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 #2019-04

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 of the Respondent's Position

1 Insolvent oil and gas licensees are governed by both provincial and federal statutes. To be granted a licence from the Alberta Energy Regulator ("AER"), an oil and gas company must comply with the provincial statutory regime. If a licensee becomes insolvent, the federal *Bankruptcy and Insolvency Act* ("*BIA*") is engaged. The main issue on appeal is whether these statutory regimes conflict during an insolvency. The doctrine of federal paramountcy provides that validly enacted federal law will prevail over validly enacted provincial law to the extent of the conflict.

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

2 The *Oil and Gas Conservation Act* ("*OGCA*"), *Pipeline Act* ("*PA*"), and the AER's *Directive 006* and *Directive 011* are the relevant parts of the provincial oil and gas regulatory regime which regulates licence holders in Alberta (the "Alberta Regime").

Oil and Gas Conservation Act, RSA 2000, c O-6.
Pipeline Act, RSA 2000, c P-15.
Alberta Energy Regulator, "Licensee Liability Rating (LLR) Program and Licence Transfer Process," *Directive 006* (Calgary: AER, 17 February 2016) [*Directive 006*].
Alberta Energy Regulator, "Licensee Liability Rating (LLR) : Updated Industry Parameters and Liability Costs," *Directive 011* (Calgary: AER, 1 August 2015) [*Directive 011*].

3 The federal *BIA* engages a court-appointed receiver or trustee in bankruptcy to be responsible for the administration of the bankrupt's estate. The *BIA* sets out a clear scheme of priorities for the liquidation and distribution of a bankrupt's assets.

4 Conflict between the *BIA* and the Alberta Regime arises from the fact that receivers and trustees are included in the definition of "licensee" in both the *OGCA* and *PA*. Accordingly, the Respondent, Grant Thornton Ltd, is subject to the regulatory framework as trustee of the Redwater Energy Corporation ("Redwater"). As trustee, the Respondent faces enduring liability for Redwater's licensing obligations including personal liability for abandonment, reclamation, and remediation of property. Such liability directly conflicts with section 14.06 of the *BIA*, which expressly limits personal liability and gives receivers and trustees the right to renounce interests in real property affected by environmental damage.

5 The Appellants, the AER and the Orphan Well Association ("OWA"), incorrectly assert that, in compliance with the Alberta Regime, environmental remediation claims should be paid in priority of all other obligations of the bankrupt. This assertion effectively reorders the distribution scheme clearly defined in the *BIA*. The doctrine of federal paramountcy renders

inoperative the provisions of the *OGCA* and *PA* that conflict, either operationally or by frustration of the *BIA*'s purpose, to the extent of the conflict (*Moloney*).

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

6 The decisions of the Applications Judge and the majority of the Alberta Court of Appeal ("ABCA") held that dual compliance of the provincial statutes and the *BIA* was impossible and that the *BIA*'s purpose was frustrated by the province's reordering of priorities. This conclusion is correct, reasonable, and should not be overturned. The Respondent respectfully requests the appeal be dismissed.

B. Background

(i) The Alberta Energy Regulator's Mandate is "Cradle-to-Grave"

7 The AER regulates all upstream oil and gas activities in Alberta (*Redwater ABCA*). Upstream oil and gas activities include exploring for oil and gas deposits, producing from an oil and gas well, and eventually abandoning the well. Over time, an oil and gas well's production rate declines. Profit is proportional to production. A typical well produces for 20 to 30 years, then it becomes a significant liability (*Redwater ABCA*; Hustle).

Orphan Well Assn v Grant Thornton Ltd, 2017 ABCA 124 at paras 11-12 [*Redwater ABCA*].
Jeff Lewis et al, "Hustle in the oil patch: Inside a looming financial and environmental crisis", *The Globe and Mail* (24 November 2018), W1 [Hustle].

