WILLMS & SHIER ENVIRONMENTAL LAW MOOT COURT COMPETITION 2019

S.E.M.C.C. File Number: 03-02-2019

IN THE SUPREME ENVIRONMENTAL MOOT COURT OF CANADA

(ON APPEAL FROM THE ALBERTA COURT OF APPEAL)

B E T W E E N:

ORPHAN WELL ASSOCIATION and ALBERTA ENERGY REGULATOR

APPELLANTS
(Appellants)

- and -

GRANT THORNTON LIMITED

RESPONDENT
(Respondent)

FACTUM OF THE APPELLANTS
ORPHAN WELL ASSOCIATION and ALBERTA ENERGY REGULATOR

Pursuant to Rule 12 of the
Willms & Shier Environmental Law Moot Official Competition Rules 2019

TEAM # 2019-01

TO: **THE REGISTRAR OF THE**
SUPREME ENVIRONMENTAL MOOT COURT OF CANADA

AND TO: **ALL REGISTERED TEAMS**

TABLE OF CONTENTS

PART I -- OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Appellants' Position

1 This case is that of a corporation seeking to avoid end-of-life environmental obligations that were a precondition to licence requirements for the right to exploit Alberta's oil and gas resources. The principle issue at stake in this case is environmental protection. The interests of creditors in the insolvency process is a distant second. The regulatory regime provides for "cradle-to-grave" regulation and includes end-of-life obligations. These end-of-life obligations are not tantamount to a provable claim in bankruptcy. The regulatory regime is a distinct and separate process from that of the *Bankruptcy and Insolvency Act (BIA)*. The *BIA*, the *Oil and Gas Conservation Act* (*OGCA*) and the *Pipeline Act* can operate in harmony, as the three laws have for the past 25 years.

2 The Ontario Well Association and Alberta Energy Regulator ("AER") strives to protect the environment and public health and safety by mandating the proper abandonment and remediation of non-producing wells. The Respondent seeks to walk away from environmental obligations that were a pre-condition for the ability to extract oil in the first place. The Respondent has taken from Alberta's public resources, made their profit, and now rely on overly complex and broad interpretations of the *BIA* to escape these end-of-life obligations. The Respondent is trying to force its obligations onto industry, the public, and the land owner.

3 The AER seeks to ensure the public duty for the safety of the environment and the public is upheld. In granting this appeal, this court would ensure the safety of the public and the environment by refusing to allow corporations to take from the environment, make their profit, and leave the mess for the industry, and the public to clean up.

B. Statement of the Facts

4 Redwater Energy Corporation ("Redwater") held licenses in oil and gas properties prior to being forced into bankruptcy by their creditors after becoming insolvent. The properties included orphan wells that are at their end of their life and are non-producing. The costs of the environmental remediation to abandon these wells far exceed the value of the actual wells themselves. Redwater's receiver and trustee in bankruptcy, the Respondent, Grant Thornton Limited, seeks abandon their interest in the orphan wells. The Respondent is attempting to

surrender their environmental obligations while at the same time realize on the value of a small group of still-producing wells.

5 The Alberta Energy Regulator (AER) has a specific set of obligations on how an end of life well is rendered environmentally safe. To benefit from the exploration of oil and gas, a company must be granted a license by the AER. The licensee must also hold an underlying property interest in the resource, which is mostly done through a mineral lease from with the Crown. Over eighty percent of oil and gas in Alberta is owned and administered by the Crown. Furthermore, a company must also obtain a right to occupy the surface, which is usually done through an agreement with the landowner. The regime takes a "cradle to grave" approach to the regulation of the resource. In this case, the AER sought to enforce the end of life obligations on the Respondents, who would then be forced to cover the costs of remediation. However, the Respondents failed to comply in order to maximize the recovery of the secured creditors.

PART II -- QUESTIONS IN ISSUE

6 (1) Did the Court of Appeal err in finding that end-of-life obligations for licenced properties are claims provable in bankruptcy and therefore do not have super priority in bankruptcy proceedings?

7 (2) Did the Court of Appeal err in holding that the licence obligations created by provincial legislation conflict with or frustrate the scheme of priorities set out in the *BIA*?

