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 # 2019-03

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

AND TO: **ALL REGISTERED TEAMS**

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Part I - Overview and Statement of Facts

A. Overview

1. This appeal is fundamentally a contest between Alberta's power to regulate its natural resources and Parliament's power over bankruptcy. The constitutional issues on appeal must be determined in light of cooperative federalism, which presumes Parliament intends its legislation to co-exist with provincial laws.

2. The Appellants seek to overturn the Alberta Court of Appeal's decision as it mischaracterizes remediation obligations as a debt rather than a regulation, and the Alberta Energy Regulator as a creditor rather than a regulator.

3. The Alberta Court of Appeal's decision shifts liability away from commercial lenders onto the innocent public. This disrupts the status quo. Lenders are aware of end-of-life obligations and account for such costs in the terms of their loans. The public has no ability to negotiate with oil and gas companies. Thus, forcing society to bear the cost of abandonment obligations is unjust.

4. The regulatory order issued by the Alberta Energy Regulatory is not a claim provable in bankruptcy and the licensing obligations do not conflict with, or frustrate the purpose of, the *Bankruptcy and Insolvency Act*. However, if the Court believes the provincial regulations cannot be read harmoniously with the *BIA*, the doctrine of reciprocal interjurisdictional immunity must be applied to shield Alberta's power over its own non-renewable natural resources from federal legislation.

RSC 1985, c B-3 [*BIA*].

B. Statement of Facts

(i) The Alberta Energy Regulator

5. The Alberta Energy Regulator (the "AER") is an administrative body established by the *Responsible Energy Development Act* that regulates all upstream oil and gas activities in Alberta. One of the AER's mandates is environmentally responsible management of energy resources in Alberta through its licensing system. The AER requires all license holders to abandon wells at the end of their life cycle under the *Oil and Gas Conservation Act* ("OGCA").

> SA 2012, c R017.3 s 2(1)(a) [*REDA*].
> *Grant Thornton Ltd. v Alberta Energy Regulator*, 2016 ABQB 278 at para 3, [2016] 11 WWR 716 [Trial Decision].
> RSA 2000, c O-6, s 27(1) [*OGCA*].

6. One of the AER's tools for enforcing end-of-life abandonment obligations is the Licensed Liability Rating ("LLR") program, as set out in *Directive 006* and *Directive 011*. The LLR program ascribes a liability rating to licensees based on a ratio of their deemed assets and deemed liabilities. The LLR program calculates the estimated cost to suspend, abandon, reclaim, and remediate AER licensed properties as a licensee's deemed liabilities. If a licensee's deemed liabilities exceed its deemed assets, the AER can require the licensee to post security to cover payment for its abandonment obligations. The goal of the LLR program is to prevent the public from absorbing the costs associated with well abandonment.

> License Liability Rating (LLR) Program and License Transfer Process (2013).
> License Liability Rating (LLR) Program: Updated Industry Parameters and Liability Costs (2015).
> Trial Decision, supra para 5 at para 26.

7. The AER may also block license transfers between parties if a license has outstanding end-of-life obligations. Under s 24 of the *OGCA*, and s 18 of the *Pipeline Act* ("PA"), the AER must approve all license transfers.

> *OGCA*, supra para 5.
> RSA 2000, c P-15 [*PA*].

(ii) Orphan Wells Association

8. The Orphan Well Association (the "OWA") "is a non-profit organization that operates as a financially independent entity under authority delegated by the AER." The purpose of the OWA is to remediate wells and properties designated as "orphans" under s 70(2) of the *OGCA*.

Trial Decision, *supra* para 5 at para 33.

9. Most of the OWA's funding comes from the industry through an annual orphan fund levy the AER prescribes and collects on the OWA's behalf. The OWA cannot seek reimbursement of its costs from a licensee, but may be eligible to be reimbursed by the AER if the AER holds a security deposit on behalf of the licensee.

Trial Decision, *supra* para 5 at para 34.

10. Largely due to the 2014 crash in oil prices, the OWA recorded an increase from 80 orphan wells in 2013/2014 to 591 new orphan wells in 2014/2015 – an increase of over 700%.

Trial Decision, *supra* para 5 at para 35.

(iii) Bankruptcy of Redwater

11. Redwater Energy Corporation ("Redwater") was an oil and gas corporation in Alberta that suffered financial difficulties. In 2015, Grant Thornton Ltd. ("GTL") was appointed Receiver, then Trustee in bankruptcy of Redwater under the *BIA*.

12. When notified of Redwater's receivership, the AER advised GTL it could not approve the transfer of Redwater's licensed oil and gas assets until Redwater's abandonment obligations (the "Abandonment Obligations") were satisfied.

Trial Decision, *supra* para 5 at para 19.

13. GTL responded that it took possession and control of 20 of Redwater's 127 AER-licensed properties and intended to disclaim the rest. GTL stated the value of the 107 remaining wells did not exceed their potential clean-up costs.

14. The AER then issued orders requiring the abandonment and remediation of the disclaimed assets.

Trial Decision, *supra* para 5 at para 23.

15. When Redwater entered bankruptcy, GTL disclaimed the assets it previously renounced, and informed the AER it did not intend to comply with the Abandonment Obligations.

Trial Decision, *supra* para 5 at para 24.