8 The AER can deny a weakly financed company the privilege of an oil and gas licence (*Redwater ABCA*). The AER grants a separate licence for each oil and gas well or pipeline, regulating according to the *OGCA* and the *PA*. Proper abandonment of an oil and gas well involves squeezing cement downhole to cover all porous zones, preventing groundwater contamination and communication between varying depths. At the surface it requires cutting the well's downhole pipe (the "casing") so it will not interfere with surface activities, plugging the casing with cement, and restoring the land (*Directive 020; Redwater ABCA*). This environmental liability is difficult to quantify in advance and can be expensive. The AER must approve any licence transfer (*OGCA*; *PA*). The AER can prevent an established company from shedding its abandonment obligations to a thinly financed company.

Redwater ABCA, supra para 7 at paras 35, 12.
Alberta Energy Regulator, "Well Abandonment," *Directive 020* (Calgary: AER, 6 December 2018) [*Directive 020*].
OGCA, supra para 2 at s 24.
PA, supra para 2 at s 18.

9 The AER is mandated to "ensure the safe, efficient, orderly, and environmentally responsible development of oil, oil sands, natural gas, and coal resources over their entire life cycle" (AER website). The AER established the OWA to aid in the proper abandonment and reclamation of well sites. Wells are considered orphans when there is no legally responsible or financially capable party with a beneficial interest in the well (OWA website).

> Alberta Energy Regulator, "Who We Are" (2018), online: <www.aer.ca/providing-information/about-the-aer/who-we-are> [AER website].
> Orphan Well Association, "Regulating Development" (2019), online <www.aer.ca/regulating-development/project-closure/liability-management-programs-and-processes/orphan-well-association> [OWA website].

(ii) The Orphan Well Association and the AER are Interwoven

10 The OWA "manages the closure of orphaned oil and gas wells, pipelines, and facilities, and the reclamation of associated sites, across Alberta", ensuring the AER meets its mandate (OWA website).

> OWA website, *supra* para 9.

11 The AER prescribes an annual Orphan Fund Levy ("OFL") to cover anticipated expenses for abandoning orphan wells (*OGCA*). The levy is imposed on each licensee in Alberta based on a formula. The licensee's share of the levy is proportionate to the percentage of deemed liabilities held relative to the other licensees in the industry (OFL Bulletin). The OWA is funded by the OFL, posted security deposits and limited government funding (*Redwater ABCA*). The AER's oversight enables the OWA to perform abandonment.

> *OGCA*, *supra* para 2 at s 70(1).
> Alberta Energy Regulator, "2018/19 Orphan Fund Levy," *Bulletin 2018-07* (Calgary: AER, 9 April 2018) [OFL Bulletin].
> *Redwater ABCA*, *supra* para 7 at para 22.

(iii) The AER's Licensee Liability Rating Program

12 The AER computes the liability management ratio (LMR) of a prospective licensee by comparing its eligible deemed assets to its eligible deemed liabilities (*Directive 006*). When the ratio falls below 1, the AER provides three options to bring the licensee back into compliance: (1) reduce the deemed liabilities by performing abandonment work; (2) transfer a licensed property and its associated obligations; or (3) post a security deposit (*Redwater ABCA*).

> *Directive 006*, *supra* para 2.
> *Redwater ABCA*, *supra* para 7 at para 136.

13 The provincial government considered that sustained decreased commodity prices would increase the amount of orphan wells when the current regulatory regime was enacted (1994 Bill

5). However, the government decided conveying a well conveys the liability. Divesting parties transfer licences without fear of future litigation (Bourassa).

> "Bill 5: Oil and Gas Conservation Amendment Act, 1994", *Legislative Assembly of Alberta*, 23-2, (12 April 1994) at 16:50 (Mrs. Black) [1994 Bill 5].
> Kelly Bourassa, Ryan Zahara & Chris Nyberg, "Restructuring Challenges in the Oil and Gas Sector: the Treatment of Regulatory Orders Post-Redwater" (2016) 54:2 Alta L Rev 383 at 385 [Bourassa].

