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 RESPONDENT
GRANT THORNTON LIMITED

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

TEAM 2019-02

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

AND TO: **ALL REGISTERED TEAMS**

TABLE OF CONTENTS

Page No.

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview of Respondent's position

1 Orphan Well Association and Alberta Energy Regulator (**"the Appellants"**) assert that this is a case of a corporation seeking to avoid environmental obligations. This characterization is not only misleading, it neglects both the careful considerations of Parliament as embodied in federal law and the inherent flaws in Alberta's regulatory regime.

2 Rather, this is a case of a trustee in bankruptcy lawfully complying with the federal *Bankruptcy and Insolvency Act* (**"*BIA*"**). Specifically, Grant Thornton Limited (**"the Respondent"**) has complied with section 14.06 of the *BIA*, a provision expressly enacted by Parliament to address environmental obligations in the context of bankruptcy and insolvency.

Bankruptcy and Insolvency Act, RSC 1985, c B-3, s 14.06 [*BIA*].

3 Moreover, this is a case of the Alberta Energy Regulator (**"AER"**) attempting to *ex post facto* patch the holes in its regulatory regime. Contrary to the Appellants' assertions, this regime is not concerned with environmental protection but, rather, with facilitating the development of Alberta's energy resources. Accordingly, the regime is back-end loaded: actual enforcement of environmental end-of-life obligations does not occur until the licensee is already in financial hardship. In the context of bankruptcy and insolvency, this means that AER demands creditors to pay for end-of-life costs that AER failed to secure in advance from the licensee.

Factum of the Appellants (Team #2019-01) at para 1 [Appellants' Factum].

4 The Appellants claim end-of-life obligations are public duties that bind the trustee. However, this broad characterization does not shield these obligations' costs from the federal bankruptcy and insolvency regime. The Supreme Court of Canada (**"SCC"**) held that such duties can still be claims provable in bankruptcy and, therefore, subject to the distribution scheme in the *BIA* (*AbitibiBowater*). Accordingly, the SCC developed a three-element test that examines the substance of a duty to determine whether it is monetary in nature and, thus, a claim provable in bankruptcy (*AbitibiBowater*). Both lower courts found the costs for satisfying AER's end-of-life obligations to be, in fact, unsecured claims. Therefore, those costs are not shielded, as the Appellants assert, but are folded into the bankruptcy and insolvency process (*Redwater*, *OWA* CA).

Appellants' Factum, *supra* para 3 at paras 8–9.

Newfoundland and Labrador v AbitibiBowater Inc., 2012 SCC 67 at paras 4, 26 [*AbitibiBowater*].

Redwater Energy Corporation (Re), 2016 ABQB 278 [*Redwater*].

Orphan Well Association v Grant Thornton Limited, 2017 ABCA 124 [*OWA* CA].

5 Furthermore, AER's regime engages the paramountcy doctrine. Where, as in this case, provincial legislation conflicts with a federal statute, the federal regime prevails and the provincial regime is rendered inoperative to the extent of the conflict. Both lower courts found that, by requiring the Respondent to pay for end-of-life costs before other creditors, AER's regime both conflicts with the operation and frustrates the purpose of the federal *BIA* (*Redwater*, *OWA* CA)

Redwater, *supra* para 4.

OWA CA, *supra* para 4.

6 Alberta's regulatory regime is flawed. The Appellants essentially assert that AER should be permitted to fix its problems by encroaching on federal jurisdiction and upending the intention of Parliament as expressed in section 14.06 of the *BIA.* AER has many legislative options for improving the environmental outcomes of its regime. Intruding on the *BIA* is not one of them.

7 The decisions of both lower courts were thorough, well-reasoned and correct. Accordingly, the Respondent respectfully requests that the appeal be dismissed with costs.

B. Respondent's position with respect to the Appellants' statement of the facts

8 The Respondent agrees in part with the Appellants' facts but submits the following additions and corrections.

(i) Alberta's regulatory regime

9 AER regulates all aspects of Alberta's upstream oil and gas activities, including the issuance of licences for exploring, drilling, extracting and producing oil and gas resources. AER exercises its regulatory authority through a number of different provincial statutes, including the *Oil and Gas Conservation Act* and the *Pipeline Act* (collectively, the **"regulatory regime"**).

Oil and Gas Conservation Act, RSA 2000, c O-6 [*OGCA*].

Pipeline Act, RSA 2000, c P-15 [*Pipeline Act*].

10 AER's mandate also includes overseeing the abandonment and closure of licensed properties at the end of their lifecycle and the enforcement of end-of-life obligations. These obligations include capping wells, removing infrastructure and reclaiming the surfaces (collectively **"end-of-life obligations"**). Unlike most jurisdictions, AER does not require

corporations to post security for these end-of-life obligations prior to receiving a licence and commencing operations (*OWA* CA).

OWA CA, *supra* para 4 at para 103.

11 Among AER's broad regulatory powers is the approval of licence transfers. In deciding whether to approve a licence transfer, AER considers the licensee's Liability Management Rating (**"LMR"**) as determined under the Licensee Liability Rating Program (**"LLR"**) (Directive 006). The LMR is a ratio of the licensee's aggregate deemed assets to deemed liabilities. Deemed liabilities are AER's estimate of the costs to satisfy the licensee's end-of-life obligations. An LMR less than 1.0 indicates the licensee has insufficient assets to pay for these obligations. When this occurs during the bankruptcy process, AER will either refuse the transfer or require security to be posted before approving the sale of assets.

Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process [Directive 006].

12 When AER is unable to identify any financially viable party to satisfy end-of-life obligations, AER will designate a well as "orphaned". The Orphan Well Association (**"OWA"**) must then satisfy these obligations. OWA is a non-profit organization operating under the delegated authority of AER (*Orphan Fund Reg*). Its funding is primarily dependent on an AER-controlled levy imposed on the oil industry. OWA does not presently have sufficient resources to reclaim all identified orphaned sites (*OWA* CA).

Orphan Fund Delegated Administration Regulation, Alta Reg 45/2001 [*Orphan Fund Reg*].

OWA CA, *supra* para 4 at para 23.

(ii) The Redwater proceedings

13 Redwater Energy Corporation (**"Redwater"**) was an oil and gas company that held AER-issued licences to operate wells, pipelines and ancillary facilities.

