Clerk's Stamp	

COURT FILE NUMBER	25-095053
ESTATE NOS.	25-095053 25-2592139
COURT	COURT OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	CALGARY
MATTER	**IN THE MATTER OF THE BANKRUPTCIES of SIKSIKA ENERGY RESOURCES CORPORATION and SIKSIKA ENERGY LIMITED PARTNERSHIP** **and IN THE MATTER OF THE *BANKRUPTCY and INSOLVENCY ACT* R.S.C. 1985, c. B-3 (as amended)**
APPLICANT	MNP Ltd. in its capacity as the Trustee in Bankruptcy of Siksika Energy Resources Corporation and Siksika Energy Limited Partnership
DOCUMENT	**BENCH BRIEF of the TRUSTEE IN BANKRUPTCY** **(for an Application on May 3, 2022 at 2:00 PM before the Honourable Justice K.M. Horner, Commercial List)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Caron & Partners LLP 2120, 237 – 4th Avenue SW Calgary, AB T2P 4K3 Tel: (403) 262-3000 Fax: (403) 237-0111 **Attention: R.J. Daniel Gilborn / Lucinda A. Wong** Solicitors for MNP Ltd. Email: dgilborn@caronpartners.com / lwong@caronpartners.com File No. 59034-000

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I. INTRODUCTION

1. This Bench Brief is filed on behalf of the Applicant, MNP Ltd. (the "**Trustee**"), in its capacity as trustee in bankruptcy of the consolidated bankrupt estates of Siksika Energy Resource Corporation ("**SERC**") and Siksika Energy Limited Partnership ("**SELP**") in support of an Application for advice and direction under section 34 of the *Bankruptcy and Insolvency Act* (the "***BIA***"), for approval of the Trustee's activities to date, and for such other consequential relief as is more particularly set out in the proposed form of Order attached as Schedule "A" to the concurrently filed Application (the "**Application**").

2. The respective bankrupt estates of SERC and SELP were administratively consolidated by Order of Registrar Prowse, granted on July 20, 2020 and filed on July 22, 2020 (the "**Consolidation Order**").[1]

3. The Application is supported by, among other things, the Trustee's First Report to the Court, filed July 15, 2020 (the "**First Report**") and the Trustee's Second Report to the Court, filed concurrently with this Bench Brief (the "**Second Report**").

4. This Bench Brief is filed to provide a succinct overview of the relevant authorities governing the relief sought in the Application. Counsel to the Trustee will argue the application of those authorities to the facts orally.

[1] A copy of the Consolidation Order is attached hereto for convenience as **[Tab 1]**.

II. FACTS

5. The fulsome background facts can be found in the First Repot and the Second Report. The facts are, as far as is known to the Trustee, undisputed.

6. Prove of service will be provided in a subsequently sworn and filed Affidavit of Service. The Trustee intends to serve all affected or potentially affected entities and parties.

III. APPLICATION FOR ADVICE AND DIRECTION

7. Section 34 of the *BIA* sets out as follows:

> **Trustee may apply to court for directions**
>
> **34 (1)** A trustee may apply to the court for directions in relation to any matter affecting the administration of the estate of a bankrupt and the court shall give in writing such directions, if any, as to it appear proper in the circumstances.
>
> **To report to court after three years**
>
> **(2)** Where an estate has not been fully administered within three years after the bankruptcy, the trustee shall, if requested to do so by the Superintendent, report that fact to the court as soon as practicable thereafter, and the court shall make such order as it considers fit to expedite the administration.
>
> **Notice to Superintendent's division office**
>
> **(3)** The trustee must send notice to the Superintendent's division office of the day and time when any application for directions made under subsection (1) is to be heard and of the day and time when the trustee intends to report to the court as required by the Superintendent under subsection (2).

8. As set out in the Second Report, the Trustee seeks advice and direction from this Court to provide the funds in the consolidated estate to the Alberta Energy Regulator (the "**AER**") as a priority payee for the end-of-life obligations associated with well and working interests owned or previously owned by the consolidated estates. Priority payable issues and dispositions of estate funds are amongst the many matters this Court will provide advice and direction on pursuant to section 34.[2]

[2] *Greenview (Municipal District No 16) v Bank of Nova Scotia*, 2013 ABCA 302 **[Tab 2]**. See also: *National Bank of Canada v Merit Energy Ltd* (2001), 27 CBR (4th) 283 (Alta QB) (not reproduced); and *Re Sefel Geophysical Ltd* (1988), 62 Alta LR (2d) 193 (QB) (not reproduced).

9. The Trustee is of the view that the single most salient authority on the issue for advice and direction has just recently been released by the Alberta Court of Appeal in *Re Manitok Energy Inc* ("***Manitok***").[3] In *Manitok*, the Court of Appeal considered the extent of the reach of the "*Redwater*" decision[4] in the context of the priority of end-of-life obligations of an insolvent oil and gas company. Obviously, that analysis is of significant importance here.

10. It is submitted that the following excerpts from *Manitok* are decisive and bind the Trustee insofar as the priority and disposition of the funds held within the consolidated estates:[5]

> [29] .... 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

[3] 2022 ABCA 117 **[Tab 3]**.

[4] *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 (not reproduced).

[5] *Manitok*, *supra*, at paras. 29-32 and 35-41 [Tab 3].

converted to cash. That, however, does not relieve the trustee of the obligation to satisfy Manitok's public abandonment and reclamation duties.

…

[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.

[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. [underlining added]

11. The foregoing findings are consistent with the Court of Appeal's earlier decision in *PricewaterhouseCoopers Inc v Perpetual Energy Inc*[6] where the Court held (at para. 95): " The Abandonment and Reclamation Obligations are an obligation of Perpetual/Sequoia, owed 'to the public' and the surface landowners, but which are nevertheless obligations which the trustee of a bankrupt corporation cannot ignore. Not only did ***Redwater*** confirm that Abandonment and Reclamation Obligations are a continuing obligation of a bankrupt corporation, that decision confirms that those obligations had to be discharged even in priority to paying secured creditors."

12. It is within the legal framework of *Redwater* and the foregoing Court of Appeal decisions that the Trustee requests the advice and direction for the disposition of the remaining funds in the consolidated estates (subject to withholdings).

13. To complete the administration of the consolidated estates, a binding direction regarding the disposition of the funds remaining (subject to withholdings) is required.

V. APPROVAL OF ACTIVITIES OF THE TRUSTEE

14. This Court possesses the jurisdiction under common law to issue an interim approval of a receiver's activities.

[6] 2021 ABCA 16 (not reproduced due to length).

15. In *Target Canada Co. (Re)* ("***Target***"),[7] Justice Morawetz discussed the process for approval of the reports of a court officer. In that case, the court dealt with a Monitor under the CCAA. However, the same relief is continually sought by trustees and granted by the Court in the context of bankruptcy proceedings.[8]

16. In *Target*, the Court recognized that the effect of the approval of the reports of a court officer varies with the context. Where a report is delivered for a specific purpose, express findings of fact may be required to support the relief being sought. The task of the court is to address squarely specific facts and to make specific findings that will be binding in future.[9]

17. Court approval serves a number of important purposes for a trustee in bankruptcy:[10]

(a) allows the trustee to move forward with the next steps in the proceedings;

(b) brings the trustee's activities before the Court;

(c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified;

(d) enables the Court to satisfy itself that the trustee's activities have been conducted in prudent and diligent manners;

(e) provides for the trustee not otherwise provided by the *BIA*;

(f) protects creditors from the delay and distribution that would be caused by:

i. re-litigation of steps taken to date, and

ii. potential indemnity claims by the trustee.