PART III -- ARGUMENT

(1) The Court of Appeal erred in finding that end-of-life obligations for licenced properties are claims provable in bankruptcy and therefore do not have super priority in bankruptcy proceedings

THE AER IS ACTING IN THE PUBLIC INTEREST

(A) The AER is fulfilling a public duty by ensuring that companies do not abandon oil wells

8 The AER's mandate includes providing "for the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta." The Respondent had full knowledge of the regulatory requirements for end of life obligations. The AER limits the inherent risks of producing oil by requiring the Respondent to properly and responsibly abandon its wells. The AER is simply fulfilling its public purpose.

9 The statutory provisions of the *Responsible Energy Development Act* which require the abandonment of oil wells are part of the general law of Alberta. These statutory provisions apply to every licensed oil and gas well. The AER is not seeking to recover money, but to enforce a general law. Therefore, by requiring the Respondents to fulfill their end of life obligations, the AER is fulfilling its public duty as a regulator.

Responsible Energy Development Act, SA 2012, c R-17.3, s 2.
Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd, [1993] 1 SCR at para 21 [*Northern Badger*].

(B) The Majority's interpretation of s. 14.06 does not mean that trustees can renounce their regulatory obligations

10 The decision of the majority in the Court of Appeal interpreted the applicable regulatory requirements too broadly. The Respondent cannot simply pick and choose the regulatory requirements that they are going to comply with. The purpose of s. 14.06 is to (1) protect insolvency practitioners from personal liability, and (2) encourage them to accept mandates despite ongoing environmental obligations.

11 Clear, express language would be required in the statute in order to allow a trustee in bankruptcy to walk away from their environmental obligations. The legislation is silent on this point and does not provide trustees an opportunity to renounce their ongoing regulatory obligations that are designed to protect the environment. The AER must be given priority over that of secured creditors as the protection of the health and safety of the environment and public must be given priority.

Bankruptcy and Insolvency Act, RSC 1985, c B-31, s 14.06 [*BIA*].

(C) Personal liability is not an issue, since it is an ongoing regulation and the charge is to the estate

12 Under s. 14.06 of the *BIA*, a trustee, who is subject to a regulatory order respecting real property, may renounce the property to avoid personal liability if compliance is too onerous. Where there is no proof of gross negligence or willful misconduct, a trustee may renounce this property. However, there is nothing in section 14.06 that releases the "estate" or the "bankrupt" from having to comply with regulatory orders respecting real property. If Parliament intended to extend the rights under section 14.06(4) beyond personal liability to effectively reduce liabilities of the bankrupt estate, it would be explicitly set out in the legislation. Therefore, the Respondent cannot avoid compliance on the basis that they can renounce their end of life obligations to avoid

personal liability. There is no personal liability here. The regulatory obligations associated with an abandoned well represents a charge (liability) to the estate itself.

BIA, *supra* para 10.

(D). S. 14.06(6) allows remediation costs to be given priority over secured creditors

13 Section14.06(6) does not state that the trustee or receiver's costs of remedying the environmental condition will be given lower priority than that of secured creditors. Section 14.06(6) simply states that claims for environmental remediation will not be ranked as costs of administration. Under section 136 of the *BIA*, secured creditors are given priority over that of administrative costs upon distribution of a bankrupt's assets. The Majority interprets s. 14.06(6) to mean that if remediation costs are not ranked as administrative costs, then secured creditors must have priority. In other words, environmental claims do not have super priority. However, Section 14.06(6) properly interpreted applies only to "claims" and not the remediation costs incurred by the public. Remediation costs are imposed by law, and are not a "claim." Therefore, the receiver's or trustee's costs of remedying the condition or damage can be given a super priority.

BIA, *supra* para 10 at s 136.
BIA, *supra* para 10.

(E) The property under consideration are the AER licenses, which are not real property.

14 Section 14.06(4) allows for the renouncement of "real property". Oil and gas leases that provide mineral or surface rights as *profits a prendre* are distinct from regulatory licenses. The majority of the Court of Appeal incorrectly found that section 14.06(4) applies to such leases as oil and gas assets as opposed to the licenses to drill. The rationale for this distinct as that the oil and gas licenses only have value in the context of the regulatory regime. Since section 14.06 does not allow for the renouncement of regulatory interests. Oil and gas licenses are regulatory tools and not interests in real property. Any end of life obligations must continue to bind the estate for such obligations not to continue would lead to an absurd result.