14 Upon bankruptcy, Redwater's non-producing wells/assets had liabilities that exceeded their value. Further, the value of Redwater's producing assets was insufficient to cover its end-of-life obligations.

OWA CA, *supra* para 4 at para 18.

15 The Respondent, Redwater's trustee in bankruptcy, immediately advised AER that it would take possession and control of Redwater's producing assets and requested AER's approval

to transfer the necessary licenses for their sale. The Respondent also notified AER that it would disclaim the licences of the unproductive assets pursuant to section 14.06(4) of the *BIA*.

OWA CA, *supra* para 4 at para 6.

16 AER refused to approve the licence transfer until the Respondent either: 1) satisfied the end-of-life obligations; 2) posted sufficient security to satisfy those obligations; or 3) sold the non-producing assets along with producing assets. As the value of the producing assets was insufficient to cover all obligations, the Respondent was unable to comply with any of these conditions while fulfilling its duty to Redwater's creditors. The Respondent informed AER that it had only taken possession of the valuable assets and had disclaimed the rest. Subsequently, AER issued the Respondent with two closure/abandonment orders in July and August of 2015 (the **"abandonment orders"**).

OWA CA, *supra* para 4 at para 90.

17 The Respondent applied to the court to approve the sale of the productive assets. Both lower courts found for the Respondent, concluding that AER's regulatory regime effectively elevated the end-of-life obligations to an unlawful super priority over other creditors.

Redwater, *supra* para 4.

OWA CA, *supra* para 4.

PART II – THE RESPONDENT'S POSITION WITH RESPECT TO THE APPELLANTS' QUESTIONS

18 In response to the Appellants' statement of questions, the Respondent submits that the Alberta Court of Appeal (**"ABCA"**) was correct in holding that:

a) The cost of satisfying the end-of-life obligations are claims provable in bankruptcy; and
b) The licence obligations created by provincial legislation conflicted with and frustrated the scheme of priorities set out in the *BIA*.

PART III – ARGUMENT

A. Issue 1: AER's abandonment orders are claims provable in bankruptcy

19 The Appellants' assertion that the end-of-life obligations imposed by AER are a public duty and therefore shielded from the *BIA* is untenable for two reasons: *Northern Badger* has been overtaken in certain key dimensions and the cost of environmental end-of-life obligations are claims provable in bankruptcy as per *AbitibiBowater*.

PanAmericana de Bienes y Servicios v Northern Badger Oil & Gas Limited, 1991 ABCA 181 [*Northern Badger*].

(i) *Northern Badger* has been overtaken by several critical evolutions in the law

20 The Appellants erroneously rely on *Northern Badger* to shield AER's abandonment orders from being ranked as unsecured provable claims in bankruptcy pursuant to section 14.06(8) of the *BIA*. The Appellants elevate these orders to a super priority by characterizing them as duties flowing from the general law of Alberta. However, *Northern Badger* has been overtaken in several key dimensions as follows.

Appellants' Factum, *supra* para 3 at paras 9, 23-31.

BIA, *supra* para 2, s 14.06(8).

(a) Two types of orders are provable as claims and *Northern Badger*'s characterization of orders as public duties is not a shield to this provability

21 Section 14.06 of the *BIA* was enacted by Parliament after *Northern Badger*, seemingly in response to that decision. Section 14.06 brought certainty to several matters involving environmental liability during bankruptcy. *AbitibiBowater* further clarified that two types of environmental orders are claims provable in bankruptcy under the *BIA*. The first type is regulatory orders that are obviously monetary in form (**"Type I Orders"**). Type I Orders were contemplated in *Northern Badger* and, to this extent, *Northern Badger* is consistent with *AbitibiBowater*.

BIA, *supra* para 2, s 14.06.

AbitibiBowater, *supra* para 4 at paras 2-3.

Northern Badger, *supra* para 19 at para 34.

22 However, *AbitibiBowater* departs from *Northern Badger* by identifying a second type of environmental order also provable as a claim in bankruptcy. Specifically, orders not asserted in monetary terms are provable claims if they are contingent on future events that are sufficiently certain as to render those orders monetary in nature (**"Type II Orders"**). Type II Orders are absent in *Northern Badger* and, to this extent, it is inconsistent with *AbitibiBowater*. Consequently, the Appellants err in arguing that "[t]he test established in *Northern Badger* is in its essence, the same test used in *AbitibiBowater*." The tests are fundamentally different.

AbitibiBowater, *supra* para 4 at paras 2-3.

Appellants' Factum, *supra* para 3 at para 22.

23 *AbitibiBowater* extended the provability of claims in bankruptcy to Type II Orders to prioritize the substance of an environmental order over its form. Determining the substance of an order "prevents a regulatory body from artificially creating a priority higher than the one conferred on the claim by federal legislation" (*AbitibiBowater*) and reveals whether "the enforcing authority [is] clothed as a creditor" (*AbitibiBowater* QCCS). Ultimately, determining the substance of an order prevents a regulator's Type II Orders from unduly circumventing the single-proceeding bankruptcy model established by the *BIA*. The Appellants admit this point when they state, "[a]s long as validly enacted provincial regulatory obligations are not in reality disguised monetary claims, they should be presumed enforceable [emphasis added]". In other words, the Appellants acknowledge that orders, which are in substance Type II Orders, should be provable as claims in bankruptcy.

AbitibiBowater, *supra* para 4 at para 19.

AbitibiBowater, *Re*, 2010 QCCS 1261 at para 259 [*AbitibiBowater* QCCS].

Appellants' Factum, *supra* para 3 at para 36.

24 Finally, *AbitibiBowater* did not reject *Northern Badger*'s characterization of environmental orders as public duties. On the contrary, *AbitibiBowater* identified that all orders are public duties but that Type I Orders and Type II Orders are duties that are also claims provable in bankruptcy. These characterizations are not mutually exclusive. Thus, the Appellants cannot shield AER's orders from being treated as Type II Orders by simply labelling them as public duties.

AbitibiBowater, supra para 4 at paras 2, 3.

Appellants' Factum, supra para 3 at paras 9, 23-31.