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[7] 2015 ONSC 7574 **[Tab 4]**.

[8] See for example, *Re Crate Marine Sales Limited, in Bankruptcy*, 2017 ONSC 444 at para. 24 (not reproduced); *Canada 3000 Inc. (Re)*, 2003 CanLII 35543 (ON CA) at para. 8 (not reproduced); and *IWHL Inc. (Re)*, 2011 ONSC 5672 at para. 87 (not reproduced).

[9] *Target*, *supra*, at para. 18 [Tab 4].

[10] *Target*, *supra*, at para. 23 [Tab 4].

18. The Court should note that Registrar Prowse was asked to approve the activities of the Trustee in the First Report when the Consolidation Order was sought, but he did not give that relief. Counsel to the Trustee can advise that the reasons Registrar Prowse gave for not granting that relief was that it was not in accordance with his standard practice and that it was in any event premature given the early state of the bankruptcies.

19. This Court has the power to grant approval of activities. There has now been a further considerable lapse of time and many more performed activities of the Trustee. Moreover, the bankruptcies are now much later in their stages, with the advice and direction issue being the matter to be dealt with prior to the ordinary steps associated with the finalization of the administration thereof.

20. It is submitted this is the most opportune time to consider the application for approval of the activities of the Trustee as it has been conveniently brought along with the advice and direction relief sought.

VI. CONCLUSION AND RELIEF SOUGHT

21. The Trustee seeks an Order substantially in the form of that appended to the Application.

22. The Trustee does not seek costs associated with the Application as against any party or affected person who does not oppose or does not take a position on the Application. The Trustee reserves its right to seek costs against any party or affected person who opposed the Application or portions thereof (which no opposition is anticipated at this time), depending on the nature of the opposition and how the Court deals with the same.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25th Day of April, 2022

CARON & PARTNERS, LLP

R.J. Daniel Gilborn
of counsel for the Applicant,
MNP Ltd.

TABLE OF DOCUMENTS AND AUTHORITIES

1. Consolidation Order granted on July 20, 2020 and filed on July 22, 2020;

2. *Greenview (Municipal District No 16) v Bank of Nova Scotia*, 2013 ABCA 302;

3. *Re Manitok Energy Inc*, 2022 ABCA 117

4. *Target Canada Co (Re)*, 2015 ONSC 7574

COURT/ESTATE NO.	25-095053
COURT	COURT OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY and INSOLVENCY
JUDICIAL CENTRE	CALGARY
MATTER	**IN THE MATTER OF THE BANKRUPTCY OF SIKSIKA ENERGY RESOURCES CORPORATION** **and IN THE MATTER OF THE *BANKRUPTCY and INSOLVENCY ACT*, R.S.C. 1985, c. B-3**
DOCUMENT	**ORDER**

Clerk's Stamp

BANKRUPTCY AND INSOLVENCY
FILED
JUL 22 2020
CALGARY
FAILLITE ET INSOLVABILITE

I hereby certify this to be a true copy of the original Order of which it purports to be a copy.

Dated this 30 day of July, 2020

For: Registrar at Calgary
Bankruptcy Division of the
Court of Queen's Bench of Alberta

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

CARON & PARTNERS LLP
Attention: R.J. Daniel Gilborn/Lucinda A. Wong
2120, 237 4th Avenue SW, Calgary, Alberta T2P 4K3
Telephone: (403) 262-3000 Fax: (403) 237-0111
File: 59034-000

DATE ON WHICH THIS ORDER WAS GRANTED: **July 20, 2020**

LOCATION OF THE HEARING: **Calgary, Alberta**

NAME OF THE REGISTRAR GRANTING THIS ORDER: J.T. Prowse

UPON the joint Application of the respective Joint-Applicants in Actions 25-2592139 and 25-095053; UPON having read the materials filed in support of the within joint Application, including in particular the First Report of the trustee in bankruptcy, MNP Ltd. (the "**Trustee**") filed in support of this joint Application (the "**Trustee's Report**"); UPON having read the Affidavit(s) of Service; UPON hearing from counsel to the Trustee; UPON noting the consent of the Inspectors of the estates of both the Joint-Applicants; UPON service being given to the Office of the Superintendent of Bankruptcy; AND UPON no one else appearing:

IT IS HEREBY ORDERED AND DECLARED AS FOLLOWS:

1. The time for service of the joint Applications and the material in support thereof is abridged

to the time actually given and service of the same is hereby validated and deemed good and sufficient, therefore the joint Applications are properly returnable on the date and time set out therein.

2. The proceedings in Estate and Actions 25-2592139 and 25-095053 (the "**Joint Proceedings**") are hereby administratively and procedurally consolidated (although no merger of any one or more of any bankruptcy estates therein shall consequentially occur) such that all filings subsequent to the filing of this Order in the Joint Proceedings shall occur in one Action number in this Court, namely Action No. 25-095053.

3. Filings subsequent to the filing of this Order in the Joint Proceedings are directed to occur pursuant to the following style of cause:

COURT NO.	25-095053
ESTATE NOS.	25-095053 25-2592139
COURT	COURT OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY and INSOLVENCY
JUDICIAL CENTRE	CALGARY
MATTER	**IN THE MATTER OF THE BANKRUPTCIES of SIKSIKA ENERGY RESOURCES CORPORATION and SIKSIKA ENERGY LIMITED PARTNERSHIP** **and IN THE MATTER OF THE *BANKRUPTCY and INSOLVENCY ACT* R.S.C. 1985, c. B-3 (as amended)**

4. The activities of the Trustee set out in the Trustee's Report are hereby approved.

Registrar in Bankruptcy in Chambers

In the Court of Appeal of Alberta

Citation: Greenview (Municipal District No 16) v Bank of Nova Scotia, 2013 ABCA 302

Date: 20130910
Docket: 1203-0069-AC
Registry: Edmonton

Between:

The Municipal District of Greenview No. 16

Appellant
(Plaintiff)

- and -

**The Bank of Nova Scotia, Deloitte & Touche Inc.
and Western Surety Company**

Respondent
(Defendant)

The Court:

**The Honourable Madam Justice Carole Conrad
The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice J.D. Bruce McDonald**

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice D.R. Thomas
Dated the 20th day of December, 2011
Filed on the 29th day of March, 2012
(2011 ABQB 799, Docket: BBK03 115363)

Memorandum of Judgment

The Court:

I. Introduction

[1] This appeal deals with the interplay between a municipality's contractual right to pay unpaid creditors under a construction contract and the terms of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (*BIA*), in the event of a contractor's bankruptcy.