BIA, *supra* para 10.

15 Without the *Surface Rights Act*, one would not be permitted to occupy another's land for exploration. Addressing the end of life obligations is a condition upon which this permission is granted. To hold otherwise would be manifestly unfair to the land-owner. The failure to abide by

the end of life obligations results in diminution of the landowner's property. The trustee was aware of this requirement when it obtained the loan. The AER is doing nothing more than enforcing its mandate by forcing the trustee to remediate the properties being abandoned.

Surface Rights Act, RSA 2000, c S-24, s 12.

(F) The polluter pay and precautionary principle must be applied

16 The Respondent argues that if the trustee is forced to cover the costs of remediation, then creditors will be the ones that pay. According to majority in the court of appeal decision, this will interfere with the polluter pays principle, and would create a new third party pay principle. This is an absurd interpretation of the polluter pay principle. The creditors engaged in the business enterprise fully aware of the end-of-life obligations. These obligations are no surprise to the creditors. If the AER is required to pay any costs of remediation the taxpayer will be forced to bear the final costs.

Canadian Environmental Protection Act, SC 1999, c C. 33, preamble.
Kawartha Lakes (City) v Ontario (Environment), 2013 ONCA 310, at para 17.

17 If the environmental damage cannot be proved, there is a duty to prevent harm even if that harm cannot be conclusively determined, as per the precautionary principle. This is even the case when the trustee had full knowledge of the remediation work.

114957 Canada Ltee (Spray-Tech, Societe d'arrosage) v Hudson (Ville), [2001] 2 SCR 241 at para 32.

THIS IS NOT A CLAIM PROVABLE IN BANKRUPTCY

(A) The test laid out in Abitibi determines whether an order is a "claim provable in bankruptcy"

18 There is no clear-cut definition for what amounts to a claim provable in bankruptcy in the *BIA*. In the *Northern Badger* case the Alberta Court of Appeal set out a test to establish this type of "claim." This test was discussed in the *Abitibi* case. As set out in paragraph 27 of Northern Badger, the test requires 3 conditions be met for an order to constitute a "claim provable in bankruptcy." (1) There must be a debt, a liability, or an obligation to a *creditor*. (2) The debt, liability or obligation must be incurred before the debtor becomes bankrupt. (3) It must be possible to attach a monetary value to the debt, liability or obligation.

Northern Badger, *supra* para 9 at para 27
Newfoundland and Labrador v. AbitibiBowater Inc., 2012 SCC 67 at para 26 [*Abitibi*].

19 A "provable claim" must be defined and interpreted narrowly to protect the public while permitting the orderly restructuring or dissolution of insolvent companies.

20 Further, the AER respectfully submits that the majority in the court of appeal failed to appropriately apply this test as endorsed by the Supreme Court of Canada in *Abitibi*. Justice Slatter, writing for the majority in *Abitibi* explains:

> "The Alberta Energy Regulator effectively concedes the outcome of this appeal by the following statement in its factum:
> 75. The AER acknowledges that compliance with its orders may ultimately lessen amounts recovered by the creditors because the costs of compliance are paid from the assets in the estate. However, the AER submits that the objective of maximizing recovery for creditors cannot be at the expense of complying with the licensee's statutory end of life obligations.
> This frank statement confirms that the effect of the Regulator's orders is to interfere with the priority of distribution in the bankrupt estate. It also confirms that the Regulator's orders directly engage the paramountcy doctrine."

Orphan Well Association v. Grant Thornton Limited, 2017 ABCA 124 at para 90 [*Orphan Well*].

21 The majority of the court of appeal attempts to justify their position by taking the position that a "provable claim" was made because it interferes with the priority of secured creditors set out in the *BIA*. This is putting the cart before the horse and is not abiding by the law. The AER submits that the test endorsed by the Supreme Court of Canada in *Abitibi* needs to be applied to determine whether an order is a "claim provable in bankruptcy" and not the fact that secured creditors may lose out on their secured credits status as cited by the majority of the Alberta Court of Appeal.