14 The AER imposes an OFL on industry to mitigate the financial risk that the public will bear any environmental liabilities (Bourassa). Where some jurisdictions require a security deposit before granting an oil and gas licence, Alberta uses a risk assessment program, the LMR, to ensure that the company holding the licence is financially responsible for well abandonment. Since 2014, sustained decreased commodity prices have made abandonment cost prohibitive for marginally financed producers (Hustle). Low commodity prices coupled with a well's finite economic life may result in a licensee's LMR decreasing rapidly.

> Bourassa, *supra* para 13.
> Hustle, *supra* para 7.

(iv) Mineral Rights Compel Surface Rights

15 The landowner is left with the orphaned well regardless of whether they desired oil and gas development on their property. The Crown holds approximately 90% of the mineral rights in Alberta on behalf of the public (Government of Alberta). Land in Alberta has two titles – surface title and mineral title – and the title holders may not have harmonious interests. The common law recognizes an implied right of entry in conjunction with mineral rights. The *Surface Rights Act* ("*SRA*") compels compensation and prevents litigation between an uncooperative landowner and a prospective operator for a right of entry to develop mineral resources (*SRA*). The *SRA* also empowers the Surface Rights Board to intervene if an impasse develops between the land owner and the operator. The landowners of Alberta never chose to sever the mineral title from the surface title. Nor do the landowners welcome oil and gas development on their land (*Dome*). Because the government compels development, it is the responsibility of the AER to manage the life-cycle of the resource, regardless of market conditions.

> Government of Alberta, "Mineral ownership" (2019), online: <www.alberta.ca/mineral-ownership.aspx> [Government of Alberta].
> *Surface Rights Act*, RSA 2000, c S-24.
> *Dome Petroleum Ltd v Richards*, [1985] AR 245 at paras 239, 252, 42 Alta LR (2d) 97 [*Dome*].

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

16 The appeal should be dismissed for the following reasons:

A. The Court of Appeal was correct 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. The Court of Appeal was correct 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 -- ARGUMENT

A. Standard of Review

17 The statutory interpretation of the provincial and federal legislation at issue, and the constitutional principles to be applied, are questions of law. The standard of review for questions of law is correctness (*Housen*; *Shepherd*). Questions of fact determine what took place between parties and are reviewed for palpable and overriding error (*Housen*; *Shepherd*). The questions raised by the appeal involve application of the facts to the legal principles of constitutional and insolvency law. They are questions of mixed fact and law and should be reviewed for palpable and overriding error (*Housen*; *Shepherd*).

Housen v Nikolaisen, 2002 SCC 33 at paras 6, 8 & 37 [*Housen*].
R v Shepherd, 2009 SCC 35 at para 18 [*Shepherd*].

B. The AER's "Tactical" Orders and Environmental Liabilities are Provable Claims in Bankruptcy

18 The AER imposed an environmental liability on the Respondent that is monetary in substance by demanding payment or performance as conditions precedent to transferring an oil and gas licence (*Redwater ABCA*). A provable claim "includes any claim or liability provable in proceedings under [the *BIA*] by a creditor" (*BIA*). A creditor is defined as "a person having a claim provable as a claim under this Act" (*BIA*).

Redwater ABCA, supra para 7 at para 75.
BIA, supra para 1 at s 2.

19 Section 14.06(8) of the *BIA* states "a claim against a debtor in a bankruptcy… for the costs of remedying any environmental condition or environmental damage affecting real property…shall be a provable claim" (*BIA*). The real property to be remedied from

environmental damage is the surface land that the operator received a right of entry upon by obtaining an oil and gas licence from the AER (*Redwater ABCA*, *Redwater ABQB*).

BIA, *supra* para 1, ss 2, 14.06(8).
Redwater ABCA, *supra* para 7 at para 33.
Re Redwater Energy Corporation, 2016 ABQB 278 at para 134 [*Redwater ABQB*].