[2] The appellant, the Municipal District of Greenview No. 16, (Greenview) entered into a contract with Horizon Earthworks Ltd. (Horizon) on October 15, 2008, whereby Horizon would perform local road-grading and other work relating to Harper Creek Road (Harper Creek Contract). The contract price was estimated at $1,497,824.00. Horizon was paid approximately $723,560.00 when it ceased work on the project and left approximately $900,000 unpaid to creditors. The contract was bonded through Western Surety Company (Western Surety) and the work was eventually completed by Petrowest Construction Ltd. (Petrowest) a third party contractor arranged for by Western Surety and paid for by Greenview. Western Surety also paid $283,302.67 to unpaid creditors under a labour and materials bond.

[3] Greenview seeks to pay the unpaid creditors the difference between the original contract price and the amounts paid by it to Horizon for work done and to Petrowest to complete the project (the disputed amount). The Bank of Nova Scotia (the Bank) holds perfected security to any accounts receivable due or to become due to Horizon at bankruptcy. The Bank and Western Surety both seek to be paid the disputed amount.

II. Issues:

1. Did the chambers judge err in determining any money potentially owing by Greenview to Horizon under the Harper Creek Contract was payable to the Bank?

2. Did the trial judge err by directing that Greenview pay the disputed amount to the Bank without determining how and if money was owing to Horizon on the facts and circumstances here?

III. Decision

[4] The Trustee's application for advice and directions was to determine which party is entitled to any funds potentially owing to Horizon by Greenview pursuant to the Harper Creek Contract. The chambers judge did not err to the extent that his decision would answer the Trustee's question

by finding that any monies potentially owing by Greenview to Horizon under the Harper Creek Contract were payable to the Bank, by virtue of the perfection of its security interest under the *Personal Property Security Act*, RSA 2000, c P-7 (*PPSA*). Similarly, the chambers judge did not err in finding that the contractual agreements with Greenview did not allow it to pay third party creditors any monies that were owing to Horizon at the date of its bankruptcy.

[5] The chambers judge did err, however, in directing monies to be paid from Greenview to Horizon without addressing the issue of whether and how monies were owed to Horizon under circumstances where Horizon walked off the project and failed to remedy the defaults following Notice of Default. The chambers judge did not address this issue, no doubt due to the lack of complete argument on that point. Although touched upon in argument on appeal, this issue was not fully canvassed. This issue raises interesting questions surrounding the bonding agreements and whether, if Horizon must rely upon the bonding documentation to establish a debt, Horizon is also caught with the burdens of those agreements. Although the Bank has priority to any funds owing to Horizon, whether and how monies were, in fact, owed is a separate issue.

[6] We direct a trial of the issue of whether, at the date of bankruptcy, there was a debt due or to be due from Greenview to Horizon pursuant to the Harper Creek Contract.

[7] We allow the appeal and direct the monies be returned to Greenview. There should be a trial of the issue as to whether, having regard to all of the circumstances of this case, funds were owed as at the date of Horizon's bankruptcy to Horizon by Greenview.

IV. Background

[8] In an effort to protect sub-trades who are prohibited from filing liens against a municipality, the parties built various clauses into the Harper Creek Contract to protect unpaid creditors. Horizon and Western Surety also entered into documentation relating to a Performance Bond, and Labour and Material Payment Bond, provided by Western Surety, aimed at protecting unpaid creditors.

[9] The Bank was Horizon's banker and advanced funds to Horizon through an operating line of credit. The Bank obtained a General Security Agreement in May 2008 to secure repayment of Horizon's loans, whereby Horizon granted the Bank a security interest in all its present and after acquired personal property, including all accounts receivable (the GSA). The Bank registered a financial statement at the Alberta Personal Property Registry on June 3, 2008, protecting its interests under the GSA.

[10] On October 20, 2008, Western Surety issued two bonds to Horizon: a Performance Bond, and a Labour and Material Payment Bond, each in the amount of $761,661.00 (the Bonds). Part of the bonding arrangement included an earlier Indemnity and Security Agreement between Horizon and Western Surety entered on or about April 28, 2008 (ISA). That document was not registered pursuant to the *PPSA*.

[11] Horizon ran into financial difficulty and on November 13, 2009, Deloitte & Touche (Deloitte) was appointed interim receiver and monitor of the property of Horizon. On or about December 17, 2009, Greenview declared Horizon to be in default of the Harper Creek Contract for:

(a) discontinuing the provision of the services;

(b) failing to provide the services with sufficient workers or material to promptly complete the contract; and

(c) failing to promptly pay its creditors for labour, services, equipment and related items.

Those defaults were not corrected.

[12] Greenview estimates that when Horizon was declared in default, $774,260.92 of the contract price had not been disbursed. Greenview made a claim under the Performance Bond and Western Surety arranged for Petrowest to complete the work under the contract pursuant to an agreement signed by Greenview, Petrowest and Western Surety. Petrowest completed that work and Greenview paid approximately $383,000.00 for that completion.

[13] Western Surety was also called upon to pay some creditors under the Labour and Material Payment Bond and on November 17, 2009, Western Surety wrote Greenview indicating that through its ISA with Horizon, Western Surety had an assignment of all funds due to Horizon under the Harper Creek Contract. The receiver Deloitte took issue with Western Surety's claim and instructed Greenview not to release any funds.

[14] Greenview received notices from many of Horizon's subcontractors and suppliers that they had not been paid for work or materials. Greenview states that those third party claims total about $922,807.12. On April 13, 2010, Horizon was assigned into bankruptcy and Deloitte was appointed Trustee. At the time of its bankruptcy, Horizon had several uncompleted contracts in different locations in Alberta, including the Harper Creek Contract. The Trustee filed a report indicating its understanding that several of the employee-related claims had been paid in full or in part through the Wage Earner Protection Program, and some of Horizon's books and records suggest there may be some differences in the amounts still owing. Despite any dispute about the exact amount of the claims, it is common ground that these claims vastly exceed the disputed amount. Western Surety has settled and paid some of the claims made pursuant to the Labour and Material Payment Bond, and indicates that others may be pending. To date it has paid $283,302.67 of the claims under the Bond.

[15] Although a named respondent, the Trustee in bankruptcy took no part in this appeal. It determined that the Bank's security took priority over all other contractual secured creditors insofar as the inventory, receivables, book debts and other intangibles of Horizon along with the proceeds thereof were involved, and that Roynat (another secured creditor) took priority over all other contractual secured creditors concerning all other personal property of Horizon. Roynat, the

Bank and the Deloitte entered into an assignment agreement, wherein the Trustee assigned its interest in any and all remaining assets of Horizon to the Bank and Roynat, as the case may be. As part of the agreement, the Trustee assigned, among other things, all its right, title and interest in the remaining book debts of Horizon to the Bank in exchange for a credit against the indebtedness owed by Horizon to the Bank. The court approved the assignment agreement, discharged Deloitte on June 2, 2011, and the Bank was substituted in the Trustee's place if the subject matter of the legal proceeding concerned inventory, receivables, book debts, or other intangible assets of Horizon, or the proceeds thereof. The assets in issue here are any accounts receivable that may be owing under the Harper Creek Contract.

[16] Deloitte also confirmed that there are no funds or other assets in the estate of Horizon in bankruptcy.