(B) Abitibi did not overrule Northern Badger

22 *Abitibi* clarified the scope of the "provable claims" test in *Northern Badger*, it did not overturn the decision. *Northern Badger* held that an enforcing body making a claim will not be a creditor. The Respondent will argue that *Abitibi* essentially presumes that a regulatory board is always a creditor. This argument is too presumptuous. The Alberta Court of Appeal discusses the relationship between these two cases and the *BIA* in *Orphan Well*, but the court makes no judgements on the relationship. This proposition would also lead to absurd conclusions. If all regulatory bodies are creditors, then the regulatory scheme of all environmental bodies who put responsibility onto companies for their environmental and/or contractual obligations to the

government would be undermined. Justice Deschamps recognizes this point when she explains that "orders relating to the environment may or may not be considered provable claims". The test established in *Northern Badger* is in its essence, the same test used in *Abitibi*. The results of the cases are different not because the test was altered, rather the unique facts of each case necessitate the different outcomes.

Abitibi, *supra* para 18 at paras 47 and 169.
Fenner L. Stewart, "How to Deal with a Fickle Friend? Alberta's Troubles with the Doctrine of Federal Paramountcy" (2017) 6 ANNREVINSOLV 24.
Orphan Well Association v Grant Thornton Limited, 2017 ABCA 124, application / notice of appeal 2017 CarswellAlta 1600 (SCC) at para 99 [*Redwater*].

(C) The AER is not a "creditor"

23 Not all regulatory bodies are creditors. The AER has no commercial or financial interest in enforcing obligations, that were agreed upon by the licensee and its lenders, onto the Respondent's estate. In *Northern Badger*, Justice Laycroft illustrates:

> "When the citizen subject to [an] order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed"

Northern Badger, *supra* para 9 at para. 33.

24 Justice Martin elaborates on this point in her dissent:

> "In my view, the regulatory regime also **does not** satisfy the first requirement of the *Abitibi* test for monetary claims – that the regulatory body is a creditor of the insolvent debtor. The obligation to abandon a well and reclaim the well site, imposed on a licensee by provincial legislation, is not, in my view, the claim of a creditor. This was the view of Laycraft CJA in *Northern Badger* at para. 32-33…" [Emphasis added.]

Redwater, *supra* para 22 at para 185.

25 Even the majority in *Abitibi* recognized the difference between a debt owed to the crown and duties owed to the public. The environmental damage arising from Redwater's activities is not a debt. It is an inevitable complication of the oil recovery process. Just as it is wrong to litter waste on the street, it is wrong to pollute oil on another's property.

26 An AER license has numerous obligations attached to them. These obligations include requiring a company that takes the oil from the province to clean up and properly abandon the well to ensure no environmental degradation. The AER does not manage oil companies' assets. It

does not hand out loans to oil companies. The AER is enforcing an agreed upon obligation – remediation of abandoned wells. It is not collecting a debt.

Lund, Anna. "Lousy Dentists, Bad Drivers, and Abandoned Oil Wells: A New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law" (2017), 80 Sask L Rev 157 at p 178.
Oil and Gas Conservation Act, RSA 2000, c O-6, s 1(1)(a).

27 The AER in this case, similar to *Northern Badger* is acting as regulator. This is distinguished from the regulator in *Abitibi* who was clearly acting as a creditor. As stated by Justice Deschamps in Abitibi:

> "The present situation is unique. It bears no similarity with the facts in any of these decisions. In none of them did the regulator stand to directly benefit financially from the orders issued. Here, to borrow from the wording used in these cases, the Province has even taken steps to make itself a creditor. Indeed, it can reasonably be inferred from the fact pattern at issue that it is, in truth, seeking to recover a benefit for itself, if not simply money... Put otherwise, looking at the true substance over the apparent form, it is not the public "enforcer" taking steps to enforce the general law. It is, to the contrary, the enforcing authority clothed as a creditor."

Abitibi, *supra* para 18 at paras 257-259.

28 The court further elaborated that the regulator in *Abitibi* was not acting in a regulatory nature but instead was acting "purely financial in reality."

> "In the context of the *EPA* Orders and the *Abitibi Act*, the Province stands as the direct beneficiary, from a monetary standpoint, of Abitibi's compliance with the *EPA* Orders. In other words, the execution in nature of the *EPA* Orders would result in a definite credit to the Province's own "balance sheet". Abitibi's liability in that regard is an asset for the Province itself."

Abitibi, *supra* para 18 at para 173.

