complexity would arise in cases, like the Persist Sale, involving non-licensed assets in addition to petroleum and natural gas rights and surface rights, such as non-operated working interests, royalties, contractual rights, equipment, seismic data, vehicles, and more.[21]

F. Municipalities, *qua* creditors and regulators

19 The Municipalities argue that (a) they regulate development in accordance with bylaws and development permits, and (b) they are empowered to issue stop orders, order the demolition of non-compliant structures, and, if necessary, add the resulting work costs to the parcel's tax roll.[22] Municipal work costs would likely constitute a provable claim under the *Abitibi* test, as interpreted in *Redwater SCC*.[23] However, if a municipality is truly enforcing a regulatory obligation that is not a provable claim, it should rightly expect to be treated like the AER and other similarly situated regulators.

PART 5 – RELIEF SOUGHT

20 As set forth in its Appellant Factum, the Receiver respectfully requests an order allowing this appeal; setting aside the Chambers Decision and the resulting order of the Chambers Justice; and authorizing the Receiver to release the Lien Holdbacks to the Manitok estate.

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

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[21] 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, article 2.1 [**Extracts of Key Evidence at 132**]; Second Amending Agreement in respect of the Persist Sale, March 29, 2019, article 2 [**Supplemental Extracts of Key Evidence at 015]**. In the sale agreements for the Persist Sale, as amended, Assets was defined to include Petroleum and Natural Gas Rights, Tangibles and Miscellaneous Interests (each of which was itself separately defined). Wells were captured by the definition of Miscellaneous Interests. Pipelines and Facilities were captured by the definition of Tangibles. Rights under mineral leases were captured by the definition of Petroleum and Natural Gas Rights. So too were royalties in favour of Manitok to be transferred to Persist (through the inclusion of Title Documents in the definition of Petroleum and Natural Gas Rights). Surface rights are defined as Assigned Contracts, which are captured by the definition of Miscellaneous Interests. Seismic licenses are also defined as Assigned Contracts and are therefore Miscellaneous Interests. So too is Manitok's proprietary seismic data captured by the definition of Miscellaneous Interests. Equipment at well sites is captured by the definition of Tangibles, as are certain vehicles (e.g. pick-up trucks) and equipment unrelated to specific well sites (e.g. trailered compressor units) which were captured by the definition of Tangibles pursuant to the Second Amending Agreement.

[22] Municipalities' Factum, para 24, citing *Municipal Government Act*, RSA 2000, c M-26, ss. 553(h.1), 645, 646.

[23] A claim for municipal tax arrears is a provable claim. So too would a municipality's enforcement costs be a provable claim if they are incurred by the municipal directly and are added to the parcel's tax roll.

Table of Authorities

	Style of Cause / Document Title	Citation and Pinpoint
1	*Orphan Well Association v Grant Thornton Ltd*	2019 SCC 5 at paras 17, 23, 115-161
2	*Newfoundland and Labrador v AbitibiBowater Inc*	2012 SCC 67 at para 26
3	*Nortel Networks Corporation (Re)*	2013 ONCA 599 at paras 1-5, 32, 42-43, 45
4	*Environmental Protection and Enhancement Act*	RSA 2000, c E-12 at section 113
5	*Wing (Re)*	2019 ONSC 4063 at paras 25, 44, 59
6	*Oil and Gas Conservation Rules*	Alta Reg 151/1971 at rule 3.012
7	*Municipal Government Act*	RSA 2000, c M-26 at sections 553(h.1), 645, 646