(b) Section 14.06 of the *BIA* has overtaken *Northern Badger* by limiting the ability of regulators to rank ahead of secured creditors in two instances

25 The reasoning in *Northern Badger* relied upon by the Appellants to afford a super priority to the regulator has been overtaken by section 14.06. The ABCA stated that section 14.06 "should be regarded as a 'complete code', in the sense that [it provides] the only exceptions" for affording a super priority to regulators' environmental orders (*OWA* CA).

Appellants' Factum, *supra* para 3 at para 9.

OWA CA, *supra* para 4 at para 57.

26 Parliament provides only two instances in section 14.06 where a super priority may essentially be available to regulators for the costs of satisfying their environmental orders/obligations. The first is when, pursuant to section 14.06(7), a regulator's unfulfilled orders cause damage to real or immovable property. The second instance occurs when a regulator's orders are determined not to be claims provable in bankruptcy and, consequently, must be fulfilled outside of section 14.06(8) and the *BIA*'s bankruptcy process. Since Type II Orders are claims provable in bankruptcy, a regulator's costs associated with satisfying this type of order cannot be afforded the latter super priority.

BIA, *supra* para 2, s 14.06(7), 14.06(8).

(ii) AER's abandonment orders are claims provable in bankruptcy

27 AER's abandonment orders are Type II Orders as per *AbitibiBowater*. Therefore, these orders are not elevated to a super priority and, rather, are unsecured claims provable in bankruptcy pursuant to section 14.06(8) of the *BIA*.

28 *AbitibiBowater* developed a three-element test for determining whether an environmental order is a claim provable in bankruptcy pursuant to section 14.06(8). Those elements are:

(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; [and]
(3) it must be possible to attach a monetary value to the debt, liability or obligation [original emphases].

AbitibiBowater, *supra* para 4 at para 48.

BIA, *supra* para 2, s 14.06(8).

29 The Respondents submit that Elements (1) and (3) are satisfied; Element (2) is also satisfied as it is uncontested by the Appellants.

(a) Element (1): AER's abandonment orders create an obligation owing to it as a creditor

30 Element (1) requires that a debt, liability, or obligation is owed to a creditor. This element is met on two facts, indicating that in exercising its enforcement authority AER acted as a creditor.

31 The Appellants state that "[t]he Respondent will argue that *AbitibiBowater* essentially presumes that a regulatory board is always a creditor." The Respondent makes no such argument. In defining Element (1), the SCC stated:

> 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 (*AbitibiBowater*).
>
> Appellants' Factum, *supra* para 3 at para 22.
>
> *AbitibiBowater*, *supra* para 4 at para 27.

32 In this case, two facts indicate AER identified itself as a creditor. First, on 14 July 2015 and 7 August 2015, AER issued abandonment orders requiring the Respondent to satisfy end-of-life obligations associated with the licences it disclaimed (*Redwater*). Second, as per the LLR, AER indicated to the Respondent that it would not authorize the transfer of the Respondent's retained licenses "unless the non-producing wells [*i.e.*, the disclaimed licenses] are sold with them, or security is posted to cover the anticipated environmental obligations" (*OWA* CA).

> *Redwater*, *supra* para 4 at para 23.
>
> *OWA* CA, *supra* para 4 at para 16.

33 Each of these facts, alone or in combination, are sufficient to demonstrate that AER exercised its enforcement power against the Respondent in respect to end-of-life obligations associated with the disclaimed licenses. Thus, AER is a creditor for the purposes of Element (1).

34 The Appellants attempt to undermine this conclusion by claiming that the orders at question in Element (1) must also have a monetary or financial component to them. For example, the Appellants seek answers to whether the orders represent a "commercial or financial interest" or a "debt owed". However, these monetary inquiries properly belong under Element (3), as emphasized in *AbitibiBowater*:

> [In this first element] 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 [in the third element].
>
> Appellants' Factum, *supra* para 3 at paras 23, 25.
>
> *AbitibiBowater*, *supra* para 4 at para 27.

(b) Element (3): AER's abandonment orders are monetary in nature

35 Element (3) asks whether the debt, liability or obligation is monetary in nature. There are two potential inquiries under this element. One inquiry is brief and seeks to determine if the regulator asserted an order in a form that is obviously monetary. If so, the order is a Type I Order and a provable claim in bankruptcy (*AbitibiBowater*).

AbitibiBowater, *supra* para 4 at para 30.

36 The other inquiry seeks to determine whether orders, not asserted in an obvious monetary form, are contingent on future events that are sufficiently certain as to render those orders monetary in nature. If so, the order is a Type II Order and also a provable claim in bankruptcy (*AbitibiBowater*). The Respondents submit AER's abandonment orders are Type II orders and, therefore, are provable claims as per section 14.06(8) of the *BIA*.

AbitibiBowater, *supra* para 4 at para 31.

BIA, *supra* para 2, s 14.06(8).

37 Determining whether an order is a Type II Order requires an inquiry into its substance (*AbitibiBowater).* Specifically, this inquiry is "whether orders that are not expressed in monetary terms can be translated into such terms" or, alternatively, whether the orders "will ripen into a financial liability" owed to the regulator (*AbitibiBowater*). If an order expressed in these monetary/financial terms is contingent on future events, four factors are considered to determine whether those events are sufficiently certain (*AbitibiBowater*). If so, the order is a *bona fide* Type II Order and, therefore, a claim provable in bankruptcy.

AbitibiBowater, *supra* para 4 at paras 19, 3, 38.

First factor

38 The first factor is whether the future event is too remote or speculative; if so, this weighs against the order being monetary in nature. *AbitibiBowater* stated, "[i]n the context of an environmental order, this [first factor] means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed." On the facts, it is not too remote or speculative that AER or OWA will undertake the end-of-life obligations themselves and subsequently seek costs from the Respondent. Rather, it is sufficiently certain that either entity will do so. Consequently, this finding weighs in favour of AER's abandonment orders being monetary in nature.

AbitibiBowater, *supra* para 4 at para 36.

39 The chambers judge, paraphrasing Patricia Johnston, AER's Executive Vice President and General Counsel, indicated that generally "AER will rarely perform abandonment work and rarely claim costs related to abandonment" (*Redwater*). However, Redwater's case appears to be

one of those rare instances where AER intended to perform abandonment work and reclaim costs. In its abandonment order of 15 July 2015, AER indicated:

> Should Redwater fail to comply [with abandoning the licenced properties…] AER will, without further notice, use its process to have the properties abandoned. AER will exercise all remedies available to it to recover costs from the liable parties [emphases added] (*Redwater*).
>
> *Redwater*, *supra* para 4 at paras 166, 23.