29 The AER has no commercial or financial interest in enforcing its obligations. The AER is simply fulfilling its obligation to protect the public. The regulator in *Abitibi* sought payment only after *Abitibi* announced its insolvency. The regulator in *Abitibi* went so far as to create *The Abitibi Act* in order to increase the funds owed resulting in financial gain for the regulator. In *Abitibi* the regulator was trying to circumvent the *BIA* to gain financially.

30 In the case before the court, the AER is merely seeking payment for commitments the Respondent had knowledge of long before their insolvency while abiding by the BIA. *Abitibi*

owned the property where their pulp mills were located. the Respondent only has claim to a *profit a prendre over* the resources located on the land owned by a third party.

31 The AER seeks entitlement for not only the orphan wells, but also the profitable wells. This ensures that innocent third parties do not have clean up the Respondent's mess. In the present case, the AER has a duty to protect the land owned by these third parties and the public good, who did not have a say in granting *profit a prendre* to the Respondent, from the liabilities left behind by the Respondent. Unlike the regulator in Abitibi, the AER has nothing to gain financially from enforcing these mutually agreed upon obligations and a strong duty to protect defenceless third parties. Clearly, the AER is an enforcement body and not a creditor.

Abitibi-Consolidated Rights and Assets Act, SNL 2008, c A-1.01.
Northern Badger, *supra* para at para 21.

32 While the facts in the present case are easily distinguishable from those set out in *Abitibi*, the Appellant submits that the court's interpretation of a creditor in that case is still misguided. Justice Deschamps in *Abitibi* writes:

> "At this first stage of determining whether the regulatory body is a creditor, the question whether the obligation can be translated into monetary terms is not yet relevant. This issue will be broached later. The only determination that has to be made at this point is whether the regulatory body has exercised its enforcement power against a debtor. When it does so, it identifies itself as a creditor, and the requirement of this stage of the analysis is satisfied."

Abitibi, *supra* para 18 at para 32.

33 This statement is absurd because it would mean that all regulating bodies would be creditors. Aside from being contrary to what justice Deschamps had stated earlier, that "not all regulatory bodies are creditors", it would also completely diminish any enforcement body's regulatory scheme. Moreover, instead of a requirement to be satisfied, the creditor requirement would now be a presumption. Obviously, on the clear face of the statute the courts nor the legislature intended this interpretation.

(D) There is No Certainty Abandonment will be Completed

34 In order to satisfy the third requirement of the *Abitibi* test the courts must be "sufficiently certain" that the regulatory body will perform the abandonment and, as a result, assert a monetary claim. However, after recognizing the uncertainty in the AER and OWA's ability to

remediate, the lower courts in this case plugged in an "intrinsically financial" element to the claim. Again, the court is inappropriately taking a requirement for a test and transforming it into an assumption. In *Nortel*, the courts observe the blatant oversight of this new element:

> "The respondents' approach is not only inconsistent with *AbitibiBowater Inc., Re*, it is too broad. It would result in virtually all regulatory environmental orders being found to be provable claims. As Deschamps J. observed, a company may engage in activities that carry risks. When those risk materialize, the costs are borne by those who hold a stake in the company."

Nortel Networks Corporation (Re), 2013 ONCA 599, at paras 26-33
Abitibi, *supra* para 18 at paras 37 and 46.
Redwater Energy Corporation (Re), 2016 ABQB 278 at para 173
Redwater, *supra* para 22 at 76.

35 The courts have clearly recognized that a company may engage in activities that carry risks. When those risk materialize, the costs are borne by those who hold a stake in the company. In this case, the costs must be borne by the creditors and the creditors alone.

36 This modification to the test laid out in *Abitibi* is inconsistent with what the Supreme Court of Canada established in that case and is overly broad. As long as validly enacted provincial regulatory obligations are not in reality disguised monetary claims, they should be presumed enforceable. This interpretation would effectively harmonize the decisions of *Northern Badger* and *Abitibi* and would bring clarity, predictability and consistency to this area of law.

