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COURT OF APPEAL OF ALBERTA

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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	ORPHAN WELL ASSOCIATION, STETTLER COUNTY and WOODLANDS COUNTY
STATUS ON APPEAL	INTERVENORS
DOCUMENT	**FACTUM OF THE RESPONDENT,** **ALBERTA ENERGY REGULATOR**

APPEAL FROM THE ORDER OF
THE HONOURABLE MADAM JUSTICE B.E.C. ROMAINE
DATED THE 24TH DAY OF MARCH, 2021
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FACTUM OF THE RESPONDENT, ALBERTA ENERGY REGULATOR

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PART I – FACTS

A. Introduction

1. This Factum sets out the position of the Alberta Energy Regulator (**AER**) on the appeal and responds to the facta of the Appellant, Alvarez & Marsal Canada Inc., in its capacity as Court-appointed receiver and manager (**Receiver**) of Manitok Energy Inc. (**Manitok**), and to the Intervenors, the Orphan Well Association (**OWA**) and Stettler County and Woodland County (**Intervenor Municipalities**).

2. Like the Receiver and OWA, the AER submits that the Chambers Justice erred in the Chambers Decision[1] in failing to apply the fundamental finding in *Redwater*[2] that a receiver (as licensee) must use estate resources to satisfy the environmental obligations associated with a debtor's unsold oil and gas assets, in priority to the payment of provable claims of creditors.

3. This appeal concerns what should have been a straight-forward application of the Supreme Court of Canada's decision in *Redwater* to the facts in Manitok. Pursuant to *Redwater*, proceeds from the Persist Sale[3] should have been applied first to address the environmental obligations of Manitok before any distribution to a secured creditor. This result would have not only been consistent with the decision in *Redwater*, but also with the polluter pays principle which the Supreme Court of Canada confirmed underpins the regulatory framework for oil and gas resources in Alberta.[4]

4. Instead, with respect, the Chambers Justice erred in introducing irrelevant distinctions that unduly narrowed the application of *Redwater* to Manitok. Were the Chambers Decision to stand, the result would be to render the judgment in *Redwater* impotent, as it would apply in only the narrowest of circumstances where AER abandonment orders were issued at the outset of an insolvency proceeding before any sales had occurred. It would allow the timing of the issuance of AER abandonment orders to be determinative as to whether a polluter effectively escapes responsibility for remedying environmental damage.

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[1] Reasons for Decision of Justice Romaine [**Chambers Justice**], filed March 24, 2021, *Manitok Energy Inc Re*, 2021 ABQB 227 [**Chambers Decision**] [Appeal Record of the Appellant, filed July 26, 2021 [**Appeal Record**] at 111-118].
[2] *Orphan Well Association v Grant Thornton Ltd*., 2019 SCC 5 [*Redwater*] [**TAB 1**].
[3] As defined in the Receiver's Factum, at para 10.
[4] *Redwater*, at para 29 [**TAB 1**].

B. Facts Relevant to the Appeal

5. In relation to this appeal, the AER is the provincial body responsible for regulating energy development in Alberta, and the single lifecycle regulator of upstream oil and gas development in Alberta. It was established by the *Responsible Energy Development* Act (**REDA**)[5] with a legislated mandate to, *inter alia*, "provide for the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta".[6] In carrying out its mandate, the AER establishes rules and issues licences, approvals, orders, decisions and directions in furtherance of the purposes of AER-administered legislation, and enforces the requirements of its administered legislation, including ensuring licensees meet their environmental obligations.

6. The regulatory scheme for upstream oil and gas operations in Alberta that is relevant to this matter is contained in REDA, the *Oil and Gas Conservation Act*,[7] the *Pipeline Act*,[8] the *Environmental Protection and Enhancement Act*[9] and in the regulations and incorporated directives under those acts.

7. As a stakeholder in the Manitok receivership (**Receivership**), the AER acts "in the public interest and for the public good"[10] in ensuring the environmental end-of-life obligations of licensees are met. As was confirmed by the Supreme Court of Canada in *Redwater*, these obligations are public duties, and seeking to enforce these obligations does not make the AER a creditor of the estate.[11]

8. The AER generally adopts the facts as set out in the Factum of the Receiver dated September 27, 2021 (**Receiver's Factum**).