V. The Applications

[17] Deloitte, as Trustee in bankruptcy, brought the initial application for advice and direction as to which party was entitled to any funds potentially owing to the bankrupt Horizon by Greenview pursuant to the Harper Creek Contract. Greenview sought advice and direction as to whether it can directly pay subcontractors and suppliers of the bankrupt Horizon out of any funds not disbursed under the Harper Creek Contract. The Bank filed a cross-application seeking a declaration that it has a perfected security interest and priority to what it refers to as the Harper Creek funds and sought a direction to have Greenview pay those funds to Horizon. Western Surety sought the right to any funds unpaid under the Harper Creek Contract on behalf of the unpaid subcontractors who have issued, or may issue, claims under the Labour and Material Payment Bond by virtue of the ISA with Horizon, or alternatively by virtue of the application of the doctrines of set-off and subrogation.

VI. The Chambers Decision

[18] The chambers judge rejected Greenview's argument that it could pay Horizon's unpaid creditors pursuant to the terms of the Harper Creek Contract and bond documents. He found that such a proposal was not compliant with the terms of the *BIA*, dealing with the priority of claims in a bankruptcy, specifically sections 136 and 141.

[19] The chambers judge concluded that the unsecured subcontractors and suppliers are unsecured creditors of the bankrupt Horizon, and not of Greenview. He observed that the circumstances here are covered by sections 136 and 141 of the *BIA* which set out the priority regime for secured and unsecured creditors of a bankrupt. If there is anything left to share, then it is to be shared with all unsecured creditors of Horizon and not just those creditors under the Harper Creek Contract. The chambers judge accepted the Trustee's submission that Greenview's proposal was a private reorganization of the priority regime of the *BIA*, and that to allow parties to construct

their own priority regimes outside of the regimes mandated by the *BIA* would create a potential for significant mischief. In addition, he listed several public policy reasons to support his decision, including the desirability of a high level of certainty and predictability for all manner of creditors and the importance of the priority regime of the BIA to timely resolution of claims. He stated at para 40:

> In summary, the *BIA* provides a scheme to create certainty in respect to competing claims and to bring the administration of the affairs of a bankrupt to a timely and predictable conclusion. This sort of end-run around the legislation which is proposed here should not be and will not be allowed by this Court.

[20] The chambers judge went on to make an alternative finding. He concluded that the GSA granted by Horizon to the Bank was a security interest in all of Horizon's present and after acquired property, including accounts receivable. The Bank had registered its security interest arising from the GSA by way of a financing statement under the *PPSA* and that registration was effective as at June 3, 2008. As a result, he found that when Horizon entered into the Harper Creek Contract, this created an account subject to the registered security interest of the Bank. He found that the Bank had a security interest in priority to Western Surety because Western Surety had not registered its assignment of any book debts. That assignment read as follows:

> Clause 20.: *Assignment of the Principal's rights* - As a continuing and collateral security for the obligations of the Indemnitors towards the Surety under this agreement, each Principal hereby grants, bargains, sells and conveys to the Surety, a continuing, specific and fixed assignment, transfer, mortgage, charge and security interest in the following:
>
> a) all of the claims and debts which it holds against all persons, and without limitation, against:
>
> i) all persons with whom it has or will enter into Bonded Contracts; and
>
> ...

[21] As a result, the chambers judge found that while Western Surety could have registered this assignment, its failure to do so meant the Trustee, and therefore the Bank, took free of that assignment.

[22] The chambers judge directed that the disputed amount be paid forthwith to the Bank.

VII. Standard of Review

[23] The parties agree that the issues in this appeal are questions of law which require a standard of correctness.

VIII. Position of the Parties

A. Greenview's Position

[24] Greenview seeks to pay to unpaid creditors, pursuant to the Harper Creek Contract, money it had as a result of fortuitously completing the contract by a third party arranged by Western Surety for less than the amount of the original contract price. Greenview argues that the Supreme Court of Canada decision in *AN Bail Co v Gingras*, [1982] 2 SCR 475 supports its position because the totality of the documents, including the contract, the Bonds and the ISA, work together to create a relationship with the unpaid third party creditors which was missing in *Bail*. It argues that *Bail* was decided in large part due to the lack of any such connection. Here, Greenview argues that the bonding contracts create a relationship with unpaid creditors to provide for their payment and to ensure that funds are held in trust pending payment.

[25] In any event, Greenview argues that there is no money owing to Horizon as it was in fundamental breach of its contract. Greenview says Horizon had been given notice of default prior to the bankruptcy for (a) discontinuing the provision of the services; (b) failing to provide services with sufficient workers or material to promptly complete the contract; and (c) failing to promptly pay its creditors as required under the Harper Creek Contract. Having failed to remedy its default, and complete the contract in accordance with its terms, Greenview argues that no funds are owing to Horizon and therefore no accounts due or to become due under the contract. The fact that the work was not complete and money owing to Horizion at the date of the bankruptcy distinguishes this case from *Bail*. Simply because the work was completed by a third party for less than the contract price does not entitle Horizon to sue for the difference where it had ceased work and was in breach of its covenants to pay third party creditors.

[26] In any event, Greenview argues that the combination of the Harper Creek Contract, the Bonds and the ISA create a trust relationship whereby Horizon expressly agrees that funds due or to become due to Horizon under a bonded contract, whether held by Horizon or otherwise, are expressly declared to be trust funds for the benefit of its creditors, who are the beneficiaries of that declaration of trust. Moreover, the Labour and Material Payment Bond creates a relationship between the owner and the third parties in that it provides that Greenview, as Obligee, can bring claims for third parties. Thus, even if Horizon could be said to be entitled to funds over the amount paid to complete the work, those funds are impressed with a trust in favour of third party creditors and therefore Horizon could not sue for the difference.

B. Western Surety's Position

[27] The respondent, Western Surety, generally supports Greenview's position but asks that the funds be delivered to it instead of the subcontractors directly under the Bonds or, at a minimum, seeks its *pro rata* share for creditors paid and to be paid. Western Surety also argues that as a guarantor under the ISA and the Bonds, it is entitled to the funds under the equitable relief of subrogation and set-off. Western Surety argues further that the bankruptcy is not determinative

here because the funds held by Greenview are held in trust pursuant to the agreement between Horizon and Western Surety pursuant to the Bonds and the ISA, wherein Horizon specifically agrees that any funds owing are impressed with a trust until such time as Horizon completes all its work and performs all its obligations, and Horizon would not have an action under the Harper Creek Contract.

[28] Western Surety acknowledges that while the Bank holds a security interest in Horizon's accounts receivable under its GSA, which was perfected, there must be in existence accounts due or to become due to which the security attaches and even section 41(2) of the *PPSA* confirms that a creditor's right to payment under a contract is subject to the conditions in the contract.

C. The Bank's Position

[29] The respondent Bank maintains that the chambers judge was correct to order Greenview to pay the funds. It argues that the trust language in the Bonds does not create a legal relationship between Greenview and the subcontractors so as to distinguish *Bail*. Rather, the Bank says that any claims by the subcontractors are pursuant to the Bond as against Western Surety and not a claim to the funds under the contract. Moreover, it denies that Western Surety is subrogated to the rights of Greenview since the equitable relief Western Surety seeks has no basis in Canadian law. Finally, the Bank argues that its perfected security interest, the GSA, attaches to the Harper Creek Contract and because the ISA is likewise covered by the *PPSA*, but is not registered, the Bank's security prevails.