20 Parliament deliberately enabled a trustee to renounce "any interest in any [contaminated] real property" (*BIA*). Section 14.06(4) of the *BIA* precludes the AER from creating a super priority for environmental liabilities on renounced property (*Redwater ABQB*). Section 14.06(7) of the *BIA* "does not create any generalized priority or super priority for existing or contingent environmental liabilities" (*Redwater ABCA*).

BIA, *supra* para 1, s 14.06(4).
Redwater ABQB, *supra* para 19 at para 133.
Redwater ABCA, *supra* para 7 at para 55.

(i) *Cooperative federalism does not condone nullifying valid federal legislation*

21 Cooperative federalism does not void the *BIA*. It is a principle of interpretation presuming that federal and provincial legislation are compatible. There is a practical limit to cooperative federalism. The principle of cooperative federalism cannot restrict validly enacted legislation (*Lemare Lake*).

Saskatchewan (AG) v Lemare Lake Logging Ltd, 2015 SCC 53 at para 23 [*Lemare Lake*].

C. The *AbitibiBowater* Test Establishes if an Environmental Order is a Provable Claim

22 The SCC's seminal decision in *AbitibiBowater* sets out a three-part test to decide whether an environmental order is a "claim" in bankruptcy (*AbitibiBowater SCC*). The test establishes if an environmental order that is not framed in monetary terms is a provable claim engaging the *BIA*. The *AbitibiBowater* test requires that a debt, liability, or obligation: (1) is to a creditor; (2) is incurred before the debtor becomes bankrupt; and (3) can have a monetary value attach to it.

Re AbitibiBowater Inc, 2012 SCC 67 at para 26 [*AbitibiBowater SCC*].

(i) *AbitibiBowater Step 1: The Appellant Identifies Itself as a Creditor by Requiring Payment or Performance Prior to Transferring an Oil and Gas Licence*

23 Enforcing an obligation upon a debtor makes the regulator a creditor (*AbitibiBowater SCC*). Restricting the transfer of an oil and gas licence until a security deposit is paid or abandonment orders are completed affirms that the AER is a creditor (*Redwater ABQB*). The Appellants demand compensation for the renounced properties' environmental liabilities before permitting the Respondent to realize value from the bankrupt's estate (*Redwater ABQB*).

AbitibiBowater SCC, *supra* para 22 at para 27.

Redwater ABQB, supra para 19 at para 182.

24 In *Moloney*, a debtor owed an Administrator appointed under the *Motor Vehicle Accident Claims Act* ("*MVACA"*) a monetary penalty for causing a car accident while uninsured (*Moloney*). The debtor made an assignment for bankruptcy, listing the judgment debt assigned to the Administrator as a provable claim.

Motor Vehicle Accident Claims Act, RSA 2000, c M-22.
Moloney, supra para 5 at para 4.

25 Moloney was discharged but Alberta's *Traffic Safety Act* ("*TSA"*) suspended his operator's licence and vehicle registration privileges until he paid his judgment debt to the *MVACA's* appointed Administrator. The Supreme Court of Canada ruled that the *TSA* was constitutionally inoperative to the extent it conflicts with the *BIA* (*Moloney*). The province cannot force payment of a discharged judgment debt (*BIA*).

Traffic Safety Act, RSA 2000, c T-6, s 102.
Moloney, supra para 5 at paras 75, 90.
BIA, supra para 1, s 178(2).

26 Making Moloney's driving privileges contingent on honouring his discharged debt is analogous to making an oil and gas licence contingent on a Trustee paying environmental orders on renounced property. Each of these schemes violates the law. The regulator is an "enforcing authority clothed as a creditor" (*AbitibiBowater QCCS*).

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

(a) Step One of the Abitibibowater Test Will Not Always be Met

27 Assessing the specific facts of each case determines if an environmental order is a claim (*AbitibiBowater QCCS*). Environmental orders that may not identify the regulator as a creditor include, *inter alia*, increasing reporting obligations, altering compliance requirements, mandating employee awareness programs, and criminal sanctions.