16. The AER applied to the Court of Queen's Bench for a declaration that GTL's disclaimer of licensed assets was void, an order compelling GTL to comply with the AER's Abandonment Obligations, and an order compelling GTL to fulfil its statutory end-of-life obligations. GTL counter-applied for a declaration that it was entitled to renounce Redwater's non-producing properties and sought approval of its proposed limited asset sale.

C. Judicial History

(i) Queen's Bench Decision

17. Chief Justice Wittmann found an operational conflict between s 14.06(4) of the *BIA* and the definition of "licensee" under the *OGCA* and *PA*. He then concluded that, "so long as the Trustee renounces the affected property in accordance with section 14.06(4), the AER cannot attempt to impose on the Trustee the obligation to remediate the renounced property by performance or posting security."

Trial Decision, *supra* para 5 at para 156.

18. Chief Justice Wittmann also held that the obligation to comply with the AER's orders frustrated a primary purpose of the *BIA*: equitable distribution of assets. Although the AER's Abandonment Obligations were not a "sanction," he concluded they would directly affect the scheme of distribution by reducing the amount of financial assets available to creditors. He further concluded that holding trustees accountable for the AER Abandonment Obligations frustrated the purpose of s 14.06, which limits the liability of receivers and trustees for environmental conditions or damage on the debtor's property.

Trial Decision, *supra* para 5 at para 176.

19. The effect of this decision renders the AER's Abandonment Obligations inoperative when used against assets held by the Trustee.

(ii) Court of Appeal Decision - the Majority

20. The Trial Decision was upheld on appeal by a 2-1 majority. Justices Slatter and Schutz (the "Majority") defined the issue as whether the environmental obligations of the debtor satisfied the test for a "provable claim" under the *BIA*, and held that they did as they were inherently monetary.

Orphan Well Association v Grant Thornton Ltd., 2017 ABCA 124 at para 178, [2017] 5 WWR 301 [CA Decision].

21. The Majority also concluded that provincial legislation imposing liability on trustees created an operational conflict with ss 14.06(2) and 14.06(4) of the *BIA*, so far as they, under certain conditions, exempt trustees from personal liability for environmental obligations in the debtor's estate.

OGCA, *supra* para 5 ss 27(1), 29, 106(2).
PA, *supra* para 7 ss 24, 25, 52(2).
CA Decision, *supra* para 20 at para 89.

(iii) Court of Appeal Decision - the Dissent

22. In dissent, Martin JA (as she then was) framed the issue as a constitutional contest between Alberta's exclusive jurisdiction to regulate its oil and gas resources under s 92A(1) of *The Constitution Act, 1867* and Parliament's jurisdiction over bankruptcy and insolvency. Martin JA found that enforcing the Abandonment Obligations did not result in a monetary claim, but rather an ongoing regulatory obligation. Further, she held that the trustee failed to demonstrate the high constitutional threshold of an operational conflict or frustration of federal purpose.

1867, 30 & 31 Vict, c-3 [*the Constitution*].
CA Decision, *supra* para 20 at para 112, 188, 115.

D. Standard of Review

23. This appeal requires the Court to review the correct legal test for claims provable in bankruptcy, engage in statutory interpretation, and answer questions of constitutional law. These are questions of law. The standard of review is correctness.

Housen v Nikolaisen, 2002 SCC 33 at para 9, [2002] 2 SCR 235.

Part II - Statement of Issues

24. This appeal concerns two issues:

A. Did the Court of Appeal err in finding that end of life obligations for "licensed properties" are claims provable in bankruptcy and therefore do not have a super priority in bankruptcy proceedings; and

B. Did the Court of Appeal err in holding that the license obligations created by the provincial legislation conflict with or frustrate the scheme of priorities set out in the *BIA*.

Part III Statement of Arguments

A. Abandonment obligations are not provable claims and have no "super priority"

25. The Majority erred in its application of the test in *AbitibiBowater Inc., Re* for whether the Abandonment Obligations are claims provable in bankruptcy. The Majority failed to consider the principle of cooperative federalism when it decided to compromise valid provincial law in a federal bankruptcy proceeding. Additionally, the Majority erred by limiting its analysis to the narrow question posed by the *Abitibi* test. The Appellants invite the Court to consider an alternative question at the first stage that asks whether a regulator is acting as a regulator in the public interest, or as a deserving creditor.

2012 SCC 67, [2012] 3 SCR 443 [*Abitibi*].

26. The Majority also erred at the third step of the test. It incorrectly found the Abandonment Obligations were monetary in nature, and failed to establish with sufficient certainty the AER would remediate and require compensation.

27. Abandonment Obligations are more properly classified as legal duties owed to the public that exist outside the bankruptcy proceeding. Thus, it is incorrect to classify them as having a "super-priority" as there is no priority to claims outside a bankruptcy proceeding.

(i) The Majority failed to apply cooperative federalism in its application of *Abitibi*.

28. Cooperative federalism requires Canadian courts to presume Parliament intends its legislation to co-exist with provincial laws. The Majority proceeded largely on the assumption that Parliament – and Parliament alone – adequately balanced all interests at stake in the interaction between end-of-life obligations and bankruptcy. This was an error because the

Majority went on to conclude, on a narrow application of the *Abitibi* test, that valid provincial regulation can be compromised in a federally regulated bankruptcy proceeding.