40 The Appellants also concede that AER seeks reimbursement for its abandonment-order work:

> […] AER is merely seeking payment for commitments the Respondent had knowledge of long before their [*sic*] insolvency while abiding by the *BIA*.
>
> Appellants' Factum, *supra* para 3 at para 30.

41 Further, Ms. Johnston indicated that AER needs to pursue, to the exhaustion of its "enforcement processes", all possible means for satisfying end-of-life obligations prior to designating a well as orphaned (*Redwater*). These processes include AER's authority to abandon wells itself and, subsequently, require the licensee to pay for the costs as a debt payable (*OGCA*).

> *Redwater*, *supra* para 4 at para 167.
>
> *OGCA*, *supra* para 9, s 28(b).

42 These emphasized portions of AER's abandonment orders and the Appellants' Factum provide sufficient certainty that it is not too remote or speculative that AER intended to satisfy end-of-life obligations itself and reclaim costs. This certainty is strengthened by AER's authority to abandon wells and reclaim costs and by Ms. Johnston's statements. Consequently, this finding weighs in favour of AER's abandonment orders being monetary in nature.

43 It is possible that OWA may carry out the end-of-life obligations (indeed, it is obligated to do so if AER does not do the work itself), however, this has no bearing on the previous conclusion. AER is authorized to designate wells as orphaned (*OGCA*), at which time the responsibility for abandoning well is delegated to OWA (*Orphan Fund Reg*). While OWA does have some power to access licensees' security deposits held by AER, OWA "has no power to seek reimbursement of costs from the licensee" directly (*Redwater*). That power falls exclusively to AER. Thus, regardless of whether AER or OWA performs end-of-life work, AER is the only entity with the power to recover costs directly from a licensee. Thus, it is not too remote or speculative that AER would seek to recover costs from the licensee even if OWA carried out the

end-of-life obligations. The first factor continues to weigh in favour of AER's abandonment orders being monetary in nature.

OGCA, *supra* para 9, s 70(2).

Orphan Fund Reg, *supra* para 12, ss 3(1)(b).

Redwater, *supra* para 4 at para 169.

Second factor

44 The second factor is whether the activity or environmental damage to be remediated by the order is ongoing; if so, this weighs against the order being monetary in nature (*AbitibiBowater*). There is no evidence that the environmental state of the disclaimed wells is changing. Consequently, this finding weighs in favour of AER's abandonment obligations being monetary in nature.

AbitibiBowater, *supra* para 4 at para 37.

Third factor

45 The third factor is whether the regulator has "no realistic alternative but to perform the remediation work itself"; if so, this weighs in favour of the order being monetary in nature. This factor is meant to countervail a regulator that "simply delays framing the order as a claim in order to improve its position in relation to other creditors" (*AbitibiBowater*).

AbitibiBowater, *supra* para 4 at para 37.

46 On the facts, this factor weighs in favour of AER's abandonment obligations being monetary in nature, as AER or OWA have "no realistic alternative but to perform the remediation work [themselves]". Such a determination is found when it is sufficiently certain that the licensee does not have control of the property at issue or "does not, and realistically will not, have the means to perform the remediation work" (*AbitibiBowater*).

AbitibiBowater, *supra* para 4 at para 37.

47 In this case, several facts lead to this sufficient certainty:

> (i) [The] evidence shows that the Trustee and Receiver is not funded to comply with the Abandonment Orders[…]
> (ii) There is no evidence that Redwater will ever be reorganized or that activities will continue with respect to the renounced assets[...] and
> (iii) [There is] no evidence of a current or subsequent owner for the renounced assets or that there is a subsequent purchaser of the renounced assets who could be compelled to undertake the abandonment work… (*Redwater*).

Redwater, *supra* para 4 at para 170.

Additional facts include:

(iv) Disclaimer of the wells pursuant to section 14.06(4) indicates those wells will remain inoperative;

(v) Relatedly, because the wells were disclaimed, they were never in the possession or under the control of the Receiver or Trustee. Thus, neither entity is legally entitled to undertake AER's abandonment obligations; and

(vi) "Redwater is entirely insolvent and has no means to fund the abandonment of the renounced assets" (GTL Factum SCC).

Orphan Well Association v Grant Thornton Ltd., 2019 SCC 5 (Factum of the Respondent GTL at paras 112-113) [GTL Factum SCC].

48 On these facts, it is sufficiently certain that the Respondent does not have control of the disclaimed wells or the means to satisfy the end-of-life obligations. Consequently, AER or OWA have no realistic alternative but to satisfy these end-of-life obligations themselves. This conclusion is only strengthened by AER's authority to abandon wells directly (*OGCA*) and OWA's requirement to abandon wells that are deemed orphaned by AER (*Orphan Fund Reg*).

OGCA, *supra* para 9, s 28(b).

Orphan Fund Reg, *supra* para 12, ss 3(1)(b).

49 Therefore, this factor weighs in favour of AER's abandonment orders being monetary in nature.

Fourth factor

50 The fourth factor is the overall "effect" that the debtor's compliance with the regulator's order would have on the insolvency process. This factor is consistent with the "effects-driven approach" of the paramountcy analysis (*AbitibiBowater*). That analysis is undertaken in Part III(B)(v) of this factum, which concludes that the effect of the abandonment orders is a re-ordering of distribution priorities under the *BIA*. This finding weighs in favour of AER's abandonment orders being monetary in nature. Otherwise, the effect of the orders would frustrate the purpose of the *BIA*.

AbitibiBowater, *supra* para 15 at para 38.

(c) Conclusion on Issue #1

51 The Respondent submits that AER's abandonment orders are claims provable in bankruptcy. AER's orders are Type II Orders: AER acted as a creditor per Element (1) and all four factors under Element (3) weighed in favour of it being sufficiently certain that the orders are monetary in nature. Consequently, the costs of the orders are properly ranked as unsecured claims that are provable in bankruptcy pursuant to section 14.06(8) and cannot enjoy a super priority.