9. In particular, the AER notes the following:

    a. Pursuant to its mandate, the AER has jurisdiction over the AER-regulated oil and gas assets of the Persist Sale, including the final approval of the transfer of licences from one party to another. The AER exercised its regulatory discretion in approving the transfer of AER licenses for the licensed assets of the Persist Sale.[12]

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[5] SA 2012, c. R-17.3, as amended [**TAB 2**].
[6] REDA, s 2. [**TAB 2**].
[7] RSA 2000, c O-6, as amended [**OGCA**] [**TAB 3**].
[8] RSA 2000, c P-15, as amended [***Pipeline Act***] [**TAB 4**].
[9] RSA 2000, c E-12, as amended [**EPEA**] [**TAB 5**].
[10] *Redwater*, para 122 [**TAB 1**].
[11] *Redwater*, paras 130-135 [**TAB 1**].
[12] Affidavit of Laura Chant, sworn October 7, 2020, filed October 8, 2020, at para 6 [**Chant Affidavit**], Receiver's Extracts at 035.

b. The AER retains its regulatory jurisdiction over the unsold AER-regulated oil and gas assets of the Manitok estate, including "disclaimed" assets.[13]

c. As of October 7, 2020, the deemed liability associated with the unsold licensed oil and gas assets from the Manitok estate was estimated to be $44.5 million, which is substantially more than the Receiver's total realizations from all its sales and operations.[14]

d. The AER designated as orphans and issued abandonment and reclamation orders over the unsold AER-licensed assets in the Manitok estate.[15]

PART II – GROUNDS OF APPEAL

10. The AER adopts the grounds of appeal as set out in the Receiver's Factum. The AER opposes the submission of the Intervenor Municipalities that this appeal should be framed as a question of the scope of the AER's regulatory authority.

PART III – STANDARD OF REVIEW

11. The AER adopts the submissions regarding the standard of review as set out in the Receiver's Factum. The correctness standard of review applies to all the issues in this appeal.

PART IV – ARGUMENT

A. The Obligation under *Redwater* is to Comply with Provincial Regulatory Laws of General Application

12. The AER adopts the submissions of the Receiver and the OWA with respect to the first ground of appeal. To summarize, the Chambers Justice erred in law by failing to apply the central legal finding in *Redwater* that:

- insolvent estates must comply with ongoing environmental obligations of the estate that are not provable claims in bankruptcy; and
- those obligations must be discharged in priority to the provable claims of secured creditors.[16]

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[13] As described in the Receiver's Factum, at para 11.
[14] Receiver's Factum, at para 23.
[15] Chant Affidavit, at paras 8-16.
[16] *Redwater*, at paras 162-163 [**TAB 1**]; and *PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABCA 16, paras 92-95 [*Perpetual*] [**TAB 6**]

13. As, rather than ordering the proceeds from the Persist Sale to be used to address, in part, the outstanding environmental end-of-life obligations of the Manitok estate, which are public duty obligations and are not a provable claim, the Chambers Justice found that those proceeds should instead go to satisfy the Lien Claims[17] of the Lien Claimants,[18] who are secured creditors. The Chambers Decision prioritizes the claims of secured creditors over the ongoing environmental obligations of the estate, and in so doing, directly contradicts the central finding in the Supreme Court's decision in *Redwater*.

14. The AER submits that, in making this decision, the Chambers Justice erred in law by taking out of context select paragraphs of the *Redwater* decision that concern questions of constitutional paramountcy that are not at issue in the Manitok receivership and using them to unduly narrow the application of the central finding in *Redwater* to the facts of Manitok and limit the precedent established by the Supreme Court.

15. In particular, one of the questions of paramountcy at issue in *Redwater* was whether there is a conflict between the Alberta oil and gas regulatory scheme and subsections 14.06(2) and 14.06(4) of the *Bankruptcy and Insolvency Act* (**BIA**),[19] which concern the personal liability of trustees. The Supreme Court resolved this question of constitutional paramountcy in *Redwater* and determined that there is no conflict between the Alberta regulatory scheme and subsections 14.06(2) and (4) of the BIA.

16. Subsection 14.06(4) of the BIA expressly refers to the circumstances of a trustee's personal liability for failing to comply "<u>where an order is made</u> which has the effect of requiring a trustee to remedy any environmental condition or damage affecting property" (*emphasis added*). Neither the personal liability of trustees nor the circumstances of same as set out in s.14.06(4) of the BIA are at issue in the Manitok receivership. However, the Chambers Justice relied on the reference in *Redwater* to an "environmental order" in the context of s. 14.06(4) as support to find that, in the context of an insolvency and the pre-existing end-of-life obligations of an insolvent estate, an environmental order must be made prior to the sale of assets of the estate in order for the proceeds of that sale to be applied against the cost to fulfil the estate's environmental obligations.[20]

[17] As defined in the Receiver's Factum, at para 5.
[18] As defined in the Receiver's Factum, at para 5.
[19] RSC 1985, c B-3, as amended [**TAB 7**].
[20] Chambers Decision, at paras 33-37.