> *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at para 27, [2015] 3 SCR 327 [*Moloney*].
> CA Decision, *supra* para 20 at para 104.

(ii) The first step of the *Abitibi* test is too narrow

1) *Abitibi* test outline

29. In *Abitibi*, the Supreme Court of Canada (the "SCC") advanced a three-part test to determine whether a regulatory obligation qualifies as a claim provable in bankruptcy:

(1) there must be a creditor;

(2) the debt, liability or obligation must have occurred before the bankruptcy; and

(3) it must be possible to attach a monetary value to the debt, liability or obligation.

> *Abitibi*, *supra* para 25 at para 26.

30. Justice Deschamps, writing for the majority in *Abitibi*, explained that the only determination made at the first step is whether the regulatory body requires the debtor's compliance with statutory obligations. The second step requires the debt, liability or obligation to be "incurred before the day on which the bankrupt becomes bankrupt" per s 121(1) of the *BIA*. The third step considers whether orders can be translated into monetary terms. If a claim is contingent, there must be sufficient certainty the regulator will incur remediation costs.

> *Abitibi*, supra para 25 at paras 27, 30, 36.
> *BIA*, *supra* para 4.

31. This test skirts the central issue of whether the regulator acted as a disinterested regulator or as a legitimate creditor, and instead narrowly focuses on whether the obligation can be reduced into monetary terms.

2) Step one of the *Abitibi* test will always be met

32. A party need only prove three criteria to satisfy the first step of the test: (1) there must be a regulatory body; (2) the regulatory body must be exercising an enforcement power; and (3) the enforcement power must be exercised against the debtor. Under this iteration, the AER would qualify as a creditor because it required a debtor to comply with its statutory obligations. The only relevant consideration at this stage is the status of the individual with a regulatory obligation; so long as this person is a debtor, courts will deem regulators as creditors.

> *Abitibi*, *supra* para 25 at para 27.
> Fenner L Stewart, "Interjurisdictional Immunity, Federal Paramountcy, Co-Operative Federalism, and the Disinterested Regulator: Exploring the Elements of Canadian Energy Federalism in the Grant Thornton Case" (2018) 33:227 BFLR at 258.

33. According to Professor Stewart, because the regulated party will always be a debtor, "the regulatory body is always a creditor in these cases: the step becomes a presumption of fact." Deschamps J does not set out a full discussion of this first step in *Abitibi*, likely because the case turned on the third element of the test. Professor Lund argues, and the Appellants agree, the *Abitibi* test fails to sufficiently respect the legislative will of the provincial government because the first step of the test sets the bar too low to have any meaning.

> Stewart, *supra* para 32 at 258.
> Anna J Lund, "Lousy Dentists, Bad Drivers, and Abandoned Oil Wells: A New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law," 80 Sask L Rev 157 at 170.

3) Step one of the *Abitibi* test should incorporate *Northern Badger*

34. The Majority ought to have expanded its analysis beyond the narrow first step in the *Abitibi* test and considered the actions of the regulator according to the analysis in *PanAmericana de Bienes y Servicios v Northern Badger Oil & Gas Ltd*. *Northern Badger* asks whether the regulator acted in a purely regulatory capacity or as a creditor.

> 1991 ABCA 181, [1991] 5 WWR 577 [*Northern Badger*].

35. Contrary to the Majority's conclusion, *Abitibi* does not overturn all of *Northern Badger* for two reasons. First, the facts in *Abitibi* are unique. The Province expropriated land from AbitibiBowater without compensation and would derive the direct financial benefit from its compliance. Second, the trial decision of *Abitibi* affirmed *Northern Badger*'s distinction between a public agency seeking to enforce a general public law, and creditors that derive the benefit of compliance.

> *AbitibiBowater Inc., Re*, 2010 QCCS 1261 at para 255, 52 CELR (3d) 17.

36. The Appellants submit that a better test for whether a regulatory obligation is a claim provable in bankruptcy should ask the question posed by *Northern Badger*: Is the regulator enforcing a general provincial law in the public's interest, or is it trying to claim a monetary amount outside the bankruptcy proceeding?

4) Step one of *Abitibi* Test should consider the actions of the regulator

37. The Appellants invite the Court to revisit the first step of the *Abitibi* test. The new test should focus, as *Northern Badger* did, on the nature of the regulator's actions. It should shift the focus away from the status of the individual with the obligation, so that this individual's status as a debtor will not determine the issue.

38. The Appellants invite the Court to consider factors such as:

(1) whether the regulator would directly benefit from the debtor's compliance;

(2) whether the regulator is attempting to evade the single proceeding model to recover a debt;

(3) whether the regulator has already ascribed a monetary value to the obligation; and

(4) whether non-compliance with the obligation impacts public health and safety.

This is not an exhaustive list of factors, but may assist courts in determining the relevant issue of whether the regulator is acting as a disinterested regulator, or a genuine creditor. The test should protect both the disinterested regulator and the genuine creditor.