AbitibiBowater QCCS, supra para 26 at para 135.

28 To assess if a regulator is a creditor, the court must consider the relevant provisions of the *BIA* (*AbitibiBowater QCCS*). The trustee, which is broadly defined in the *BIA* to include a court-appointed receiver or a licenced insolvency trustee, cannot be held liable for environmental claims that were not caused by the "trustee's gross negligence or wilful misconduct" (*BIA*). Parliament amended section 14.06 in 1997 to encourage trustees to take possession of contaminated properties, realizing maximum value via efficient remediation. A trustee is

permitted to renounce property deemed to have no economic viability (*Industry Committee*). The legislation affords a trustee time to evaluate property and refuse risky liabilities (*BIA*).

> *AbitibiBowater QCCS, supra* para 26 at para 133.
> *BIA, supra* para 1, ss 14.06(1.1), 14.06(2)(b), 14.06(4)(a)(ii).
> House of Commons, Standing Committee on Industry, *Evidence*, 35-2, No 16 (11 June 1996) at 15:50 (Jacques Hains) [*Industry Committee*].

29 Next, the court must evaluate the true nature and impact of the AER orders (*AbitibiBowater QCCS*). The Appellants attempt to circumvent the *BIA* by forcing the bankrupt's estate to remain bundled as one package through the imposition of transfer restrictions (*Redwater ABCA*). More contaminated properties are likely to become orphaned if the trustee has no discretion on how to parcel out the assets (*Industry Committee*). If the bankrupt's entire bundled estate was valuable, then it is unlikely that a bankruptcy would have occurred (*Redwater ABQB*). The AER attempts to usurp the trustee's role contrary to sections 14.06(4), 14.06(6), 136, and 141 of the *BIA,* violating "the equitable distribution of the bankrupt's [estate] among his or her creditors" (*Moloney*).

> *AbitibiBowater QCCS, supra* para 26 at para 133.
> *Redwater ABCA, supra* para 7 at para 75.
> *Industry Committee, supra* para 28 at 15:45 (Jacques Hains).
> *Redwater ABQB, supra* para 19 at para 170.
> *Moloney, supra* para 5 at para 31.

30 Parliament contemplated the same issues that *Redwater* raises when amending section 14.06 of the BIA. It balanced safeguarding businesses and jobs with providing the best measures possible to get contaminated sites cleaned up (*Industry Committee)*. By allowing trustees to pick and choose which properties are economically viable, at least some contaminated land will be remediated. The clarity provided by s 14.06 of the *BIA* mitigates the risk so receivers and trustees will accept mandates with significant environmental liabilities. This decreases the number of orphaned properties.

> *Industry Committee, supra* para 28 at 15:50 (Jacques Hains), 17:05 (David Tobin).

31 The *BIA* allows all creditors which rank equally to share rateably by using a single proceeding model. Justice Deschamps explained this logic in *Re Ted Leroy Trucking Ltd*:

> The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claim against the debtor's limited assets while the other creditors attempt a compromise.

Allowing the AER to disrupt this model would create uncertainty in the market and dissuade trustees from accepting contaminated properties. "[H]ighly leveraged industries (like the oil and gas industry)" with a large environmental footprint would not attract financing if environmental claims are given a super priority (*Redwater ABCA*). Parliament intended to remove uncertainty for lending institutions when it enacted s 14.06 of the *BIA* (*Industry Committee*).

> *Re Ted Leroy Trucking Ltd*, 2010 SCC 60 at para 22.
> *Redwater ABCA, supra* para 7 at para 96.
> *Industry Committee, supra* para 28 at 17:10 (Gordon Marantz).