37 The AER submits that the *Abitibi* test does not apply because abandonment will not be completed by the regulator. The OWA operates at an arms length from the AER. Although its power is delegated to it by the AER, it operates under a different mandate and Board. The AER also has no statutory obligation to carry out abandonment work and has no intention to carry out the work in this instance. Instead, the AER inspects and declares orphan wells to then be referred to the OWA. The OWA is not a regulator, it is not the crown and has no authority to seek reimbursement from the licensee. It may not collect taxes and it generally only uses the payments given to it by licensees as deposit for remediation. In *Abitibi* abandonment was carried out by the Newfoundland Ministry of Environment, in the present case the Respondent is asking that an industry funded association clean up their mess.

38 Even if the *Abitibi* test did apply to the OWA, which it does not, and a provable claim could be made, which it can not, it does not have the means to properly abandon the wells left behind by the Respondent.

39 A study conducted by the C.D. Howe Institute has demonstrated that the OWA's expenses may increase to $8.6 billon due to the increase of wells it has obtained since the ruling in *Abitibi*. This expense exceeds its assets ten times over. The Respondent will claim that government funding or higher levies may aid in alleviating this issue. However, even millions of dollars in government grants and hundreds of millions of dollars in government loans will not sufficiently address its current expenses. Even if it could, which it can not, the rate at which the OWA's inventory is expanding is too great to be addressed by government loans and grants and the costs should not be borne by the public. While it could be argued that higher levies may address the issue, a higher levy will only lead to further insolvencies exacerbating the problem. The OWA does not have the ability properly abandon its current well inventory, let alone tackle the barrage of "orphan" wells it will have to deal with in the future if the courts continue to undermine the AER's regulatory scheme.

Dachis, B, Shaffer, B, and Thivirerge, V. (2017). *C.D. Howe Institute, Commentary No. 492, All's Well that Ends Well: Addressing End-of-Life Liabilities for Oil and Gas Wells* at p 4 C.D. Howe Institute.

(2) *The Court of Appeal erred in holding that the licence obligations created by provincial legislation conflicted with or frustrated the scheme of priorities set out in the* BIA.

INTERPRETATION OF FEDERAL AND PROVINCIAL STATUTES UNDER A PARAMOUNTCY ANALYSIS SHOULD BE GUIDED BY THE PRINCIPLES OF CO-OPERATIVE FEDERALISM

40 The Court should be cognisant of the principles of co-operative federalism during statutory analysis of the provincial regulatory regime and the *BIA*. The principles of co-operative federalism include the following: (i) onus of proof; (ii) presumption rule; and (iii) judicial restraint:

(i) Onus of Proof Rule

41 It is important to note that the party seeking to trigger federal paramountcy bears the onus of proving all elements necessary to render the provincial law inoperative.

Canadian Western Bank v Alberta, 2007 SCC 22, at para 75 [*Canadian Western Bank*].

(ii) The Presumption Rule

42 The court must presume "that Parliament intends its laws to coexist with provincial laws." Accordingly, courts must "favour and interpretation of the federal legislation that allows

concurrent operations of both laws", when the option presents itself. Thus, the provincial regulatory regime can and should be interpreted to operate alongside the *BIA* in harmony.

Alberta (Attorney General) v Moloney, 2015 SCC 51, at para 27 [*Moloney*].

(iii) The Judicial Restraint Rule

43 The court must exercise judicial restraint, as the court is not a legislator. First, a court must adopt a strict definition of the concept of conflict when considering to what degree Parliament has occupied the field of provincial-federal overlap. Second, this rule directs the court to use only very clear statutory language when establishing the purpose of the federal enactment in question.

Rothmans, Benson & Hedges Inc v Saskatchewan, 2005 SCC 13, at para 21
Abitibi, *supra* para 18 at para 119.
Abitibi, *supra* para 18 at para 67.

THERE IS NO OPERATIONAL CONFLICT BETWEEN THE FEDERAL *BIA* AND THE AER REGULATORY REGIME MAKING COMPLIANCE WITH BOTH IMPOSSIBLE

44 An operational conflict is triggered when there is an actual conflict in operation. The Supreme Court of Canada in *Moloney* framed the test as whether both laws "can operate side by side without conflict", or whether both "laws can apply concurrently, and citizens can comply with either of them without violating the other" If there is no true incompatibility between the federal and provincial law, co-operative federalism requires the two laws operate concurrently.

Moloney, *supra* para 42 at para 19.
Marine Services International Ltd v Ryan Estate, [2013] SCR 53, at para 76.
Canadian Western Bank, *supra* para 41 at para 72.