17. The Chambers Decision also erroneously relies on portions of the *Redwater* decision, paragraph 159 in particular, that concern a second question of paramountcy[21] that was at issue in *Redwater* but is not in Manitok: whether there is a conflict between the oil and gas regulatory regime in Alberta and subsection 14.06(7) of the BIA, which sets out the priority for Canada or a province for a provable environmental claim affecting real property or an immoveable. The Chambers Justice again erred in relying on a part of the *Redwater* decision that is concerned with a question of constitutional paramountcy not at issue in Manitok to limit the central finding in *Redwater* with respect to the priority to be given to public duty environmental obligations that are not provable claims. The Intervenor Municipalities make the same error in their submissions.[22]

18. Subsection 14.06(7) of the BIA addresses the priority for costs for Canada or a province of remedying an environmental condition or damage affecting real property or an immoveable property of a debtor "by permitting regulators to place first charge", that is, a provable claim, "on real property of a bankrupt that is affected by an environmental condition or damage in order to fund remediation".[23] The Court determined in *Redwater* that this provision of the BIA does not apply to the end-of-life obligations associated with the AER-licensed oil and gas assets of an estate in bankruptcy.[24] As was the case in the *Redwater* insolvency and is the case in the Manitok insolvency, the binding end-of-life obligations of an estate are not provable claims.[25]

19. However, the Chambers Justice incorrectly equates the language of s.14.06(7) of the BIA that is used in the Supreme Court's discussion of the question of constitutional paramountcy in paragraph 159 of *Redwater*, which references the "assets affected by environmental condition or damage" for which the costs of remedying by Canada or a province are a provable claim, to assets against which the AER has issued an abandonment order. This reading of *Redwater* erroneously reduces the statutory public duty end-of-life obligations of a licensee of AER-regulated oil and gas assets to only those end-of-life obligations enforced by the AER by means of an abandonment order. Relying on this error, the Chambers Justice distinguishes the Manitok receivership from the central finding in *Redwater*: "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

[21] Chambers Decision, at paras 38-41.
[22] Factum of the Intervenor Municipalities, at paras 11-17 [**Intervenor Municipalities' Factum**].
[23] *Redwater*, at para 159 [**TAB 1**].
[24] *Ibid*.
[25] *Ibid*.

represented by the abandonment orders it has issued, assets over which Manitok no longer has ownership or control"[26] (*emphasis added*).

20. With respect, the AER submits that nowhere in paragraph 159 of *Redwater*, or in *Redwater* at all, does the Supreme Court of Canada equate the issuance of abandonment orders to a determination that assets are "affected by an environmental condition or damage". Nor does the Supreme Court draw any distinction between the "environmental condition or damage" of the AER-regulated assets of a bankrupt estate that are sold and the AER-regulated assets of a bankrupt estate that are unsold and that will, ultimately, become the responsibility of the OWA. Rather, the AER submits that a correct reading of paragraph 159 of the Supreme Court's decision in *Redwater* would equate the reference to "assets affected by environmental condition or damage" to oil and gas assets with inherent end-of-life obligations, such as the end-of-life abandonment and reclamation obligations common to both the *Redwater* and Manitok estates.

21. More generally, the AER agrees with, and has adopted, the OWA's submissions that when considered in context, paragraph 159 does nothing more than to recognize a distinct but generally analogous priority for end-of-life obligations that is consistent with the policy aims and intentions of the BIA: that priority exists until end-of-life obligations are satisfied, following which provable claims are to be addressed.[27] Further, as the OWA submits, paragraph 159 does not "impose a nebulous 'relatedness' test"[28] to determine what assets of an estate are or are not available to address the estate's end-of-life obligations.

22. The Chambers Decision and the submissions of the Intervenor Municipalities illustrate the shortcomings of importing a 'relatedness' test to the decision in *Redwater*. The Chambers Decision finds the proceeds from the assets sold in the Persist Sale to be "unrelated" to the unsold assets.[29] However, this determination completely contradicts the finding in *Redwater*.

23. In all cases where AER-licensed assets are sold, the purchaser assumes the end-of-life obligations of those assets, which are not provable claims in bankruptcy. This is an inherent aspect of the Alberta regulatory regime, regardless of whether the sale is part of a receivership or the operations of a solvent business. What remains with the estate, as was the case with the *Redwater* insolvency, are the environmental end-of-life obligations

[26] Chambers Decision, at para 39.
[27] Factum of the OWA, at para 12 [**OWA's Factum**].
[28] *Ibid*, at para 16.
[29] Chambers Decision, at para 39.

associated with the unsold assets of the estate.[30] In *Redwater*, the Supreme Court considered the priority for the distribution of the remaining value of an insolvent estate,[31] including the proceeds of the sale of AER-regulated assets, to address the estate's environmental end-of-life obligations. If sale proceeds contributing to or forming the value of an estate cannot be used to satisfy the estate's end-of-life public duty obligations on the basis that those proceeds are somehow 'unrelated' to the estate's public duty obligations, the decision in *Redwater* would have no meaning.

24. The Intervenor Municipalities offer a different interpretation of the presumed 'relatedness' test than that found in the Chambers Decision. The Municipalities seek to limit the value of an insolvent estate that is available to address end-of-life obligations to only proceeds from "*licensed assets*, falling within the AER's regulatory authority."[32] The Supreme Court's decision in *Redwater* neither imposes nor considers such a requirement.