> Stewart, *supra* para 32 at 262.
> *Northern Badger*, *supra* para 34 at paras 32, 33.

a. The AER's conduct indicates it acted as a disinterested regulator under step one

39. Under the first factor, the AER does not stand to directly benefit from the debtor complying with its Abandonment Orders. Rather, compliance benefits the OWA, industry participants, and taxpayers who would otherwise bear the costs of proper oil well abandonment.

40. Under the second factor, the AER is not attempting to evade bankruptcy proceedings to obtain a priority it did not otherwise have. Instead, the AER is attempting to hold Redwater's estate accountable for all the conditions on its drilling licenses, conditions to which Redwater agreed at the time the licenses were issued.

41. Third, the AER has not ascribed a specific monetary amount on the Abandonment Obligations. It is attempting to enforce a duty, rather than a monetary figure.

42. Fourth, non-compliance would have a major impact on health and safety. The OWA became responsible for a 700% increase in orphaned wells in the span of one year. Improperly abandoned wells could pose a risk to rural landowners by contaminating subsurface soils, groundwater, and the surface.

> Trial Decision, *supra* para 5 at para 35.

43. All four factors indicate the AER acted in a purely regulatory role and should not be deemed a creditor at the first stage of the *Abitibi* test.

(iii) The second step of the *Abitibi* test is satisfied

44. The second step of the *Abitibi* test requires that the debt, liability or obligation be incurred before the debtor becomes bankrupt. Redwater incurred the Abandonment Obligations from the date it received its license, so the relevant obligations arose in the time period required.

(iv) Under step three of *Abitibi*, the claim is not monetary and it is not sufficiently certain the AER itself will remediate the property.

1) The obligation is not monetary in nature

45. In the third step of *Abitibi*, "the question is whether orders that are not expressed in monetary terms can be translated into such terms." It is true the Abandonment Obligations cost money - but regulatory compliance is seldom cost-free. Classifying the Abandonment Obligations as monetary fails to appreciate the true nature of the obligations as duties owed to the public.

Abitibi, *supra* para 25 at para 30.

2) It was not sufficiently certain the AER would remediate and seek compensation

46. If a claim is not inherently monetary, the third step of the *Abitibi* test also incorporates contingent or future claims by asking whether it is sufficiently certain the regulator will remediate and seek recovery of costs. According to Deschamps J in *Abitibi*, it must be sufficiently certain that the regulatory body triggering the enforcement mechanism will ultimately perform the remediation work and seek compensation. The Majority erred by failing to establish with sufficient certainty that the AER <u>itself</u> would perform the remediation work.

Abitibi, *supra* para 25 at para 36.

47. The Majority found, "diverting value from the bankrupt estate to ensure that the remediation will be done clearly meets the standard [of sufficient certainty]." However, according to *Abitibi*, the question is, "whether the environmental duty will ripen into a financial liability owed to the regulatory body that issued the order." *Nortel Networks Corp., Re* followed *Abitibi*'s reasoning and held that directing money away from the estate was not enough to satisfy the requirement that the regulatory body issuing the order would remediate and claim compensation.

> CA Decision, *supra* para 20 at para 80.
> *Abitibi*, *supra* para 25 at para 3.
> 2013 ONCA 599 at para 31, 368 DLR (4th) 122.

48. The Majority incorrectly held that, "it does not matter which public body actually does the remediation, and which therefore qualifies as the 'creditor' in the insolvency proceedings." This is incorrect. According to *Abitibi*, an obligation is only a provable claim if the obligation is owed to the regulator. The Majority fails to identify with sufficient certainty that the AER – and the AER only – will undertake the Abandonment Obligations and seek compensation.

> CA Decision at para 78.

3) The AER may pursue directors and officers to perform the remediation

49. The AER is empowered to pursue directors and officers for abandonment obligations, under s 106(1) of the *OGCA*, as it recently reminded directors and officers in Bulletin 2016-10. Therefore, it is not sufficiently certain the AER will perform the abandonment remediation.

> AER, "Bulletin 2016-10" (Calgary: AER, 2016), online:
> <https://www.aer.ca/documents/bulletins/Bulletin-2016-10.pdf>

(v) The Abandonment Obligations are not provable claims

50. The Majority ought to have considered cooperative federalism when considering whether to compromise a provincial regulatory obligation in the federal bankruptcy scheme. The Majority

confined its focus at the first step of the *Abitibi* test on the status of the debtor, rather than the actions of the regulator. The Appellants invite the Court to reformulate the *Abitibi* test to consider more substantive issues at the first step. However, if the Court is satisfied the *Abitibi* test should remain the same, the Majority still erred at the third step of the *Abitibi* test by holding the Abandonment Obligations are monetary, rather than public duties, and it was sufficiently certain the AER would itself perform the remediations.

51. Because the Abandonment Obligations are not claims provable in bankruptcy, it is incorrect to classify them as having a "super-priority." The obligations will be enforced outside the bankruptcy proceeding, so do not "rank" in the bankruptcy priority scheme.

B. The AER's license obligations do not conflict with or frustrate the scheme of priorities set out in the *BIA*

52. If this Court accepts that Abandonment Obligations are not provable claims, the Appellants maintain that the provincial regulatory obligations do not conflict with the *BIA*, as s 14.06(4) does not apply to permissive drilling licenses. There is no frustration of purpose because the AER is not holding GTL personally liable and enforcing the Abandonment Obligations outside the bankruptcy proceeding is a risk creditors would have - or ought to have - accounted for in their loans.