[30] As noted previously, the Trustee did not participate in this appeal.

IX. Analysis

Issue 1: Did the Chambers judge err in determining that any money potentially owing by Greenview to Horizon under the Harper Creek Contract was payable to the Bank?

[31] The contractual arrangements present in this appeal are motivated, in part, by the inability of subcontractors and suppliers to file liens for work on public highways. The Harper Creek Contract contained several clauses aimed at ensuring payment of third party claims. In addition, the ISA between Horizon and Western Surety, and the Bonds contained several conditions intended to protect unpaid creditors.

[32] Relevant provisions of the Harper Creek Contract include:

> 1.2.26.2 Holdback
>
> The Department will retain holdback in the amount of 10% of the value of each progress estimate.

...

1.2.26.4 Increase in Holdback

The Department may increase the amount of holdback retained by the total amount of any outstanding third party claims, deficiencies in the work or unpaid back charges.

...

1.2.26.6 Release of Holdback

After a minimum of 45 days has expired from the date of Construction Completion, the Department will release the full amount of the holdback to the Contractor provided that all of the following have occurred:

(i) All Work has been completed and accepted by the Department and the Contractor has complied with all the terms of the Contract excluding his obligations under section 1.2.53, Contractor's Warranty and Final Acceptance.

(ii) There are no outstanding third party claims filed with the Department.

.....

If the Contractor fails to meet his obligations with respect to any of these items, the Department may use holdback funds to rectify the deficiency, in accordance with the terms of the Contract and the Public Works Act.

[33] In seeking a direction allowing Greenview to pay creditors up to the disputed funds, Greenview relies, in part, upon the following language of the Harper Creek Contract:

1.2.35 Payment for Labour and Material

The Contractor shall promptly pay, or ensure that prompt payment is made, for all labour, services, equipment, supplies and Material used for, on or about the Work, including any sum due from the Contractor, any subcontractor or any person, for the labour or services of any subcontractor, foreman, worker or other person, or for the use of plants, machinery or camp supplies. In the event of failure by the Contractor at any time to do so, or if the Department has reason to believe that such payments will not be promptly made, the Department may retain out of any money due on any account to the Contractor from the Department such amount as the Department may deem sufficient to satisfy the same giving him notice of such claims, requesting him to settle them directly and withholding the balance until the claims are satisfied. The Department may pay directly to any claimant such amount

as the Department determines is owing, rendering to the Contractor the balance due after deducting the payments so made.

When the liabilities of the Contractor under the Contract exceed the money owed to him on any account by the Department, the Contractor or the Surety shall pay all such claims as are certified by the Department to be correct.

[34] In addition, it relied upon language of Clause 22 of the ISA between Horizon and Western Surety which provides:

Clause 22: *Trust Funds* -

a) **The Principal agrees and hereby expressly declares that all funds due or to become due under any Bonded Contract, are, whether in the possession of the Principal or another, trust funds for the benefit of and payment to all persons to whom the Principal incurs, in the performance of such Bonded Contract, obligations for which the Surety would be liable under any Bond. If the Surety assumes or discharges any such obligation, it shall be entitled to assert the claim of such person to the trust funds**;

b) **The Principal shall, upon demand and in implementation of any trust hereby created, open an account or accounts with a bank or similar depository designated by the Principal and approved by the Surety, which account or accounts shall be designated as a trust account or accounts for the deposit of such trust funds, and shall deposit therein all monies received pursuant to said Bonded Contract or contracts.** Withdrawals from such accounts shall be by cheque or similar instrument signed by the Principal and countersigned by a representative of the Surety.

c) Said trust or trusts shall terminate on the payment by the Principal of all the contractual obligations for the payment of which the trust or trusts are hereby created or upon the expiration of twenty years from the date hereof, whichever shall first occur. [Emphasis added.]

[35] Greenview acknowledged that in light of the Supreme Court of Canada's decision in *Bail*, clause 1.2.35 alone is insufficient to justify its payment to creditors after bankruptcy. It argues, however, that the totality of the language under all of the contractual documents, including the Bonds, create a relationship between the unpaid creditors and Greenview which was missing in the leading authority from the Supreme Court of Canada. Greenview also says that here, where Horizon walked off the job and the work was not complete, there was no money owing.

[36] *Bail*, the leading authority on this issue, dealt with the effect of bankruptcy on a clause similar to that of clause 1.2.35 of the Harper Creek Contract. In that case, the appellant Bail had contracted with the Defence Construction (1951) Ltd. on behalf of the Department of National Defence for design and construction of vehicle storage and maintenance facilities at the Canadian Forces Base at Valcartier. The contract contained Clause 21 which provided that "Her Majesty may, in order to discharged lawful obligations of and satisfy lawful claims against the Contractor or subcontractor arising out of the execution of the work, pay any amount which is due and payable to the Contractor pursuant to the Terms of Payment or is payable pursuant to section 41 of the General Conditions...". By virtue of a subcontract, Bail delegated the masonry work to Maçonnerie Montmorency Inc. That subcontract incorporated the terms allowing Bail the right to pay Maçonnerie Montmorency Inc's subtrades.

[37] Maçonnerie Montmorency Inc went into bankruptcy. The Federal Crown instructed Bail to pay Tuyauz Vibrés Inc, Maçonnerie Montmorency Inc's material supplier, rather than the Trustee in bankruptcy, relying upon Clause 21. The Federal Crown argued that it wished to protect subcontractors and suppliers, and to ensure that their claims would be paid. It insisted on payment being made directly by Bail, because as the general contractor, Bail was in a better position to assess the merits and quantum of the supplier's claim.

[38] The court posed the fundamental question as being whether a contractual clause permitting payment to an unpaid supplier could apply after bankruptcy, such that Bail's payment to the unpaid creditor of the bankrupt had the effect of releasing Bail from its obligation to the trustee in bankruptcy.

[39] Bail relied on *In re Wilkinson, ex parte Fowler*, [1905] 2 KB 713; and *In re Tout & Finch Ld*, [1954] 1 WLR (UK) 178, as support of its position. In *Wilkinson*, A signed a contract with a local authority to contract sewage works. A term of the contract provided that if the engineer had reasonable cause to believe that the contract was unduly delaying proper payment to the firms supplying machinery, he had the power to direct payment to them. Bigham J concluded that the authority given by the contractor (the bankrupt) to the engineer to direct money which would otherwise come to him was an authority that could not be withdrawn by the bankrupt and it was never intended that it could be withdrawn. In arriving at his decision, Bigham J discussed all the worthy reasons why a council inserts such a clause, stating, in part, at 481-82 (*Bail*):

> It is very much to the interest of the council to see that contracts of this kind for public works into which they enter are carried out in a manner satisfactory to all persons who are concerned in the performance of them. The council certainly may, and no doubt frequently do, make contracts of this kind, and they make them much more advantageously when the people who supply the machinery or other goods which are to be used by the contractor in the performance of the contract know that there is a reasonable probability that they will be paid.