25. The AER submits that Intervener Municipalities' concept of 'relatedness' fails to even account for the full scope of the AER's regulatory authority. The AER's regulatory authority extends beyond AER-"licensed assets", and includes, for example, non-licensed assets that are used in upstream oil and gas operations, such as non-operating working interests,[33] non-licensed facilities and equipment located on a well or facility site or used in connection with*, inter alia*, the operation, abandonment or reclamation of a well, facility, well site or facility site,[34] and abandonment orders in respect of expired mineral leases, despite not having the regulatory authority to approve mineral leases,[35] as well as the disposition and management of public lands, the protection of the environment, and the conservation and management of water, including the wise allocation and use of water, in respect of energy resource activities in Alberta.[36]

26. The Intervenor Municipalities appear to be attempting to limit the AER's regulatory jurisdiction from the expansive scope of its authority to "do all things that are necessary for or incidental to the carrying out of any of [its] duties or functions"[37] to that of a licencing

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[30] *Redwater*, at para 52 [**TAB 1**].
[31] *Ibid*, at para 3.
[32] Intervenor Municipalities' Factum, at para 14 (emphasis in original).
[33] Pursuant to s 30 of the OGCA [**TAB 3**], a working interest participant may be required to pay for their proportionate share of suspension, abandonment, remediation, and reclamation costs for a well.
[34] OGCA, s 32 [**TAB 3**]. Under various provisions of the *Oil and Gas Conservation Rules*, AR 151/1971, as amended [**OGCR**] [**TAB 8**], and the *Pipeline Rules*, AR 91/2005, as amended [***Pipeline Rules***] [**TAB 9**], the AER also has additional regulatory authority over the operation of equipment used in oil and gas operations, despite not licencing the sale or manufacture of industrial equipment in Alberta and in some instances, vehicles.
[35] OCGR, s 3.012(a) [**TAB 8**].
[36] REDA, s 2(1)(b) [**TAB 2**], concerning one aspect of the AER's mandate. REDA, s 2(2) sets out a non-exhaustive list of powers, duties and functions of the AER.
[37] *Ibid*, s 14(1).

agency. They seek to justify their version of the 'relatedness' test on the basis that *Redwater* was largely concerned with "ensuring that secured creditors cannot profit from oil and gas assets while ignoring the regulatory requirements for those assets".[38] However, this justification disregards the central finding in *Redwater* that an insolvent estate cannot walk away from its ongoing environmental liability, but must comply with its environmental obligations that are not provable claims in bankruptcy.

27. Finally, as the OWA submits, to require a nebulous 'relatedness' test is to invite a host of legal and practical issues that are not present when the AER enforces a licensee's end-of-life obligations outside of an insolvency proceeding.[39] The effect of introducing a 'relatedness' requirement to the precedent established in *Redwater* would be to undermine the central finding of that decision.

B. The Timing of Abandonment Orders is Irrelevant

28. The AER adopts the submissions of the Receiver and the OWA with respect to the second ground of appeal: the Chambers Justice erred in law by relying on the relative timing of the sale processes and the issuance of abandonment orders by the AER as a distinguishing factor that justified a different result in Manitok than was reached in *Redwater*.

29. The AER submits that in both *Redwater* and Manitok, the AER issued abandonment and reclamation orders only against the unsold AER-licensed oil and gas assets of the estate. For the *Redwater* insolvency, the AER issued abandonment orders <u>before</u> the sale of the *Redwater* estate's other AER-licensed oil and gas assets. For the Manitok insolvency, the abandonment orders were issued <u>after</u> the Persist Sale. The difference in timing of the issuance of the orders is reflective of the different progressions of the two insolvencies. It is not determinative of the existence of the environmental obligation.

30. As is set out in the *Redwater* decision,[40] in the *Redwater* insolvency, when the *Redwater* receiver alerted the AER that it was not taking possession and control of the various assets it did not intend to sell, the receiver and the AER disagreed as to the continuing obligation of the *Redwater* estate to satisfy the end-of-life environmental requirements of those assets. The AER issued the abandonment orders against those assets of the *Redwater*

[38] Intervenor Municipalities' Factum, at para 17.
[39] OWA's Factum, at para 16.
[40] *Redwater,* at paras 46-53 [**TAB 1**].

estate because there was no longer a party responsible for them, and therefore they represented an environmental and safety hazard.[41]

31. Whereas, for the Manitok insolvency, the Manitok Receiver and the AER agreed on the Manitok estate's responsibility for the ongoing end-of-life obligations of its oil and gas assets: the central finding in *Redwater*. The AER worked with the Manitok Receiver to pursue marginally or non-accretive sales to reduce the number of unsold assets and therefore reduce any remaining end-of-life obligations in the estate.[42] When the unsold assets of the Manitok estate were ultimately renounced by the Receiver and the Receiver was discharged of them, the AER issued abandonment orders against those unsold assets because there was no longer a party responsible for them, and therefore they represented an environmental and safety hazard.[43]

32. The Chambers Justice erred in using this difference in the timing of the AER-issued abandonment orders to unduly narrow the application of the central finding in *Redwater*.[44] Just as the end-of-life obligations of a licensee of AER-regulated oil and gas assets are not only those end-of-life obligations enforced by the AER by means of an abandonment order, the existence of Manitok's environmental obligations is not constrained by the timing of AER orders.