53. In the alternative, the Alberta Court of Appeal should have first considered reciprocal interjurisdictional immunity. The *BIA* should be inapplicable to the extent it impairs the core of the province's jurisdiction over natural resources under s 92A(1).

(i) There is no operational conflict between s 14.06(4) of the *BIA* and s 27(1) of the *OGCA*

54. The Majority made two errors in its interpretation of the *BIA*. First, it erred by claiming trustees have broad powers under s 40 to dispose of assets encumbered by a regulatory order, and not recognizing that the power of a trustee to dispose of these types of assets is governed solely by s 14.06(4). Second, the Majority incorrectly held that permissive drilling licenses draw the application of s 14.06(4). As the s 14.06(4) does not apply to the permissive drilling license, GTL cannot disclaim the license before it fulfils the Abandonment Obligations from Redwater's estate.

> *BIA*, *supra* para 4 ss 40, 14.06(4).
> CA Decision, *supra* para 20 at paras 112-113.

55. Courts must strive to interpret federal laws in a manner that gives fullest effect to provincial law and apply the presumption "that Parliament intends its laws to co-exist with provincial law." The Appellants' interpretation allows the *BIA* and the *OCGA* to operate harmoniously.

> *Moloney*, *supra* para 28 at para 27

56. For conflict to be found by the court, "compliance with one" law must be "defiance of the other." Conflict between legislation is defined narrowly by modern jurisprudence.

> *Multiple Access Ltd. v McCutcheon*, [1982] 2 SCR 191 at para 48 (WL).
> *Moloney*, *supra* para 28 at para 27.

1) Section 40 of the *BIA* does not provide trustees power to disclaim assets subject to regulatory obligations

57. Section 40 of the *BIA* provides a trustee power to divest assets "incapable of realization." The general power of a trustee to divest itself of assets is well established. However, s 4.06(4)(a)(ii) of the *BIA* implicitly provides a trustee specific power to abandon real property affected by an environmental condition or damage subject to a regulatory order. Subparagraph 14.06(4)(a)(ii) removes personal liability from a trustee who discharges property subject to a

regulatory order requiring the remedy of an environmental condition or damage. Presuming that legislation is not superfluous, it follows that trustees do not have power to abandon property subject to a regulatory order under s 40. If this were untrue, s 14.06(4) would be unnecessary because of the general divestment power in s 40 and release of environmental liability granted in s 14.06(2).

> *BIA*, *supra* para 4 ss 40, 14.06(4), 14.06(2).
> *Canada (Attorney General) v Mowat*, 2011 SCC 53 at para 38, 3 SCR 471.

58. Parliament did not intend s 14.06(4) to provide plenary power to trustees to ignore valid provincial regulatory obligations. Rather, Parliament intended trustees to be bound by regulatory orders associated with the property vested with them. Subsection 14.06(4) provides a narrow carve-out to this overarching rule and only applies when there is an asset affected by an environmental condition or damage.

> *BIA*, *supra* para 4 s 14.06(4).

2) Subsection 14.06(4) does not apply to permissive drilling licenses

59. Subsection 14.06(4) does not apply to permissive drilling licenses. It provides a trustee the power to divest an interest in real property affected by an environmental condition or damage that is subject to a valid regulatory order. It is a powerful grant of power, as it operates "notwithstanding" any other federal or provincial law. The correct interpretation of such authority must be necessarily narrow.

> *BIA*, *supra* para 4 s 14.06(4).

60. To draw the application of s 14.06(4), the trustee must specifically divest:

(1) real property;

(2) that is affected by an environmental condition or damage.

The permissive drilling license is not, and cannot be, affected by an environmental condition or damage. Subsection 14.06(4) does not apply.

BIA, *supra* para 4 s 14.06(4)(a)(ii).

a. The permissive drilling license is not real property affected by an environmental condition

61. To exploit an oil and gas reserve in Alberta, a company requires three separate authorizations: (1) the *in-situ* rights to the reserve; (2) the ability to enter onto the land to drill; and (3) a permissive license from the Alberta government granting authority to engage in drilling activities. The three property interests, while holistically needed to participate in oil extraction, all operate independently.

CA Decision, *supra* para 20 at para 119.

62. This appeal relates only to the third right, the permissive drilling license, which is a property right providing a drilling company permission to engage in otherwise illegal activity. The license attaches to the estate and is burdened with the end-of-life obligations GTL seeks to renounce.

63. The permissive license granted by the AER cannot fall under s 14.06(4) because the permission to extract a resource cannot be affected by an environmental condition or damage. Even if the permissive lease attaches to the *in-situ* reserve, s 14.06(4) is still inapplicable. An oil spill does not contaminate oil.

BIA, *supra* para 4 s 14.06(4).

64. The permissive drilling license GTL seeks to disclaim cannot be affected by any environmental condition or damage, as the existence of a well requiring preventative abandonment is not an environmental condition. Therefore, the trustee is unable to divest of the

asset per s 14.06(4) or s 40 without first fulfilling the end-of-life obligations legally associated with the permissive drilling license.

BIA, *supra* para 4 s 14.06(4), 40.