B. Issue #2: The licence obligations created by provincial legislation conflict with or frustrate the scheme of priorities set out in the *BIA*

52 AER's regulatory regime conflicts with the *BIA* in two ways. First, it conflicts with the *BIA*'s operation by defining trustees as licensees and prohibiting trustees from disclaiming properties burdened with environmental obligations as per section 14.06(4) of the *BIA*. Second, by requiring the trustee to post a security or satisfy end-of-life obligations prior to distributing estate assets to creditors, AER effectively re-orders the distribution priorities under section 136 of the *BIA*. The ABCA correctly found these conflicts to constitute genuine inconsistencies and engage the paramountcy doctrine (*OWA* CA).

BIA, *supra* para 2 at s 14.06(4), s 136.

OWA CA, *supra* para 4 at para 89.

(i) The doctrine of paramountcy

53 The paramountcy doctrine holds that when federal and provincial legislation conflict, the federal law prevails and the provincial law becomes "inoperative […] to the extent of the conflict" (*Moloney*).

Alberta (Attorney General) v Moloney, 2015 SCC 51 at para 29 [*Moloney*].

54 A conflict between federal and provincial legislation occurs in two circumstances. An operational conflict occurs when compliance with the provincial law renders compliance with the federal law impossible. Provincial legislation frustrates the purpose of the federal law when compliance with the provincial regime undermines the object(s) of federal legislation. Either conflict engages the paramountcy doctrine (*Moloney*).

Moloney, *supra* para 53 at para 16.

55 The Appellants are correct that cooperative federalism requires courts to apply the paramountcy doctrine with restraint. Absent a "genuine inconsistency" between federal and

provincial regimes, "courts will favour an interpretation of the federal legislation that allows the concurrent operation of both laws" (*Moloney*). However, the SCC has also recognized that cooperative federalism has a limit. At some point, provincial legislation will unduly overlap with federal legislation and engage the paramountcy doctrine (*Moloney*). A conflict exists when the effect of the provincial law intrudes into federal jurisdiction. This inquiry properly focuses on the substance of the law to ensure that provinces do not do indirectly what they may not achieve directly (*Husky Oil*).

Moloney, *supra* para 53 at paras 28, 29.

Husky Oil Operations Ltd. v Minister of National Revenue, [1995] 3 SCR 453 at para 39, 258 DLR (4th) 213 [*Husky Oil*].

(ii) Section 14.06(4) of the *BIA* affirms trustees have broad power to disclaim properties

56 The Appellants' narrow interpretation of section 14.06(4) is incorrect. Rather, this provision affirms that trustees in bankruptcy have the power to disclaim assets burdened with environmental liabilities regardless of their personal liability being at risk. This interpretation is the clear result of the modern approach to statutory interpretation: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo*).

Appellants' Factum, *supra* para 3 at para 12.

Rizzo & Rizzo Shoes Ltd (Re) [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193 [Rizzo].

(a) Textual analysis

57 On its face, section 14.06(4) affirms that a trustee can disclaim any interest in real property burdened with environmental liabilities. Specifically, section 14.06(4) provides that a trustee is not personally liable for failure to comply with an environmental order if they fulfill any of the three criteria listed in paragraphs (a), (b), or (c). The subsection does not say, as the Appellants submit, that trustees can only disclaim property burdened with orders if there is a risk of personal liability.

BIA, *supra* para 2, ss 14.06(4)(a), (b), (c).

Appellants' Factum, *supra* para 3 at para 12.

58 A broad power to disclaim properties in section 14.06(4) is supported by the grammatical and ordinary meaning of the text in paragraph (c). This provision clearly states that a trustee is not personally liable for failing to comply with an environmental order issued after the property

is disclaimed, notwithstanding the exception in section 14.06(2)(b). As a trustee's personal liability regarding compliance with an order cannot be engaged where such an order does not yet exist, section 14.06(4)(c) must refer to a broader power to disclaim than the Appellants' interpretation allows.

BIA, *supra* para 2, ss 14.06(4)(c), ss 14.02(b).

59 The courts below were correct in concluding that section 14.06 "does not appear to create a right to disclaim assets, but assumes that the right exists" (*OWA* CA). Subsection 14.06(4) clarifies how trustees are to exercise that right when properties are burdened by environmental obligations and specifies that exercise of this right does not result in personal liability.

OWA CA, *supra* note 4 at para 68.

(b) Contextual analysis

The scheme of section 14.06

60 The Appellants' interpretative analysis is incomplete as it does consider section 14.06 read as a whole. The correct interpretation—that section 14.06(4) affirms trustees have a broad power to disclaim properties—is further supported when read within the context of section 14.06.

61 For example, subsection (5) provides that a court may stay an environmental order referred to in subsection (4) to give trustees time "to assess the economic viability of complying with the order" (*BIA*). A trustee's power to determine the "economic viability" of compliance is broader than determining whether noncompliance triggers personal liability. Read together, subsections (4) and (5) entitle the trustee to disclaim properties burdened with environmental liabilities when the trustee determines that compliance is not economically viable and complies with the timelines and procedures in subsection (4). If, as the Appellants assert, personal liability was the sole trigger to permit disclaiming properties burdened by environmental obligations, subsection (5) would serve no purpose. This would run counter to the basic interpretative principle that every provision of a statute must have a meaning (Sullivan).

BIA, *supra* para 2, ss 14.06(4), ss 14.06(5).

Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at 43.

62 Further, section 14.06(2) defines a trustee's liability specifically in relation to environmental matters. The text of the provision includes the language "notwithstanding anything in any federal or provincial law", indicating that Parliament intended for this definition

of personal liability to prevail over other possible interpretations. According to section 14.06(2)(b), a trustee is personally liable when environmental damage resulted from the trustee's gross negligence or wilful misconduct. If the Appellants' interpretation was correct—that personal liability is a condition precedent to section 14.06(4)—the trustee would only be able to disclaim properties damaged through the trustee's own gross negligence or wilful misconduct. Thus, the Appellants' interpretation runs counter to the interpretive presumption against absurd results (Sullivan).

BIA, *supra* para 2, ss 14.06(2).

Appellants' Factum, *supra* para 3 at paras 10-12.

Sullivan, *supra* para 61 at 212.

The legislative history of section 14.06

63 The legislative history of section 14.06 further supports the interpretation that subsection (4) affirms trustees' broad powers to disclaim properties burdened with environmental obligations.