33. Abandonment and reclamation orders are simply a statutory tool for the enforcement of existing environmental obligations; abandonment and reclamation orders do not create environmental obligations. As this Court has made clear in *Perpetual*,[45] abandonment and reclamation obligations are inherent in any oil well, from the moment it is drilled and comes into production. They exist "whether or not abandonment orders have been issued by the [AER]."[46] Abandonment and reclamation of oil and gas assets in Alberta is required pursuant to statute. A licensee of oil and gas assets in Alberta must abandon them when required by the OGCA or the *Pipeline Act*, in accordance with the regulations and rules, or when ordered by the AER.[47] Abandonment is required, *inter alia*, on the termination of the associated mineral lease, surface lease or right of entry for the underlying asset,[48] if a corporate licensee ceases to be active, is dissolved or struck,[49] and in accordance with

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[41] *Redwater*, at para 51.[**TAB 1**]
[42] Chant Affidavit, at para 6.
[43] Chant Affidavit, at para 8.
[44] Chambers Decision, at paras 39 and 42.
[45] *Perpetual,* at paras 86-87 [**TAB 6**].
[46] *Ibid,* at para 87.
[47] OGCA s 27 [**TAB 3**]; *Pipeline Act*, s 23 [**TAB 4**].
[48] OCGR, s 3.012(a) [**TAB 8**].
[49] OGCR, s 3.012(f) [**TAB 8**]; ***Pipeline Rules***, s 82(9)(e) [**TAB 9**].

asset-closure procedures related to the end-of-life of the asset.[50] The duty to reclaim is established by EPEA.[51]

34. The Chambers Justice's error in distinguishing Manitok based on the timing of when the Persist Sale closed relative to when abandonment orders were issued by the AER underlies the Chambers Justice's misunderstanding of the nature of Manitok's end-of-life obligations, and the AER's role in representing the public interest and seeking to enforce those obligations. As the Supreme Court confirmed in *Redwater,* enforcement of a licensee's end-of-life environmental obligations that are not reduced to a provable claim does not make the AER a creditor of the estate.[52] Nevertheless, the Chambers Justice's narrow interpretation of *Redwater,* based on erroneously characterizing the Manitok estate's end-of-life obligations as only those created and enforced by the AER through the issuance of abandonment and reclamation orders*,* in effect, reduces the public duties owed by a licensee of AER-regulated assets to provable claims, and the AER to a creditor. This can be seen in paragraph 42 of the Chambers Decision, which concludes that:

> Thus, the findings in ***Redwater*** do not extend to a situation, such as in this case, where 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 where the new licensee assumes the inherent end-of-life obligations for that property. In this case, the AER is not at risk for any current costs of reclamation of the transferred property.

35. Contrary to the Chambers Justice's conclusion, the AER is not a creditor of Manitok who bears risk, and the environmental obligations of the AER-licensed oil and gas assets that were sold in the Persist Sale are not at issue in Manitok. The inherent end-of-life obligations of the sold assets are now the obligations of the new licensees. The end-of-life obligations of the unsold AER-licensed oil-and-gas assets of the Manitok estate are at issue; these obligations remain with the estate. In this case, as was the case in *Redwater*, these obligations are enforced by means of the AER's abandonment and reclamation orders.

36. The AER echoes the submissions of the OWA that nothing in the Alberta regulatory regime, or in *Redwater*, permits a licensee to avoid its environmental obligations simply by selling its valuable assets prior to the issuance of any abandonment or reclamation

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[50] OGCR, s 3.012(g.1) [**TAB 8**]; *Pipeline Rules*, s 82(9)(h.1) [**TAB 9**].
[51] EPEA, s 137 [**TAB 5**].
[52] *Redwater*, at paras 130-135 [**TAB 1**].

orders. And as the Receiver points out,[53] in *Northern Badger*,[54] which was expressly affirmed and applied in *Redwater*,[55] the abandonment orders at issue in that case were made after the receiver had sold all of the valuable assets in the Northern Badger estate[56] and no concern was expressed by the court with regard to either the timing of the orders in relation to the sale or that the sale proceeds were "unrelated to the environmental condition or damage."[57]

37. As the Receiver sets out, there would be a potentially detrimental impact to the value of the assets in an estate if the AER were required in every case to issue abandonment and reclamation orders at the start of any insolvency.[58]