3) Subsection 14.06(7) supports the interpretation that s 14.06(4) is a limited grant of power

65. Subsection 14.06(7) recognizes that the burden of cleanup, should a trustee choose to abandon real property affected by an environmental condition, will likely fall upon the regulator of that industry. Thus, s 14.06(7) provides a super priority in bankruptcy for that regulator to recoup the costs associated with cleanup and forms a statutory compromise. The Majority was aware of the environmental impact associated with its application of s 14.06(4) to GTL's request to disclaim. It stated, "[t]hese considerations should be kept in mind, but… Parliament considered and balanced them." This ignores the realities of end-of-life obligations and the fact that s 14.06(7), by the Majority's own admission, does not apply in the circumstances. If one half of the statutory compromise does not apply, then there is no balancing of interests.

BIA, *supra* para 4 s 14.06(7), s 14.06(4)
CA Decision, *supra* para 53 at paras 92, 210, 217-218.

(ii) There is no conflict because s 14.06(4) does not apply to permissive drilling licenses

66. The Majority's decision improperly presumed conflict between the *BIA* and provincial statutes regulating the oil and gas industry. The legislative schemes can operate harmoniously if courts ensure trustees can only divest assets subject to regulatory orders in narrow circumstances. As the permissive drilling license GTL seeks to abandon is not real property subject to an environmental condition or damage, s 14.06(4) does not apply. Therefore, the trustee is bound by valid provincial law and must utilize estate funds to fulfill end-of-life well obligations.

(iii) The *BIA* is not frustrated by enforcement of the Abandonment Obligation

67. If dual compliance is possible, the Court must consider whether the operation of a provincial legislation nevertheless frustrates the purpose of the federal law.

68. The purpose of the *BIA* is not frustrated for two reasons. First, the AER has not imposed personal liability on trustees, but rather denied GTL's proposed transfer of well licenses. Second, reducing the size of the estate does not frustrate the single proceeding model, as commercial lenders had an opportunity to agree to the risk of this occurring, and incorporated that risk into the terms of their loan.

1) Test for Frustration of Purpose

69. A provincial law will be rendered inoperative to the extent that it frustrates the purpose of a federal law. The party invoking the doctrine of paramountcy must: (1) establish the purpose of the federal statute; and (2) prove that the provincial legislation is incompatible with this purpose. Courts should not presume Parliament intended to occupy the provincial field unless there is very clear statutory language to the contrary.

> *Saskatchewan (Attorney General) v Lemare Lake Logging*, 2015 SCC 53 at paras 19, 26, 27, [2015] 3 SCR 419.

2) No frustration of purpose regarding trustee liability

70. The Majority upheld the Trial Decision's conclusion that, "forcing a licensee to comply with the AER orders frustrates the purpose of s 14.06 in limiting the liability of receivers and trustees" over properties with environmental conditions or damage. This confuses the obligations of the *estate* with the obligations of the *trustee*. Redwater's estate is still responsible to comply with the terms on its licenses. The AER is not imposing personal liability on GTL, as it is

empowered to do under s 29 of the *OGCA*. Rather, the AER is withholding its approval of GTL's proposed license transfer under s 24 of the *OGCA*.

Trial Decision, *supra* para 5 at para 176.

3) No frustration of purpose by enforcing obligations outside the bankruptcy proceeding

71. The Majority held that requiring GTL to devote a substantial portion of Redwater's estate to satisfy the Abandonment Obligations would effectively give environmental claims priority over secured creditors. The Abandonment Obligations are not provable claims and enforcing them does not frustrate the priority scheme in the *BIA*.

CA Decision, *supra* para 20 at para 91.

72. The *BIA* has two purposes: financial rehabilitation of the debtor, and equitable distribution of assets manifested by the single proceeding model. Only the latter purpose relates to this appeal as companies do not survive bankruptcy.

Moloney, *supra* para 28 at para 32.

73. It is not inequitable to enforce the Abandonment Obligations outside the bankruptcy proceeding. According to the Canadian Association of Petroleum Producers, an organization that represents oil and gas industry interests, "lenders of an insolvent company who voluntarily engaged in business with that company must continue to accept that risk and Alberta's jurisdiction to manage such risk under its valid regime."

Factum of the Intervenor, the Canadian Association of Petroleum Producers at para 5, on appeal to *Orphan Well Association v Grant Thornton Ltd.*, [2017] SCCA No 213.

74. Commercial lenders profit from the risk associated with drilling and have an opportunity to account for that risk in the terms of the loan. The Majority's decision allows creditors to shed liability they accounted for when negotiating their loans, and step into better shoes in a

bankruptcy. Allowing trustees to ignore the Abandonment Obligations is not an equitable distribution of assets.

75. In conclusion, there is no frustration of purpose because the AER is not imposing personal liability on GTL, and enforcing the Abandonment Obligations outside the bankruptcy proceeding is not an inequitable distribution of assets because commercial lenders knew of Redwater's future abandonment liabilities when negotiating the terms of their loan.

(iv) The regulations do not conflict with or frustrate the purpose of the *BIA*

76. If this Court finds the Abandonment Obligations are not provable claims, there is no operational conflict and no frustration of purpose. As the permissive drilling license GTL seeks to disclaim is not subject to an environmental condition or damage, it does not draw the protection of s 14.06(4) and there is no conflict. Further, enforcing the Abandonment Obligations outside the bankruptcy proceeding does not impose any personal liability on the trustees, and creditors should have already incorporated that risk into their loan terms.