45 The operational conflict at issue is whether section 14.06(4) of the *BIA* and the definition of "licensee" under the *OCGA* and the *Pipeline Act*, that explicitly includes trustees and receivers are in conflict with one another. This means that the obligations imposed on the licensee to abandon and remediate wells are transferred to the receiver or trustee during bankruptcy proceedings. The Respondent interprets section 14.06(4) of the *BIA* to allow for the renouncement of certain wells with environmental liabilities. The Respondent asserts that this ability to renounce assets includes the ability to renounce end of life obligations associated with those assets.

OCGA, *supra* para 26 at s 1(1)(cc).
Pipeline Act, RSA 2000, c P-15, s 1(1)(n).

Orphan Well, *supra* para 20 at para 232.

46 Essentially, the Respondent seeks to renounce or disclaim worthless assets without paying the costs of environmental obligations associated with those assets. These environmental obligations were a pre-condition to the issuance of the license to Redwater. The Respondent was, at all times, well aware of these environmental obligations on an application for a license. The Respondent's creditors were also advised and aware of the end-of-life environmental obligations prior to make any loans to Redwater. The Respondent seeks to use this Court to circumvent these obligations, shifting the burden of these environmental obligations onto the industry, the tax payer and the land owner. This court should not allow the Respondent to avoid its obligations and the polluter pay principle, by polluting for a profit and leaving the mess for the industry and the public to clean up.

47 The Appellants submit that there is no operational conflict between the AER regulatory regime and the *BIA*. The two statutes are distinct and serve two separate purposes. Both laws operate in harmony with one another when the principle of judicial restrain and the presumption rule are applied to interpretation. The Respondent cannot renounce the end of life obligations associated with their assets for two reasons: (1) regulatory activities continue during bankruptcy; and (2) there is no conflict between the two regulatory regimes.

48 The *BIA* specifically allows for regulatory activities to continue during a bankruptcy. Section 72(1) provides that the provisions of the *BIA* "shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this act". Section 69.6(4) of the *BIA* shows that the default position of the *BIA* with respect to regulators is that a regulator is a non-creditor. The regulatory scheme of the AER falls outside the priority distribution scheme of the BIA. Therefore, absent express language to the contrary by Parliament in the *BIA*, which is not found in section 14.06(4), the regulator's obligations requiring abandonment and remediation of the trustee continue through the bankruptcy process.

BIA, *supra* para 10 at s 72(1).
BIA, *supra* para 10 at s 69.6(4).

49 If the *BIA* is read according to the principles of co-operative federalism, there is no conflict. The two laws can be interpreted harmoniously. The regulatory regime is in place for the public good and strives to regulate the process of oil extraction from cradle to grave. This is

wholly within the constitutional powers of the province. This regime as a public purpose regime that sits outside of the *BIA*. The two obligations cannot and should not be combined. The regulatory regime does not fall within the priority distribution scheme. The *BIA* does not expressly allow for the renouncement of environmental obligations. Absent express language to the contrary, this court should not step into the shoes of a legislator and read that intention into the statute.

THE PROVINCIAL REGULATORY REGIME DOES NOT FRUSTRATE THE PURPOSE OF THE *BIA*

50 The question of whether the provincial regulatory regime frustrates the purpose of the *BIA* is a two-step process. The first step is to determine the purpose of the federal legislation. Second, is to determine whether the provincial law subverts the federal law's purpose.

51 Applied to the case at hand, the first step is to determine the purpose of the *BIA*. The purpose of the *BIA* was defined by the Supreme Court of Canada in *Moloney* as twofold. The first purpose is to provide for the orderly liquidation of insolvent debtors through a single proceeding model, which strives to ensure "the equitable distribution of the bankrupt's assets among his or her creditors." The second purpose is the bankrupt's financial rehabilitation. The first purpose of the *BIA* is at issue in this case.

Moloney, *supra* para 42 at para 32.

52 The Appellants submit that the provincial regulatory regime does not subvert the *BIA*'s purpose of providing for an equitable distribution of the bankrupt's assets among creditors for the following three reasons.