C. The Disputed Lien Holdbacks are Part of the Manitok Estate

38. The AER adopts the submissions of the Receiver and the OWA with respect to the third ground of appeal. The Chambers Justice erred in finding that the Disputed Lien Holdbacks[59] were not part of the estate for the purposes of addressing the environmental obligations of the estate.[60]

39. For emphasis, the Persist SAVO[61] expressly provided that the proceeds from the sale of the estate assets were to "stand in the place and stead" of those assets.[62] Further, the use of sale proceeds of estate assets held in trust pending the resolution of claims to those funds for the purposes of addressing an insolvent estate's environmental obligations was expressly directed by the Supreme Court in *Redwater*.[63]

D. The Administrative Law Argument Raised by the Intervenor Municipalities is Without Merit

40. The AER submits that the Intervenor Municipalities' assertion that in seeking to uphold the central finding in *Redwater*, the Receiver, and by implication, the AER and the OWA, is arguing that insolvency expands the AER's statutory authority[64] is without merit. The AER

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[53] Receiver's Factum, at para 49.
[54] *PanAmericana de Bienes y Servicios SA v Northern Badger Oil & Gas Ltd*, 1991 ABCA 181 [*Northern Badger*] [**TAB 10**].
[55] *Redwater*, at paras 130-136 [**TAB 1**].
[56] *Northern Badger*, at paras 17-18 [**TAB 10**].
[57] Chamber's Decision, at para 39.
[58] Receiver's Factum, at para 53. On the issuance of abandonment and reclamation orders, the underlying assets are required to be "shut-in" or to stop producing. "Shut-in" assets, particularly those that have been shut-in for long duration, not only are of less value to prospective purchasers but also produce no revenue for the estate, while the estate continues to incur expenses such as maintenance, surface, and mineral lease payments in relation to those assets.
[59] As defined in the Receiver's Factum, at para 1.
[60] Chambers Decision, at paras 43-44.
[61] As defined in the Receiver's Factum, at para 12.
[62] Persist SAVO, at para 4(b)(ii) [**Appeal Record at 032**].
[63] *Redwater*, at para 163 [**TAB 1**].
[64] Intervenor Municipalities' Factum, at para 22.

opposes this assertion and the underlying submission of the Intervenor Municipalities that this appeal should be framed as a question of the scope of the AER's regulatory authority.

41. In support of their argument, the Intervenor Municipalities mischaracterize the nature of the AER's regulatory authority and its role to act in the public interest and enforce the public duties of licensees. The AER has a broad-ranging mandate with respect to the regulation of energy resources in the province, including upstream oil and gas, as set out in REDA.[65] The AER is not the financial regulator for the province of Alberta, and does not oversee licensees' finances or financial management. The AER does not have a regulatory interest in a licensee's finances *except in so far* as there is a correlation between the financial resources of a licensee and the ability of a licensee to meet its regulatory obligations under AER-administered legislation: an issue that which falls directly within the scope of the AER's statutory authority.[66]

42. Contrary to the assertions of the Intervenor Municipalities, the AER, as the regulator of upstream oil and gas in the province, is not seeking to expand its statutory authority in Manitok. Rather, the AER is acting squarely within its statutory authority in ensuring that licensees (including the Receiver acting in the place of a licensee in an insolvency)[67] fulfill the abandonment and reclamation obligations associated with their licensed oil and gas assets at the end of the useful life of those assets.

43. If the AER were to issue an order to a solvent licensee to abandon and reclaim a well or facility, or if a solvent licensee were otherwise statutorily obligated to abandon and reclaim a well or facility, the AER's authority would concern whether the licensee fulfilled its regulatory obligations. Nothing would turn on the source of funds used to realize compliance with those obligations. It would not be an expansion of the AER's statutory authority if the solvent licensee chose to fulfill its obligations with resources drawn from

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[65] Subsection 2(1) of REDA sets out the AER's mandate as follows:

> The mandate of the Regulator is
>
> a) to provide for the efficient, safe, orderly, and environmentally responsible development of energy resources in Alberta through the Regulator's regulatory activities, and
>
> b) in respect of energy resource activities, to regulate
>
> i) the disposition and management of public lands,
>
> ii) the protection of the environment, and
>
> iii) the conservation and management of water, including the wise allocation and use of water,
>
> in accordance with energy resource enactments and, pursuant to this Act and the regulations, in accordance with specified enactments.

[66] For example, s 12.152 of the OGCR requires a licensee to provide financial and reserves information to the AER for the express purposes of: (a) assessing licensee eligibility; (b) administering the liability management program [which has been revised since the onset of the Manitok insolvency] and (c) otherwise to ensure the safe, orderly, and environmentally responsible development of energy resources in Alberta including closure [**TAB 8**].