[40] The Supreme Court of Canada rejected the conclusion reached in *Wilkinson*. Chouinard J found that the contractual term, revocable or not, does not supersede the bankruptcy. Greenview argues that the lack of a relationship between the owner and the unpaid creditors was fundamental to the reasoning in *Bail*, whereas here the totality of the documents creates a relationship between Greenview and the third party creditors. In particular, counsel for Greenview relies upon the following language in *Bail* at 485-87:

> In the case at bar, the supplier of materials Tuyaux Vibrés Inc. is a complete stranger to the clause linking the owner and the general contractor, and between the latter and the bankrupt subcontractor.
>
> Clause 21 contains only an option which the owner reserved in the principal contract, and appellant in its sub-contract: no obligation has been created.
>
> There is no contract of guarantee which presupposes a contractual relationship between appellant and Tuyaux Vibrés Inc. (*Civil Code*, art. 1028).
>
> There is no stipulation for the benefit of a third person, which requires that an obligation be undertaken by the promisor, whereas here neither appellant nor Defence Construction (1951) Ltd. has undertaken any obligation (*Civil Code*, art. 1029).
>
> There is no novation, which would require the participation of Tuyaux Vibrés Inc.: the latter is a stranger to the contracts between Defence Construction (1951) Ltd. and appellant and between the latter and Maçonnerie Montmorency Inc. (*Civil Code*, arts. 1169 *et seq.*).
>
> There is no delegation of payment, which assumes an obligation undertaken by the new debtor (*Civil Code*, art. 1173).
>
> Finally, there is no assignment of a debt by Maçonnerie Montmorency Inc. to Tuyaux Vibrés Inc. (*Civil Code*, art. 1570).
>
> There is no legal connection between Tuyaux Vibrés Inc. and appellant, nor between Tuyaux Vibrés Inc. and Defence Construction (1951) Ltd. Tuyaux Vibrés Inc. could not enforce any claim against either one or the other.
>
> Its only claim is against the bankrupt company, Maçonnerie Montmorency Inc.
>
> Its claim is neither preferred nor secured. Appellant indeed is not arguing the contrary.
>
> The payment made by appellant to Tuyaux Vibrés Inc. remains a payment made on behalf of the bankrupt company, which as of the date of the bankruptcy can make no further payments (*Bankruptcy Act*, s. 50(5)).

> From the date of the bankruptcy also, the debt of Maçonnerie Montmorency Inc. against appellant passed into the hands of the trustee as part of the property of the bankrupt company, and only the trustee can obtain payment of it (*Bankruptcy Act*, ss. 47, 50).
>
> It would be to disregard the *Bankruptcy Act* and deprive it of all meaning if the debtor of a bankrupt, instead of paying the trustee, were authorized, by contract or some other means, to pay one or other of the creditors of the bankrupt as he saw fit.

[41] Pursuant to section 71 of the *BIA*, upon a bankruptcy order being filed, a bankrupt ceases to have the capacity to dispose or otherwise deal with its property, which shall "subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order...". Upon bankruptcy Horizon's creditors become creditors of the bankrupt estate. While a provisions such as clause 1.2.35 may allow payment of contractors and suppliers by Greenview from monies owing Horizon prior to bankruptcy, once bankruptcy occurs any monies owing become the property of the Trustee, and the terms of the contract do not replace the terms of the *BIA* to prefer some of Horizon's creditors over others. Once Horizon was placed in bankruptcy, all creditors stand on an equal footing vis-à-vis Horizon, and claims must be submitted in accordance with the provisions of the *BIA* section 69.3. Further, clause 1.2.35 embodies a discretion, not a commitment, on the part of Greenview, the exercise of which would reduce what Greenview might owe to Horizon either for work already billed or work to be billed. Any unpaid subcontractors and suppliers not paid by Greenview remain creditors of Horizon, not Greenview, under that clause.

[42] Greenview candidly acknowledges that if it had to rely solely upon clause 1.2.35, *Bail* would not allow payment by Greenview of monies owing to Horizon at bankruptcy. It submits, however, that considering the importance placed upon the relationship between the owner and the subtrades by the Supreme Court in *Bail*, this case is distinguishable having regard to the combination of documentation surrounding this transaction, including the Labour and Material Payment Bond, which allow it to present claims of creditors to Western Surety.

[43] We disagree. In our view, the contractual arrangements here do not establish a relationship sufficient to distinguish *Bail*. Although there is language in the contracts between Horizon and Western Surety relating to unpaid funds being earmarked with a trust, Greenview is not a party to the Bonds or the ISA, and has no legal obligations under any of those agreements to pay unpaid creditors. While the Labour and Material Payment Bond says that Greenview, as Obligee under the Bonds, can bring claims on behalf of unpaid creditors, it does not require Greenview to do so. Nothing in any document places an obligation on Greenview to pay the unpaid creditors. Thus, if Greenview owes money to Horizon at bankruptcy pursuant to the Harper Creek Contract, that account receivable becomes the property of the Trustee.

[44] In summary, if money is due or to become due Horizon under the Harper Creek Contract on the date of bankruptcy, an issue which is discussed later, that asset, subject to the rights of

secured creditors, becomes the property of the Trustee upon bankruptcy. The Trustee has assigned any interest in accounts receivable to the Bank. Horizon had also assigned its receivables to the Bank under the GSA, which was registered pursuant to the *PPSA*. Although Western Surety held an earlier assignment of funds owed by an owner under a bonded contract, that security was not registered and therefore to the extent that a debt is owing, the Bank has priority.

Issue 2: Did the chambers judge err in directing Greenview to pay the disputed amount to the Bank without determining if and how any monies were owing to Horizon on the facts and circumstances here.

[45] We are not in a position to determine whether the disputed amount is owed to Horizon. The chambers judge did not address the issue. Here, the work was not complete and Horizon had been paid approximately $762,000.00 of a $1.4 million contract for all work done to date. It ceased work before completion leaving approximately $900,000 of unpaid third party claims. The work was incomplete at the date of bankruptcy. It was completed by Petrowest, an unrelated third party contractor arranged by Western Surety and paid for by Greenview. Under these circumstances we are of the view that there is a live issue as to whether Horizon, on the facts here, could successfully prosecute a claim against Greenview for any amount in which there would be no account receivable to pass to the Trustee on bankruptcy.

[46] The Bank's security also only protects valid accounts due to Horizon. The Bank's secured interest, duly registered, stems from the GSA between Horizon and the Bank which provides:

> 1. Horizon Earthworks ...grants to the Bank, a security interest in the present and after acquired undertaking and property... of the Customer including without limitation all the right title, interest and benefit which the Customer now has or may hereafter have in all property of the kinds hereinafter described ... :
>
> ....
>
> (c) all accounts, including deposit accounts in banks, credit unions, trust companies and similar institutions, debts, demands and choses in action which are now due, owing or accruing due or which may hereafter become due, owing or accruing due to the Customer, and all claims of any kind which the Customer now has or may hereafter have including but not limited to claims against the Crown and claims under insurance policies:

[47] The Bank's interest is to such amount that is "due, owing or accruing due or which may hereafter become due, owing or accruing due" to Horizon. Horizon must have a valid claim against Greenview under the Harper Creek Contract to be captured by the Bank's security.