53 The *BIA*'s priority distribution scheme recognizes that the purpose of equitable distribution does not come at an unreasonable cost to other public interests. As put by Justice Martin in her dissent,

> "the distinctive Alberta regulatory and licensing regime for oil and gas resources, which is wholly within provincial jurisdiction, creates generally applicable public legal duties, outside the scope of 'claims provable in bankruptcy.'"

Orphan Well, *supra* para 20 at para 113.

54 The *BIA* expressly preserves the rights of regulators throughout the bankruptcy process. Moreover, the *BIA* includes a number of checks and balances to ensure debtors, such as the Trustee in this case, cannot avoid their obligations to the public.

55 The regulatory regime does not frustrate the purpose of the *BIA* merely because the regime has an incidental impact on a particular insolvency. The regulatory regime has been in operation without conflict for 25 years. The particular facts of this case leave the creditors with nothing once the environmental obligations to abandon and remediate are completed. The assets available for distribution to creditors in compliance with the *BIA* will be none. This is unfortunate, but not the fault of the regulator or the regulation scheme.

56 The regulatory regime does not subvert the *BIA* merely because they require the expenditure of funds that have the effect of reducing the size of the debtor's estate. The Supreme Court of Canada has explicitly rejected a 'bottom line" approach, it held that

> "provincial law necessarily affects the "bottom line', but this is contemplated by the *Bankruptcy Act* itself. Indeed, it is no exaggeration to say that there is no 'bottom line' without provincial law."

Husky Oil Operations Ltd v Minister of National Revenue (1995), 128 DLR (4th) 581, at para 31.

57 As put by Justice Martin,

> "the continued application of the regulatory regime following bankruptcy does not determine or reorder priorities among creditors but rather values accurately the assets available for distribution."

Orphan Well, *supra* para 20 at para 240.

PART IV -- CONCLUSION

58 This court cannot allow the Respondent to use complex and expansive legal arguments to circumvent the end-of-life obligations required of them by provincial law. To do so would be to allow corporations to take from Alberta's public resources without the obligation to any environmental harm caused by, or arising from, their operations. This would put the safety of the environment and the public health in jeopardy.

PART V -- SUBMISSIONS IN SUPPORT OF COSTS

59 The Appellants are seeking their costs on a substantial indemnity basis.

PART VI -- ORDER SOUGHT

60 The Appellants respectfully request that this appeal be allowed and the following additional relief be granted:

(a) The declarations of Wittmann J. in paragraphs 3, and 5-16 of the order pronounced May 19, 2016 be set aside;

(b) An Order that the proceeds from the sale of the Redwater assets be used to address Redwater's end of life obligation; and

(c) A declaration be made confirming that regulatory obligations to abandon and reclaim provincial oil and gas assets are public duties that operate outside of the *BIA*'s priority distribution scheme

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of January, 2019.

_____
Courtney Wilson

_____
Avi Freedland

_____
Tyler Hammond

Counsel for the Appellants
Orphan Well Association and Alberta Energy Regulator

PART VII -- TABLE OF AUTHORITIES

Paragraph No.

LEGISLATION AT ISSUE

Abitibi-Consolidation Rights and Assets Act, SNL 2008, c A-1.01.
Bankruptcy and Insolvency Act, RSC 1985, c B-31, s14.06(4), 69.6(4), 72(1).
Canadian Environmental Protection Act, SC 1999 c C-33, preamble.
Oil and Gas Conservation Act, RSA 2000, c O-6, s 1(1)(a).
Pipeline Act, RSA 2000, c P-15, s 1(1)(n).
Responsible Energy Development Act, SA 2012, c R-17.3, s 2.
Surface Rights Act, RSA 2000, c s-24, s 12.

ORPHAN WELL ASSOCIATION and ALBERTA ENERGY REGULATOR
APPELLANTS
(Appellants)

-and-

GRANT THORNTON LIMITED

RESPONDENT
(Respondent)

S.E.M.C.C. File Number: 03-02-2019

SUPREME ENVIRONMENTAL MOOT
COURT OF CANADA

FACTUM OF THE APPELLANTS ORPHAN WELL ASSOCIATION and ALBERTA ENERGY REGULATOR

TEAM #

Courtney Wilson
Avi Freedland
Tyler Hammond

Counsel for the Appellants,
Orphan Well Association and
Alberta Energy Regulator

Document #: 1482474