64 Hansard evidence indicates lawmakers intended for trustees to have broad powers to disclaim property. Speaking to Parliament, Mr. Jacques Hains, then-Director of Corporate Law Policy Directorate for the Department of Industry Canada, stated:

> [...] If the [trustee] were to receive an order to remedy environmental damage, he would have four options[...] The third option would be for the [trustee] to apply to the appropriate court for a period of stay <u>to assess the economic viability of complying with the order, whether it is worth the trouble and whether the assets are sufficient to cover the cleanup costs</u>. <u>As a fourth option, if he considers that this course has absolutely no economic viability, he may give notification that he has renounced the real property to which the order applies</u>. [emphasis added] (*Hansard*)
>
> Canada, House of Commons Debates, *Evidence of the Standing Committee on Industry*, 35th Parl, 2nd Sess, No 16 (11 June 1996) at 1550 (*Hansard*).

65 Mr. Hains' explanation indicates these amendments were intended to affirm trustees' broad power to disclaim properties burdened with environmental obligations—including when compliance with environmental orders was not economically practicable due to insufficient assets. This evidence weighs against the Appellants' assertion that a trustee's personal liability is a condition precedent for disclaiming property.

(c) Purposive analysis

66 The interpretation that trustees have a broad power to disclaim property is supported by the purpose of section 14.06. The chambers judge found as fact that section 14.06 has at least three objectives:

(1) To limit the liability of insolvency professionals to ensure they accept mandates despite environmental obligations;

(2) To reduce the number of orphaned sites in the country; and

(3) To permit trustees to undertake rational economic assessments of the costs associated with environmental orders and exercise their discretion whether to comply. (*Redwater*)

Redwater, *supra* note 4 at paras128-129.

67 These objectives are supported by an interpretation of section 14.06 affirming the broad right for trustees to disclaim assets burdened by environmental obligations, regardless of personal liability. Trustees have a professional duty to maximize the value of a debtor's estate for the benefit of all creditors (Intervenor Factum SCC). If prohibited from broadly disclaiming properties, trustees will not accept mandates that include properties with costly environmental obligations. Consequently, there would be an increase in orphaned properties with environmental orders, including an increase in valuable orphaned properties. The Appellants' interpretation of section 14.06(4) would lead to more orphaned wells in Alberta, an outcome that undermines the purpose of this provision.

Orphan Well Association v Grant Thornton Ltd., 2019 SCC 5 (Factum of the Intervenor Canadian Association of Insolvency and Restructuring Professionals at para 14) [Intervenor Factum SCC].

68 By contrast, the interpretation of section 14.06 affirming trustees' broad power to disclaim properties ensures trustees accept mandates for properties burdened by environmental obligations. Accordingly, this reduces the number of orphaned wells and fulfills Parliament's purpose for section 14.06.

69 The correct interpretation of section 14.06(4) is supported by a fulsome interpretative analysis. In exercising its right to disclaim properties burdened with end-of-life obligations, the Respondent is not, as the Appellants allege, simply picking and choosing its obligations—it is complying with federal law.

Appellants' Factum, *supra* para 3 at para 10.

(iii) Interpretation of Alberta's regulatory regime

70 Under Alberta's regulatory regime, trustees replace the bankrupt licence holder as licensees. By including trustees in the statutory definition of "licensee", insolvency professionals are directly subject to the obligations of the regime.

71 For example, the *OCGA* and the *Pipeline Act* require trustees to "suspend or abandon a well or facility when directed by the Regulator or required by the regulations or rules" and/or to "discontinue or abandon a pipeline when directed by the Regulator or required by the rules." Any trustee failing to comply with AER's orders may be guilty of an offence pursuant to the *OCGA* or the *Pipeline Act.* Importantly, neither Act limits the liability of the trustee to the estate's assets. This omission contrasts with Alberta's *Environmental Protection and Enhancement Act*, which expressly provides such a limitation.

OGCA, *supra* note 9, s 27(1), 29, 106.

Pipeline Act, *supra* note 9, s 23(1), 25, 52(2).

Environmental Protection and Enhancement Act, RSA 2000 c E-12, s 240(3) [*EPEA*].

72 Further, a licence can only be transferred with AER's approval. In the insolvency context, AER can impose conditions on this approval, as discussed above.

Directive 006, *supra* para 16.

73 Having interpreted the *BIA* and Alberta's regulatory regime, the following analysis shows they are in conflict.

(iv) Alberta's regulatory regime is in operational conflict with the *BIA*

74 In assessing if an operational conflict exists, the inquiry is whether dual compliance with both regimes is possible. This conflict cannot be resolved simply by a trustee "renouncing the protection afforded to [it] under the federal law" in order to comply with provincial law.

Moloney, *supra* para 53 at para 60.

75 An operational conflict clearly exists between section 14.06(4) and Alberta's regulatory regime. Both lower courts concluded this subsection affirms trustees' broad powers to disclaim properties with environmental obligations; however, the definition of trustees as licensees in the provincial regime renders these disclaimers unlawful. Trustees are caught between regimes—a trustee exercising its right to disclaim property under the federal regime commits an offence under the provincial regime and is liable to prosecution.

76 Moreover, the lack of provisions in the provincial regime limiting liability to the estate's assets exposes the trustee to personal liability. However, section 14.06(2)(b) limits the personal liability of trustees to situations involving gross negligence or wilful misconduct. Even if AER does not intend to enforce obligations beyond the estate's assets, this does not eliminate operational conflicts. If the Appellants' interpretation of section 14.06(4) is upheld, Alberta's regime exposes trustees to the personal liability the *BIA* guards against.

BIA, *supra* para 2, ss 14.06(2)(b), ss 14.06(4).

77 Dual compliance by trustees with both federal and provincial regimes is impossible and genuine inconsistency exists. This engages the paramountcy doctrine and renders Alberta's regime inoperative to the extent of this conflict.

78 In addition to operational conflict, Alberta's regime also frustrates the purpose of the *BIA* as demonstrated in the next section.

(v) Alberta's regulatory regime frustrates the purpose of the *BIA*

79 Parliament has exclusive jurisdiction to legislate regarding bankruptcy and insolvency (*Constitution Act*). The federal *BIA* is to be treated as "a complete code governing bankruptcy. It sets out which claims are treated as provable claims, which assets are distributed to creditors, and how" (*Moloney*).

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3 s 91(21), reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act*].

Moloney, *supra* para 27 at para 40.