[48] Interestingly, *Bail* is not helpful to the Bank on this point. The question of whether an account existed that would pass to the trustee was not in issue in *Bail*, as the work had been

completed and the money, including any holdbacks, was owed by the owner to the appellant. Significantly, Chouinard J stated at 479:

> Indeed, it appears from the evidence that **although the work had been completed and the holdbacks were due to be paid by the owner to Appellant**, the owner nonetheless held back approximately $250,000.00, that is the normal holdback of $200,000.00 which was due and payable to Appellant and a further special holdback of $50,000.00 to cover the claim of the supplier TUYAUX VIBRES INC. in the amount of $27,116.28. [Emphasis added]

[49] In *Bail*, there were also some different policy issues in play. For example, in *Bail* the court noted that the unpaid creditors were creditors of the bankrupt, and it was concerned with a creditor receiving preferential treatment from funds owed to the bankrupt. Here that is equally true should there be funds owing to Horizon. But of course the creditors are entitled to seek payment from other sources such as the Bonds without raising the same concerns.

[50] Unfortunately, the chambers judge failed to address the issue of whether Horizon had a claim to the disputed amount having regard to its defaults and if so how. Although in his reasons, the chambers judge noted that, "If there is anything left to share...," he then went on to direct all of the disputed funds to be paid to the Bank. He did not analyze the basis for finding that money was owed to Horizon in circumstances where Horizon walked off the project. We sympathize with the chambers judge because the arguments regarding whether a debt existed and how were not fully developed. Nonetheless, it is critical that the Bank establish an account receivable to Horizon at the relevant time before it is entitled to receive payment.

[51] It is not clear as to how Horizon, which was paid for work done to the date of ceasing work, can establish that an account was due or to become due at the time of Horizon's bankruptcy. We are not, however, prepared to make that finding without allowing Horizon the full opportunity to establish such a claim. In our view, although touched upon, the arguments surrounding this issue were not developed fully during the chamber application or on appeal. Our decision here does not foreclose any arguments that may be relevant between the parties in determining whether money is owing.

[52] In summary, we are of the view that the chambers judge erred when he ordered Greenview to pay the disputed amount to the Bank at this time. The debt must be established first. The Trustee sought advice and direction as to which party was entitled to any funds **potentially** owing under the contract, suggesting that the Trustee was alive to the fact that there was a serious issue whether monies were owing.

[53] The Bank sought a declaration that it was entitled to the funds. This is tantamount to seeking summary judgment that an amount was owing to Horizon from Greenview under the Harper Creek Contract, notwithstanding Horizon's major defaults. We are satisfied that whether Horizon has a valid claim against Greenview is not only a live issue, but a serious one that should not be determined in a summary manner without full argument. These bonded contracts are no

doubt common place and the results of completion and payment under those contracts are important issues. Western Surety raised arguments for the first time on appeal and no doubt further arguments as to the proper interpretation of the bonding documents will be developed in a trial of this issue.

[54] In our view, the chambers judge erred in disposing of this important issue summarily by directing the disputed amounts to the Bank at this time. To that extent we allow the appeal and direct a trial of an issue as to whether Horizon is owed money under the Harper Creek Contract.

X. Conclusion

[55] In answer to the Trustee's application for advice and directions as to which party was entitled to any funds potentially owing to the bankrupt pursuant to the Harper Creek Contract, the chambers judge was correct in determining the Bank was entitled to any funds potentially owing.

[56] The chambers judge erred, however, in directing a payment of the disputed amounts to the Bank without a determination of whether the disputed funds were owed by Greenview to Horizon in the circumstances of this case.

[57] The appeal is allowed and the order directing that the disputed funds be paid by Greenview to the Bank is set aside and we order the disputed funds be returned to Greenview.

[58] Should the parties wish to proceed further, we direct a trial of an issue as to whether Horizon is owed the disputed amount.

Appeal heard on May 2, 2013

Memorandum filed at Edmonton, Alberta
this 10th day of September, 2013

"as authorized" Conrad J.A.

Watson J.A.

McDonald J.A.

Appearances:

M.J. McCabe, Q.C.
for the Appellant Municipal District of Greenview No. 16

D.R. Bieganek, Q.C.
for the Respondent Bank of Nova Scotia

R.C. Rutman [no appearance]
for the Respondent Deloitte & Touche Inc.

E.A. Olszewski, Q.C. and D.M. Nowak
for the Respondent Western Surety Company

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.

The Effect of the Trust and Holdback

[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:

H.A.Gorman, Q.C./M Parker/D.A. Stephenson
for the Appellant

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

G.S.E. Hamilton
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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

CITATION: Target Canada Co. (Re), 2015 ONSC 7574
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-12-11

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP. AND TARGET CANADA PROPERTY LLC.**

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *J. Swartz* and *Dina Milivojevic*, for the Target Corporation

Jeremy Dacks, for the Target Canada Entities

Susan Philpott, for the Employees

Richard Swan and *S. Richard Orzy*, for Rio Can Management Inc. and KingSett Capital Inc.

Jay Carfagnini and *Alan Mark*, for Alvarez & Marsal, Monitor

Jeff Carhart, for Ginsey Industries

Lauren Epstein, for the Trustee of the Employee Trust

Lou Brzezinski and Alexandra Teodescu, for Nintendo of Canada Limited, Universal Studios, Thyssenkrupp Elevator (Canada) Limited, United Cleaning Services, RPJ Consulting Inc., Blue Vista, Farmer Brothers, East End Project, Trans Source, E One Entertainment, Foxy Originals

Linda Galessiere, for Various Landlords

ENDORSEMENT

[1] Alvarez & Marsal Canada Inc., in its capacity as Monitor of the Applicants (the "Monitor") seeks approval of Monitor's Reports 3-18, together with the Monitor's activities set out in each of those Reports.

[2] Such a request is not unusual. A practice has developed in proceedings under the Companies' Creditors Arrangement Act ("CCAA") whereby the Monitor will routinely bring a

motion for such approval. In most cases, there is no opposition to such requests, and the relief is routinely granted.

[3] Such is not the case in this matter.

[4] The requested relief is opposed by Rio Can Management Inc. ("Rio Can") and KingSett Capital Inc. ("KingSett"), two landlords of the Applicants (the "Target Canada Estates"). The position of these landlords was supported by Mr. Brzezinski on behalf of his client group and as agent for Mr. Solmon, who acts for ISSI Inc., as well as Ms. Galessiere, acting on behalf of another group of landlords.

[5] The essence of the opposition is that the request of the Monitor to obtain approval of its activities – particularly in these liquidation proceedings – is both premature and unnecessary and that providing such approval, in the absence of full and complete disclosure of all of the underlying facts, would be unfair to the creditors, especially if doing so might in future be asserted and relied upon by the Applicants, or any other party, seeking to limit or prejudice the rights of creditors or any steps they may wish to take.

[6] Further, the objecting parties submit that the requested relief is unnecessary, as the Monitor has the full protections provided to it in the Initial Order and subsequent orders, and under the CCAA.