[67] The definition of "licensee" includes receivers and trustees in bankruptcy: EPEA, s 134(b) [**TAB 5**], OGCA, s 1(1)(cc) [**TAB 3**], *Pipeline Act*, s 1(1)(n) [**TAB 4**].

cash, the proceeds from the sale of an unlicensed property, a different licensed property, or otherwise.[68] The same is no less true in the insolvency context. Nevertheless, the Intervenor Municipalities seek to restrict the contours of the estate available to a receiver to fulfil the end-of-life obligations as if end-of-life obligations arise only at the end of the solvent life of a licensee, and as if licensees are not required to comply with "those obligations… outside of an insolvency".[69]

44. The AER submits that there is no requirement in its administered legislation that the source of funds paid by a licensee to fulfill an obligation tied to an AER-licensed asset be generated from, or even connected to, that asset. The requirement of a licensee to comply with its obligations is legislated; the permitted sources of a licensee's funds when expenditure of funds is required to achieve compliance is not. For example, pursuant to REDA, the AER may, "in respect of any fiscal year, impose and collect an administration fee with respect to any facility, oil sands project, coal project or well".[70] Administration fees may be calculated based on adjustment factors and formulae that include production volumes directly tied to an underlying asset,[71] but there is no requirement that the source of the monies ultimately collected as payment of an administration fee originate from the underlying asset. In fact, administration fees are imposed and collected with respect to inactive, non-producing assets.[72]

45. Respectfully, the AER submits that, were it to be applied in practice, the Intervenor Municipalities' argument would result in an absurdity. The purpose of statutorily imposed obligations on licensees to fulfil the environmental obligations inherent to the AER-regulated assets for which they are granted licence would be frustrated if the only funds available to a licensee to abandon, reclaim or remediate were required to be realized from the AER-licensed asset. If this were the case, a licensee could not fund abandonment, reclamation, or remediation obligations if, for example, its underlying AER-regulated assets were ultimately unproductive and did not generate funds, or were inactive, or had previously been abandoned but remediation work was required. The absurdity of the Intervenor Municipalities' argument is further apparent when considered beyond the bounds of the AER's mandate. Surely the Intervenor Municipalities are not suggesting that

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[68] For example, pursuant to s. 3.014 of the OGCR, the AER may impose closure quotas or require a certain dollar amount to be spent by a solvent licensee on closure work (abandonment and reclamation). However, nowhere in the legislation does the AER determine or limit the source of funds that a licensee may use to do this work.
[69] Intervenor Municipalities' Factum, at para 7.
[70] REDA, s 29(2) [**TAB 2**].
[71] *Alberta Energy Regulator Administration Fees Rules*, AR 70/2019, as amended, ss 3-5 [**TAB 11**].
[72] *Ibid*, ss 3(a) and 4(a)-(b) [**TAB 11**].

residents of their municipalities only be permitted to pay to the municipalities monies that are generated by the underlying assets to which they relate, and yet this is the extension of the Intervenor Municipalities' reasoning.

46. In their submissions, the Intervenor Municipalities seek to further expand the argument in the present appeal by introducing the question of what might happen if another regulatory body also seeks to enforce the environmental obligations of a company with a similar priority to the environmental obligations enforced by the AER. To be clear, on the facts of Manitok there is no other regulator asserting such a priority. The AER submits that the Court should not consider the Intervenor Municipalities' hypothetical argument as part of this appeal.

47. However, should the Court wish to consider the Intervenor Municipalities' hypothetical argument, the AER disputes the applicability of the Intervenor Municipalities' example to the central finding of *Redwater.* The example the Intervenor Municipalities provide to illustrate their point is one where a municipality issues a stop order to a development that is contrary to a land use bylaw, subsequently completes work itself, and then adds those costs to the property taxes for the underlying parcel of land.[73] While it is not necessary to get into the details of this hypothetical, the recovery of the municipality's costs would appear to be a monetary claim to recoup costs for work completed. As the Court made clear in *Redwater*, a monetary claim owed to a creditor, such as the claim in the Intervenor Municipalities' example, is distinct from the type of non-monetary public duty obligation the AER seeks to enforce when acting as a regulator to enforce end-of-life obligations. The claim in the Intervenor Municipalities' example would meet the *Abitibi* test[74] for a claim provable in bankruptcy, whereas a public duty to enforce end-of-life obligations would not. Respectfully, the AER submits that the Intervenor Municipalities' argument mistakenly conflates the costs of complying with an end-of-life obligation, and by extension the costs of complying with any other public duty, with the requirement to fulfill that obligation.

48. In an insolvency, were there to truly be a case involving the AER and another regulator both seeking to enforce public duty obligations that were not claims provable in bankruptcy with the same priority to the estate, then the court in that instance could take a number of different approaches to resolving that issue, including some sort of *pro rata* apportionment of the estate to address an insolvent company's outstanding public duty liabilities. But, as

[73] Intervenor Municipalities' Factum at para 24.
[74] Established in *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, as summarized by the Supreme Court in *Redwater,* at para 119, and considered on the facts of *Redwater* relevant to Manitok at paras120-154 [**TAB 1**].

previously submitted, this is not a matter before this Court. Equally, it is not a rationale for suggesting that public duties should be set aside in an insolvency in the interest of creditors.