80 However, the nature of bankruptcy means that the *BIA* necessarily affects property and civil rights, which are under provincial jurisdiction (*Constitution Act*). Accordingly, the *BIA* clarifies that it prevails over provincial laws related to property and civil rights in the event of a conflict. Indeed, the SCC has referred to section 72(1) of the *BIA* as "an integral paramountcy mechanism" (*Moloney*). Likewise, it held that the *BIA* must be given a large and liberal interpretation and that "to interpret [the *BIA*] using an overly narrow legalistic approach is to misinterpret it" (*Mecure*).

Constitution Act, *supra* para 78, s 92(13).

BIA, *supra* para 2, s 72(1).

Moloney, *supra* para 53 at para 40.

Mecure v Marquette & Fils Inc., [1977] 1 SCR 547 at 556, 65 DLR (3d) 136 [*Mecure*].

81 The *BIA* has two primary goals: the equitable distribution of assets among creditors; and the financial rehabilitation of the bankrupt (*Husky Oil*). Only the first goal is engaged in this case.

Husky Oil, *supra* para 55 at para 7.

82 The equitable distribution of assets is achieved through a single-proceeding model that distributes the bankrupt's assets to creditors according to priorities established in the *BIA*. As the SCC stated, "[f]or this [single-proceeding] model to be viable, creditors must not be allowed to enforce their provable claims individually, that is, outside the collective proceeding" (*Moloney*).

BIA, *supra* para 2, s 136.

Moloney, *supra* para 27 at para 34.

83 However, AER's actions are, in effect, establishing a separate process for claiming costs outside the bankruptcy regime. By restricting the broad power of trustees to disclaim properties with environmental obligations, AER requires trustees to pay for environmental costs before distributing assets to other creditors through the *BIA*'s single proceeding model. Yet, as noted previous, these environmental obligations are claims provable in bankruptcy pursuant to *AbitibiBowater* and, therefore, subject to section 14.06(8). AER's demands on trustees effectively elevate the costs for environmental obligations to a super priority in the bankruptcy process, which is contrary to the *BIA*.

84 The ABCA correctly found that requiring the Respondent to comply with AER's abandonment orders amounts to a re-ordering of the *BIA*'s distribution priorities. Therefore, these orders frustrate the *BIA*'s purpose and engage the paramountcy doctrine. Consequently, the provincial regime is rendered inoperative to the extent of this conflict as found by the chambers judge and upheld by the ABCA.

Redwater, *supra* para 4 at paras 181-182.

OWA CA, *supra* para 4 at para 106.

C. Dismissing this appeal respects Parliament's careful balancing of environmental and economic interests

85 Orphaned wells are not the result of the federal bankruptcy regime but, rather, are a symptom of AER's failure to properly regulate Alberta's resources. AER is aware of the oil economy's cyclical nature and that bankruptcy increases when oil prices go down. Yet, AER has

designed a regulatory regime that does not enforce end-of-life obligations until a licensee is in financial hardship and, thus, less likely to satisfy them. Leaving the payment of security until the end of a well's lifecycle demonstrates that AER is less concerned with environmental protection than it is with decreasing up-front investment barriers to Alberta's oil industry.

86 AER's regulatory approach is reactive. The growing number of orphaned wells demonstrates it is also ineffective. AER has legislative options to reduce the risk of end-of-life obligations falling to the public but it elects not to exercise them. Rather than require up-front security or impose expiry dates on wells—strategies employed in other jurisdictions to reduce the incidence of orphaned wells—AER has chosen a riskier back-loaded regime. In bankruptcy, AER's approach is not a "polluter pays" regime, as claimed by the Appellants, but a "creditors pay" regime that conflicts with the *BIA*. AER cannot correct its regulatory flaws by interfering with federal law.

87 The Appellants assert that the Respondent is simply trying to avoid environmental obligations, but this is a facile description of a complex situation. Bankruptcy is usually involuntary and necessarily means that not all the bankrupt's debts will be paid or obligations met. Section 14.06 demonstrates that Parliament was aware of the problem of environmental costs going unpaid at bankruptcy. In response, section 14.06 folds environmental claims into the bankruptcy process while maintaining the predictability of asset distribution to creditors. It was open to Parliament to prioritize <u>all</u> environmental costs above the claims of <u>all</u> creditors, but Parliament chose to prioritize environmental obligations only in certain situations. Thus, section 14.06 reflects Parliament's careful weighing of potentially conflicting yet equally important social values: the need to protect the environment and the need for the orderly dissolution of estates in bankruptcy. Dismissing this appeal upholds the careful weighing undertaken by Parliament.

88 Environmental protection is unquestionably important. So, too, is the responsible development of Alberta's energy resources. However, upholding this appeal offers little more than a band-aid solution for AER's failure to properly regulate Alberta's energy resources and it would have a chilling effect on investment in Alberta's oil and gas sector. Dismissing this appeal may encourage AER to reconsider the role its regulatory regime plays in the proliferation of orphaned wells. Moreover, dismissing this appeal ensures the integrity of Canada's bankruptcy

and insolvency regime is not undermined and that Parliament's careful effort to balance environmental and economic interests upon bankruptcy are respected.

PART IV – SUBMISSIONS IN SUPPORT OF COSTS

89 The Respondent requests its costs for this appeal.

PART V – ORDER SOUGHT

90 The Respondent requests that the appeal be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4 day of February, 2019.

_____
Shafic Khouri

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Amanda Montgomery

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Alice Pan

Counsel for the Respondent
Grant Thornton Limited

PART VI – TABLE OF AUTHORITIES

Paragraph No.