[7] Alternatively, the objecting parties submit that if such approval is to be granted, it should be specifically limited by the following words:

> "provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval."

[8] The CCAA mandates the appointment of a monitor to monitor the business and financial affairs of the company (section 11.7).

[9] The duties and functions of the monitor are set forth in Section 23(1). Section 23(2) provides a degree of protection to the monitor. The section reads as follows:

> (2) Monitor not liable – if the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

[10] Paragraphs 1(b) to (d.1) primarily relate to review and reporting issues on specific business and financial affairs of the debtor.

[11] In addition, paragraph 51 of the Amended and Restated Order provides that:

> … in addition to the rights, and protections afforded the Monitor under the CCAA or as an officer of the Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, including for great certainty in the Monitor's capacity as Administrator of the Employee Trust, save and except for any gross negligence or wilful misconduct on its part.

[12] The Monitor sets out a number of reasons why it believes that the requested relief is appropriate in these circumstances. Such approval

> (a) allows the monitor and stakeholders to move forward confidently with the next step in the proceeding by fostering the orderly building-block nature of CCAA proceedings;
>
> (b) brings the monitor's activities in issue before the court, allowing an opportunity for the concerns of the court or stakeholders to be addressed, and any problems to be rectified in a timely way;
>
> (c) provides certainty and finality to processes in the CCAA proceedings and activities undertaken (eg., asset sales), all parties having been given an opportunity to raise specific objections and concerns;
>
> (d) enables the court, tasked with supervising the CCAA process, to satisfy itself that the monitor's court-mandated activities have been conducted in a prudent and diligent manner;
>
> (e) provides protection for the monitor, not otherwise provided by the CCAA; and
>
> (f) protects creditors from the delay in distribution that would be caused by:
>
> a. re-litigation of steps taken to date; and
>
> b. potential indemnity claims by the monitor.

[13] Counsel to the Monitor also submits that the doctrine of issue estoppel applies (as do related doctrines of collateral attack and abuse of process) in respect of approval of the Monitor's activities as described in its reports. Counsel submits that given the functions that court approval serves, the availability of the doctrine (and related doctrines) is important to the CCAA process. Counsel submits that actions mandated and authorized by the court, and the activities taken by the Monitor to carry them out, are not interim measure that ought to remain open for second guessing or re-litigating down the road and there is a need for finality in a CCAA process for the benefit of all stakeholders.

[14] Prior to consideration of these arguments, it is helpful to review certain aspects of the doctrine of *res judicata* and its relationship to both issue estoppel and cause of action estoppel.

The issue was recently considered in *Forrest* v. *Vriend*, 2015 Carswell BC 2979, where Ehrcke J. stated:

> 25. "TD and Vriend point out that the doctrine of *res judicata* is not limited to issue estoppel, but includes cause of action estoppel as well. The distinction between these two related components of *res judicata* was concisely explained by Cromwell J.A., as he then was, in *Hoque* v. *Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (C.A.) at para. 21:
>
> > 21 *Res judicata* is mainly concerned with two principles. First, there is a principle that "… prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "… prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.
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> …
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> 30. It is salutary to keep in mind Mr. Justice Cromwell's caution against an overly broad application of cause of action estoppel. In *Hoque* at paras. 25, 30 and 37, he wrote:
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> > 25. The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible application of cause of action estoppel to all matters that "could" have been raised does not fully reflect the present law.
> >
> > ….
> >
> > 30. The submission that all claims that could have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matter not actually raised and decided, the

> test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.
>
> …
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> 37. Although many of these authorities cite with approval the broad language of *Henderson* v. *Henderson*, *supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether proceeding constitutes a collateral attack on the earlier findings, whether it simply assets a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

[15] In this case, I accept the submission of counsel to the Monitor to the effect that the Monitor plays an integral part in balancing and protecting the various interests in the CCAA environment.

[16] Further, in this particular case, the court has specifically mandated the Monitor to undertake a number of activities, including in connection with the sale of the debtors assets. The Monitor has also, in its various Reports, provided helpful commentary to the court and to Stakeholders on the progress of the CCAA proceedings.

[17] Turning to the issue as to whether these Reports should be approved, it is important to consider how Monitor's Reports are in fact relied upon and used by the court in arriving at certain determinations.

[18] For example, if the issue before the court is to approve a sales process or to approve a sale of assets, certain findings of fact must be made before making a determination that the sale process or the sale of assets should be approved. Evidence is generally provided by way of affidavit from a representative of the applicant and supported by commentary from the monitor in its report. The approval issue is put squarely before the court and the court must, among other things conclude that the sales process or the sale of assets is, among other things, fair and reasonable in the circumstances.

[19] On motions of the type, where the evidence is considered and findings of fact are made, the resulting decision affects the rights of all stakeholders. This is recognized in the jurisprudence with the acknowledgment that res judicata and related doctrines apply to approval

of a Monitor's report in these circumstances. (See: *Toronto Dominion Bank v. Preston Spring Gardens Inc.*, [2006] O.J. No. 1834 (SCJ Comm. List); *Toronto Dominion Bank v. Preston Spring Gardens Inc.*, 2007 ONCA 145 and *Bank of America Canada v. Willann Investments Limited*, [1993] O.J. No. 3039 (SCJ Gen. Div.)).

[20] The foregoing must be contrasted with the current scenario, where the Monitor seeks a general approval of its Reports. The Monitor has in its various reports provided commentary, some based on its own observations and work product and some based on information provided to it by the Applicant or other stakeholders. Certain aspects of the information provided by the Monitor has not been scrutinized or challenged in any formal sense. In addition, for the most part, no fact-finding process has been undertaken by the court.

[21] In circumstances where the Monitor is requesting approval of its reports and activities in a general sense, it seems to me that caution should be exercised so as to avoid a broad application of res judicata and related doctrines. The benefit of any such approval of the Monitor's reports and its activities should be limited to the Monitor itself. To the extent that approvals are provided, the effect of such approvals should not extend to the Applicant or other third parties.

[22] I recognized there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process. These reasons are set out in paragraph [12] above. However, in my view, the protection should be limited to the Monitor in the manner suggested by counsel to Rio Can and KingSett.

[23] By proceeding in this manner, Court approval serves the purposes set out by the Monitor above. Specifically, Court approval:

(a) allows the Monitor to move forward with the next steps in the CCAA proceedings;

(b) brings the Monitor's activities before the Court;

(c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,

(d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;

(e) provides protection for the Monitor not otherwise provided by the CCAA; and

(f) protects the creditors from the delay and distribution that would be caused by:

(i) re-litigation of steps taken to date, and

(ii) potential indemnity claims by the Monitor.

[24] By limiting the effect of the approval, the concerns of the objecting parties are addressed as the approval of Monitor's activities do not constitute approval of the activities of parties other than the Monitor.

[25] Further, limiting the effect of the approval does not impact on prior court orders which have approved other aspects of these CCAA proceedings, including the sales process and asset sales.

[26] The Monitor's Reports 3-18 are approved, but the approval the limited by the inclusion of the wording provided by counsel to Rio Can and KingSett, referenced at paragraph [7].

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Regional Senior Justice G.B. Morawetz

Date: December 11, 2015