49. The Intervenor Municipalities go on to assert that the AER is acting in a manner analogous to a "creditor" gaining greater access to funds on insolvency than they would have possessed prior to the insolvency. In *Redwater*, the SCC expressly found that the AER was not acting as a creditor in seeking to enforce environmental obligations in an insolvency: the AER was enforcing a public duty, and there was no financial gain or benefit to the AER in doing so.[75] The same is true here. Furthermore, as previously submitted, were the AER to enforce the abandonment and reclamation of a well or facility outside of an insolvency, it would be up to the licensee what funds it used to fund its fulfillment of its environmental obligations. The AER is not gaining any greater access to a licensee's assets on insolvency; rather, the application of *Redwater* to the facts in Manitok would be entirely consistent with the result outside of an insolvency.

50. Finally, the Intervenor Municipalities seek to limit the application of *Redwater* through the AER's approach to liability management under its Licensee Liability Rating (**LLR**) Program. The AER submits that its liability management approach is not at issue and that this Court should not consider the Intervenor Municipalities' arguments concerning the AER's liability management approach as part of this appeal. However, to assist the Court in its understanding of the LLR Program, the AER submits the following.

51. First, the AER's LLR Program utilizes a ratio of deemed assets to deemed liabilities to provide an estimate of a licensee's ability to meet its environmental obligations.[76] There is nothing, however, in the legislation defining this program that supports its use to limit what assets of a licensee are available to address that licensee's environmental obligations. Rather, the LLR Program is reflective of the information that was historically available to the AER to assess the viability of a licensee to meet its environmental obligations.

52. Second, the AER notes that, in carrying out the policy of the Government of Alberta, it has recognized the limited information that the LLR ratio provides. Amendments to the OGCR and the *Pipeline Rules* and a new liability management directive have recently come into

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[75] *Ibid*, at para 122.

[76] *Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process,* February 17, 2016 [**Directive 006, 2016**] [**TAB 12**]. The 2016 version of Directive 006 was in effect at the time of the Chambers Decision. A new version of Directive 006 replaced the 2016 version on December 1, 2021.

force to replace, in part, the LLR Program.[77] The new approach to liability management allows the AER to take a more holistic look at a licensee's ability to meet its abandonment and reclamation obligations over the lifecycle of that licensee's energy resource activities by ensuring the AER has greater access to both a licensee's energy resource reserves information and financial information.[78]

PART V – RELIEF SOUGHT

53. The AER adopts the relief sought by the Receiver. It respectfully requests an order:

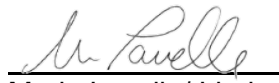
    a. allowing this appeal;

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

    c. authorizing the Receiver to release the Disputed Lien Holdbacks to the Manitok estate.

54. The AER does not seek costs and submits that costs should not be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2nd DAY OF DECEMBER, 2021.



Maria Lavelle/ Lindsey Mosher,
Legal Counsel, Alberta Energy Regulator

Estimated time for Argument: 30 minutes

[77] On December 1, 2021, a new AER liability management directive came into effect, *Directive 088: Licensee Life-Cycle Management* [**Directive 088**] [**TAB 13**]. Section 1 of Directive 088 outlines the information sources that can be used by the AER to holistically assess the ability of a licensee to meet their regulatory and liability obligations throughout the energy resource development lifecycle. Additionally, Directive 006, 2016 was amended to remove components related to license transfer applications and their security collection, and was renamed *Directive 006: Licensee Liability Rating (LLR) Program*, December 1, 2021.

[78] Section 12.152 of the OGCR authorizes the AER to use and collect a licensee's financial and reserves information [**TAB 8**].

TABLE OF AUTHORITIES

TAB	STYLE OF CAUSE / DOCUMENT DESCRIPTION
1	*Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5
2	*Responsible Energy Development Act*, SA 2012, c R-17.3
3	*Oil and Gas Conservation Act*, RSA 2000, c O-6
4	*Pipeline Act*, RSA 2000, c P-15
5	*Environmental Protection and Enhancement Act*, RSA 2000, c E-12
6	*PricewaterhouseCoopers Inc v Perpetual Energy Inc*, 2021 ABCA 16
7	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3
8	*Oil and Gas Conservation Rules*, Alta Reg 151/1971
9	*Pipeline Rules*, Alta Reg 91/2005
10	*PanAmericana de Bienes y Servicios SA v Northern Badger Oil & Gas Limited*, 1991 ABCA 181
11	*Alberta Energy Regulator Administration Fees Rules*, Alta Reg 70/2019
12	*Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process*, February 17, 2016, repealed December 1, 2021.
13	*Directive 088: Licensee Life-Cycle Management*, December 1, 2021