77. In the alternative, the Alberta Court of Appeal ought to have considered applying reciprocal interjurisdictional immunity ("IJI").

(v) Reciprocal interjurisdictional immunity applies to protect provincial regulatory obligations

78. If the Court finds impermissible overlap between the legislative schemes, the Appellants alternatively submit the Court of Appeal should have applied reciprocal IJI. Reciprocal IJI demands the *BIA* be read down to the extent it impairs provincial ability to regulate non-renewable natural resources.

1) Reciprocal nature of interjurisdictional immunity

79. IJI is an evolving doctrine. The SCC has thus far applied IJI to protect federal legislation from provincial encroachment, producing "asymmetrical results." However, in *Canadian Western Bank*, the SCC stated "[i]n theory, the doctrine is reciprocal: it applies both to protect provincial heads of power and provincially regulated undertakings from encroachment."

> *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 35, [2007] 2 SCR 3 [*Canadian Western Bank*].

80. The British Columbia Court of Appeal was first to apply reciprocal IJI. The Court applied reciprocal IJI to protect provincial jurisdiction over health care from federal criminal law legislation. The SCC upheld the decision, but favoured a *Charter* infringement analysis for several reasons.

> *PHS Community Services Society v Canada (Attorney General)*, 2010 BCCA 15, aff'd 314 DLR (4th) 209 [*PHS Community Services*].

81. First, the proposed core of "provincial power over health has never been recognized in the jurisprudence." Second, the claimants failed to delineate a "core" of provincial power, as health power was too broad. Third, the broad core of health power was viewed as having the potential to create legal vacuums, where federal power over criminal law would be "unable to legislate on controversial medical procedures."

> *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at paras 67, 69, [2011] 3 SCR 134.

82. The SCC recognized the reciprocal nature of IJI again in *Tsilhqot'in Nation*. The case discussed the conflict between provincial jurisdiction to manage forests under s 92A(1) and federal jurisdiction over "Indians" under s 91(24). The Court stated in *obiter* that "[i]n the case of forests on Aboriginal title land, courts would have to scrutinize… any federal legislation to ensure that it did not impair the core of the province's power to manage the forests."

Tsilhqot'in Nation v British Columbia, 2014 SCC 44 at para 148, [2014] 2 SCR 256 [*Tsilhqot'in Nation*].

2) The test for interjurisdictional immunity is unchanged for reciprocal application

83. IJI applies "where laws enacted by one level of government impair the protected core of jurisdiction possessed by the other level of government." The doctrine will be applied where: (1) the provincial legislation impairs a protected core of federal power; and (2) the impugned law's effect on the "exercise of the protected federal power is *sufficiently serious* to invoke the doctrine."

Tsilhqot'in Nation, *supra* para 82 at para 131.
Quebec (Attorney General) v Canadian Owners and Pilots Association, 2010 SCC 39 at para 27, [2010] 2 SCR 536.

84. The BC Court of Appeal in *PHS Community Services* did not create a new test for reciprocal IJI. The Appellants will not deviate from this jurisprudence. Reciprocal IJI should be applied in this case because (1) the *BIA* impairs the core of Alberta's power to manage non-renewable natural resources under s 92A(1)(b); and (2) the *BIA*'s effect on the exercise of the AER's regulatory powers over natural resources is sufficiently serious to invoke the doctrine.

PHS Community Services, supra para 80 at para 77.

a. The core of the provincial power to manage its natural resources includes the power to impose end-of-life obligations

85. The "core" of a power has been described as the "basic, minimum, and unassailable content" and what is absolutely necessary "to achieve the purpose for which exclusive legislative jurisdiction was conferred." Precedent assists when identifying a "core." This appeal must identify the protected core of the provincial power under s 92A(1)(b) to develop, conserve, and manage non-renewable natural resources in the province.

Bell Canada v Quebec (Commission de la Santé et de la Sécurité du Travail), [1988] 1 SCR 749 at para 254 (CanLII).
Canadian Western Bank, *supra* para 79 at para 77.
PHS Community Services Society, *supra* para 80 at para 66.

86. Managing end-of-life obligations falls within the protected core of the provinces jurisdiction under s 92A(1)(b) because of: (1) the history of the section's inclusion; and (2) the principle of subsidiarity.

b. The history of s 92A demonstrates managing end-of-life obligations is part of the core of the province's power to develop, conserve, and manage its non-renewable natural resources

87. The 1970s were a contentious time for natural resource policies, specifically, jurisdictional power over the control and management of resource development. Prior to 1982, provincial governments had proprietary power over natural resources and the federal government had power over trade and commerce. Federal and provincial interests clashed over pricing, revenues, and control of production and distribution of natural resources. Western provinces wanted more control over natural resources.

Robert D Cairns, Marsha A Chandler & William D Moull, "The Resource Amendment (Section 92A) and the Political Economy of Canadian Federalism" (1985) 23:2 Osgoode Hall LJ 253 at 254, 259 (Heinonline).