A. Legislation

Bankruptcy and Insolvency Act, RSC 1985, c B-3.	2, 20-21, 26, 28, 36, 52, 57-58, 61-62, 76, 80-81
Constitution Act, 1867 (UK), 30 & 31 Vict, reprinted in RSC 1985, Appendix II, No 5.	79-80
Environmental Protection and Enhancement Act, RSA 2000 c E-12.	71
Oil and Gas Conservation Act, RSA 2000, c O-6.	9, 41, 43, 48, 71
Orphan Fund Delegated Administration Regulation, Alta Reg 45/2001.	12, 43, 48
Pipeline Act, RSA 2000, c P-15.	9, 71

B. Jurisprudence

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Alberta (Attorney General) v Moloney, 2015 SCC 51.	53-55, 74, 79-81
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Orphan Well Association v Grant Thornton Limited, 2017 ABCA 124	4-5, 10, 12, 14-17, 32, 52, 59, 84
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Canada, House of Commons Debates, Evidence of the Standing Committee on Industry, 35th Parl, 2nd Sess, No 16 (11 June 1996).	64

D. Secondary sources and other materials

Factum of the Appellants (Team #2019-01)	3-4, 20, 22-25, 31, 34, 40, 56-57, 62
Orphan Well Association.v Grant Thornton Ltd., 2019 SCC 5 (Factum of the Respondent GTL)	47
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Professionals)	
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PART VII – LEGISLATION AT ISSUE

***Bankruptcy and Insolvency Act*, RSC 1985, c B-3**

14.06 (1) No trustee is bound to assume the duties of trustee in matters relating to assignments, bankruptcy orders or proposals, but having accepted an appointment in relation to those matters the trustee shall, until discharged or another trustee is appointed in the trustee's stead, perform the duties required of a trustee under this Act.

Application

(1.1) In subsections (1.2) to (6), a reference to a trustee means a trustee in a bankruptcy or proposal and includes

(a) an interim receiver;

(b) a receiver within the meaning of subsection 243(2); and

(c) any other person who has been lawfully appointed to take, or has lawfully taken, possession or control of any property of an insolvent person or a bankrupt that was acquired for, or is used in relation to, a business carried on by the insolvent person or bankrupt.

No personal liability in respect of matters before appointment

(1.2) Despite anything in federal or provincial law, if a trustee, in that position, carries on the business of a debtor or continues the employment of a debtor's employees, the trustee is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,

(a) that is in respect of the employees or former employees of the debtor or a predecessor of the debtor or in respect of a pension plan for the benefit of those employees; and

(b) that exists before the trustee is appointed or that is calculated by reference to a period before the appointment.

Status of liability

(1.3) A liability referred to in subsection (1.2) is not to rank as costs of administration.

Liability of other successor employers

(1.4) Subsection (1.2) does not affect the liability of a successor employer other than the trustee.

Liability in respect of environmental matters

(2) Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

(a) before the trustee's appointment; or

(b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct or, in the Province of Quebec, the trustee's gross or intentional fault.

Reports, etc., still required
(3) Nothing in subsection (2) exempts a trustee from any duty to report or make disclosure imposed by a law referred to in that subsection.

Non-liability re certain orders
(4) Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of requiring a trustee to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, or during the period of the stay referred to in paragraph (b), the trustee

(i) complies with the order, or

(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property, or any right in any immovable, affected by the condition or damage;

(b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a), within ten days after the order is made or within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the trustee to contest the order, or

(ii) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(c) if the trustee had, before the order was made, abandoned or renounced or been divested of any interest in any real property, or any right in any immovable, affected by the condition or damage.

Stay may be granted
(5) The court may grant a stay of the order referred to in subsection (4) on such notice and for such period as the court deems necessary for the purpose of enabling the trustee to assess the economic viability of complying with the order.

Costs for remedying not costs of administration
(6) If the trustee has abandoned or renounced any interest in any real property, or any right in any immovable, affected by the environmental condition or environmental damage, claims for costs of remedying the condition or damage shall not rank as costs of administration.

Priority of claims
(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.

Claim for clean-up costs
(8) Despite subsection 121(1), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.

***Oil and Gas Conservation Act,* RSA 2000, c O-6**

Suspension and abandonment
27(1) Subject to subsection (2), a licensee or approval holder shall suspend or abandon a well or facility when directed by the Regulator or required by the regulations or rules.

Continuing liability
29 Abandonment of a well or facility does not relieve the licensee, approval holder or working interest participant from responsibility for the control or further abandonment of the well or facility or from the responsibility for the costs of doing that work.

Actions re principals
106(1) Where a licensee, approval holder or working interest participant

(a) contravenes or fails to comply with an order of the Regulator, or

(b) has an outstanding debt to the Regulator, or to the Regulator to the account of the orphan fund, in respect of suspension, abandonment or reclamation costs,

and where the Regulator considers it in the public interest to do so, the Regulator may make a declaration setting out the nature of the contravention, failure to comply or debt and naming one or more directors, officers, agents or other persons who, in the Regulator's opinion, were directly or indirectly in control of the licensee, approval holder or working interest participant at the time of the contravention, failure to comply or failure to pay.

106(3) Where the Regulator makes a declaration under subsection (1), the Regulator may, subject to any terms and conditions it considers appropriate,

(a) suspend any operations of a licensee or approval holder under this Act or a licensee under the Pipeline Act,

(b) refuse to consider an application for an identification code, licence or approval from an applicant under this Act or the Pipeline Act,

(c) refuse to consider an application to transfer a licence or approval under this Act or a licence under the Pipeline Act,

(d) require the submission of abandonment and reclamation deposits in an amount determined by the Regulator prior to granting any licence, approval or transfer to an applicant, transferor or transferee under this Act, or

(e) require the submission of abandonment and reclamation deposits in an amount determined by the Regulator for any wells or facilities of any licensee or approval holder,

where the person named in the declaration is the licensee, approval holder, applicant, transferor or transferee referred to in clauses (a) to (e) or is a director, officer, agent or other person who, in the Regulator's opinion, is directly or indirectly in control of the licensee, approval holder, applicant, transferor or transferee referred to in clauses (a) to (e).

***Pipeline Act* RSA 2000, c P-15**
Discontinuation and abandonment
23(1) A licensee shall discontinue or abandon a pipeline when directed by the Regulator or required by the rules.

(2) The Regulator may order that a pipeline be discontinued or abandoned where the Regulator considers that it is necessary to do so in order to protect the public or the environment.

(3) A discontinuation or abandonment must be carried out in accordance with the rules

Offences
52(2) A person who

(a) whether as a principal or otherwise, contravenes any provision of this Act or of the rules or of any order, direction or licence under this Act,

(b) either alone or in conjunction or participation with others causes any holder of a licence to contravene any of those provisions, or

(c) instructs, orders, directs or causes any officer, agent or employee of any holder of an approval or licence to contravene any of those provisions,

is guilty of an offence.

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 RESPONDENT GRANT THORNTON LIMITED

TEAM #2019-02

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