(b) Northern Badger was Overtaken when Parliament Expressly Categorized Environmental Obligations to Real Property as a Provable Claim in Bankruptcy

32 The Appellants encourage the court to consider *Northern Badger* when categorizing a regulator's environmental order (*Northern Badger*). *Northern Badger* is an ABCA case that classified enforcement of a general law as outside the *BIA*, preventing a regulator from being a creditor. As noted by the Ontario Court of Appeal in *General Chemical*, *Northern Badger* has been overtaken by the s 14.06(8) amendment to the *BIA* (*General Chemical*). Section 14.06(8) states an environmental obligation to real property is a provable claim. It is impermissible for provincial environmental legislation to change the scheme of priorities in the *BIA* (*General Chemical*).

> *Panamericana de Bienesy Servicios SA v Northern Badger Oil & Gas Ltd*, 1991 ABCA 181, 5 WWR 557 [*Northern Badger*].
> *Re General Chemical Canada Ltd*, 2007 ONCA 600 at para 46 [*General Chemical*].

(c) Step One of the AbitibiBowater Test Considers the Actions of the Regulator

33 Analogous to *AbitibiBowater*, the AER's orders have the effect of compelling the Respondent to expend material sums of money to remediate property with no return value (*AbitibiBowater QCCS*). The security deposit acts as a conduit for transferring to the AER monies that would otherwise be paid out in priority order as stated in section 136 of the *BIA* (*Husky Oil*).

> *AbitibiBowater QCCS, supra* para 26 at para 129.
> *Husky Oil Operations Ltd v MNR*, [1995] 3 SCR 453 at para 55, 128 DLR (4th) 1 [*Husky Oil*].

34 The AER has "exercised its enforcement power against a debtor" by making the transfer of oil and gas licences contingent upon either the payment of a security deposit or the performance of abandonment orders on renounced property (*AbitibiBowater SCC, Redwater*

ABQB). The AER can exercise its enforcement power by being slow to respond and blocking transfers (Hearing). This enforcement identifies the AER as a creditor (*AbitibiBowater SCC*).

> *AbitibiBowater SCC, supra* para 22 at para 27.
> *Redwater ABQB, supra* para 19 at para 182.
> Supreme Court of Canada, "Webcast of the Hearing on 2018-02-15, Docket 37627, Orphan Well Association, et al v Grant Thornton Limited, et al" (15 February 2018) at 2h:53m:49s, online (video): SCC <www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=37627&id=2018/2018-02-15--37627&date=2018-02-15> [Hearing].

35 The AER is a creditor satisfying step one of the *AbitibiBowater* test.

(ii) *AbitibiBowater Step 2: The AER Obligation was Triggered as Soon as Redwater's LMR Fell Below 1, Before the Debtor Became Bankrupt*

36 Prior to declaring bankruptcy, Redwater's LMR fell below the AER's threshold of 1.0 (*Redwater ABQB*). The AER enforces environmental claims below this threshold (*Redwater ABCA*).

> *Redwater ABQB, supra* para 19 at paras 4, 31.
> *Redwater ABCA, supra* para 7 at para 136.

37 Section 14.06(8) of the *BIA* broadens environmental obligations to include those that arose before or after the date of filing a proposal for the costs of remedying them, or the date of bankruptcy.

38 The AER's order satisfies the second step of the *AbitibiBowater* test for provable claims.

(iii) *AbitibiBowater Step 3: There is Sufficient Certainty the AER will Abandon and Reclaim the Property*

39 A well licence to produce oil shall only be transferred if a security deposit is paid (*Redwater ABQB;* Hearing). The AER's environmental order is monetary in nature, thus meeting step 3 of the *AbitibiBowater* test.

> *Redwater ABQB, supra* para 19 at paras 19, 181.
> Hearing, *supra* para 34 at 2h:47m:38s.

40 It must be "sufficiently certain" that the AER will have the remediation work completed (*AbitibiBowater SCC*). The claim cannot be too "remote and speculative" as the government may make a claim for environmental remediation but ultimately divert the funds elsewhere (*Confederation; Redwater ABCA*).