88. Section 92A is the product of negotiations between Parliament and the Western provinces. The inclusion of s 92A indicates the federal government's acceptance of provincial power to govern "resource-management...in relation to *all* resources in the provinces."

Cairns, *supra* para 87 at 271.

89. The term "exclusively" in s 92A(1) is unique when read in light of other sections. No other subsections in s 92A use the term "exclusive." Further, s 92A(2) states that each province "may make laws" relating to the export of non-renewable natural resources, and s 92A(3) states

that nothing in s 92A(2) derogates from Parliament's power to make laws relating to such export. Significantly, s 92A(3) does not derogate from (1).

90. When legislatures express one thing, it is to exclude another under the canon of "*expressio unius est exclusio alterius.*" Thus, by excluding s 92A(1) from the carve-out in s 92A(3), we can infer that the federal and provincial governments agreed to leave the development, conservation, and management of non-renewable natural resources under the provinces' exclusive jurisdiction.

> *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 282, 423 DLR (4th) 197.

91. The addition of s 92A reflects the need of resource-rich Western provinces to exercise exclusive jurisdiction to develop, conserve, and manage their non-renewable natural resources. The core of this power must include managing end-of-life obligations for resource development as it is an integral component to developing, conserving, and managing non-renewable natural resources.

c. The Principle of subsidiarity demonstrates managing end-of-life obligations is part of the core of the province's power to develop, conserve, and manage its non-renewable natural resources

92. According to the principle of subsidiarity, powers are not divided at random, but granted to the "level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs." As Professor Newman argues, provinces are best able to regulate non-renewable natural resources as the government is "attentive to local circumstances."

> *114957 Canada Lteé (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 3, [2001] 2 SCR 241.
> Dwight Newman, *Natural Resource Jurisdiction in Canada* (Markham: LexisNexis Canada, 2013) at 108.

93. Martin JA highlights that an essential component of the province's jurisdiction over natural resources is the licensing regime in Alberta's oil and gas industry. According to Martin JA, "[t]he end of life obligations are an inherent part of the issuance of a well license."

CA Decision, *supra* para 20 at para 127.

94. The inclusion of s 92A demonstrates that the provinces are best suited to design effective and responsive regulatory policies for the development, conservation, and management of their non-renewable natural resources. Oil and gas production occurs all across Alberta, including on private land. The provincial government is best placed to effectively respond to the concerns of private landowners.

95. It would be absurd if the Alberta government held the exclusive power to regulate non-renewable natural resources and this did not include imposing end-of-life obligations on all oil and gas producers regardless of their financial circumstances.

3) Section 14.06 of the *BIA* impairs the provincial power to develop, conserve, and manage its natural resources

96. All parties agree that the relevant legislation - the federal *BIA* and provincial *OGCA* - is valid. The province has chosen to delegate its s 92A(1)(b) power over non-renewable natural resources to the AER, which retains the exclusive power to regulate the resource from "cradle to grave" through the *OGCA*, which governs end-of-life well obligations.

CA Decision, *supra* para 20 at para 120.
OGCA, *supra* para 5 at s 24.

97. The Majority's interpretation of s 14.06 of the *BIA* is that a trustee is allowed to "abandon or renounce assets encumbered with environmental obligations." If trustees can disclaim properties affected by environmental conditions at their discretion, without complying with valid provincial law over end-of-life obligations, it impairs the core of the provincial power.

CA Decision, *supra* para 20 at para 57.

4) The impairment is sufficiently serious to invoke the doctrine of reciprocal IJI

98. By allowing trustees to, as the Majority phrases it, "simply ignore valueless assets in the estate and turn them back to the bankrupt", the *BIA* undermines the core provincial power to manage end-of-life obligations for non-renewable resources. When an oil and gas company enters bankruptcy, the AER loses its ability to prevent well license transfers. Martin JA states the correct position that the regulatory obligations should continue to apply after a bankruptcy.

CA Decision, *supra* para 20 at paras 70, 156.

99. If the Majority's interpretation of s 14.06 of the *BIA* stands, Alberta's power to manage, develop, and conserve natural resources, including its ability to impose end-of-life obligations, is not just impaired by the *BIA*; it is destroyed.

(vi) Conclusion on reciprocal interjurisdictional immunity

100. The Court of Appeal failed to consider reciprocal IJI. If it had, it would have recognized the *BIA* sufficiently impairs the core of the provincial power over developing, conserving, and managing non-renewable natural resources by allowing GTL to wash its hands of Redwater's license obligations.

101. If the Court finds the Abandonment Obligations are provable claims, or enforcing them outside the bankruptcy proceeding conflicts with, or frustrates the purpose of the *BIA*, then s 14.06 must be read down to the extent that it impairs end-of-life obligations.

Part IV. Submission on Costs

102. The Appellants do not seek costs and costs should not be ordered against them.

Part V. Orders Sought

103. The Appellants request that this appeal be allowed, and the following relief granted:

1) A declaration setting aside Wittman J.'s conclusions in paras 156, 173 and 176 of the Trial Decision;

2) An order compelling GTL to set aside proceeds from its proposed asset sale to satisfy Redwater's Abandonment Obligations; and

3) A declaration that abandonment and reclamation obligations for oil and gas assets in Alberta are public duties.

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

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