> *AbitibiBowater SCC, supra* para 22 at para 36.
> *Re Confederation Treasury Services Ltd*, [1997] OJ No 67 at para 4, 96 OAC 75 [*Confederation*].
> *Redwater ABCA, supra* para 7 at para 74.

41 The first factor to consider is the substance of the environmental obligation. The security deposit demanded by the AER is a monetary order. The security deposit allows the AER to

"determine unilaterally the extent of its claim against the estate" contradicting the *BIA* (*Husky Oil*). It is not a regulatory order since the Trustee is not expected to perform the remediation work. The "polluter-pays" principle was never intended to extend to a "third-party pays" principle (*AbitibiBowater SCC*). Both payment and performance are monetary in substance, directly and indirectly (*Redwater ABCA*). The AER "cannot do indirectly" what it claims not to be doing directly (*Husky Oil*).

Husky Oil, *supra* para 33 at paras 39, 77.
AbitibiBowater SCC, *supra* para 22 at para 40.
Redwater ABCA, *supra* para 7 at para 77.

42 The second factor does not demand sufficient certainty that the creditor performs the environmental remediation, rather it must be sufficiently certain that remediation will occur. The AER can use the OWA to remediate the land. The remediation work need not be done by the government of Alberta, the AER, or the OWA. The fact that the AER requests funds to be set aside for environmental remediation reduces the obligation to a monetary claim (*Redwater ABCA*).

Redwater ABCA, *supra* para 7 at para 78.

43 Thirdly, the factual context determines sufficient certainty, not solely timing. The AER cannot tactically decide to forgo environmental reclamation to avoid being classified as a creditor. It is sufficiently certain that the AER collects money to properly abandon orphan wells. It would be contradictory to request security deposits to compensate for environmental remediation and then state that these funds will not be used to remediate the land (*Redwater ABCA*). The funds contribute to the AER's responsible development mandate (AER website).

Redwater ABCA, *supra* para 7 at para 79.
AER website, *supra* para 9.

44 The last factor to consider is the effect of AER's order. By making payment or performance a condition precedent to a well licence transfer, the AER has artificially transferred the value of the oil and gas assets to the well licence (*Redwater ABCA*). The security deposit represents the abandonment liabilities for the renounced properties (Hearing). A receiver can only afford to pay the security deposit if assets are sold. This results in a "catch-22" since it is not possible to sell an asset if the licence cannot be transferred. The asset has no value without a well licence allowing production. Therefore, there will be no asset to sell if the AER blocks the transfer of the licence. The AER is effectively creating a super priority for environmental claims

by accessing the value of the estate prior to allowing the realization of any value from the *profits à prendre* in the oil and gas assets (*Redwater ABCA*).

Redwater ABCA, supra para 7 at para 81.
Hearing, *supra* para 34 at 2h:48m:13s.

45 The AER's order therefore satisfies the third step of the *AbitibiBowater* test. Barring a palpable and overriding error, the Applications Judge's conclusion should not be overruled (*Redwater ABQB*).

Redwater ABQB, supra para 19 at para 173.

(iv) *The AER's Order Meets All 3 Steps of the Abitibibowater Test, Qualifying as a Provable Claim*

46 The AER's abandonment order compels the Respondent to spend money that it may never recover. There is no certainty that the bundle of properties will yield a net profit. Section 14.06(4) of the *BIA* allows a trustee discretion to renounce property that is not economically viable, but the AER refutes this discretion by withholding licences. Section 14.06(2)(b) of the *BIA* is clear – a trustee is not personally liable for any environmental condition or damage to real property. The AER demands payment before it will grant any realizable value in the bankrupt estate. The true nature and impact of the AER's order is financial in substance. "The [AER's] policy on transfers essentially strips away from the bankrupt estate enough value to meet the outstanding environmental obligations" (*Redwater ABCA*).

Redwater ABCA, supra para 7 at para 77.

47 Forcing the trustee to accept the licence "warts and all" contradicts the *BIA*'s renouncement provision, upsetting the priorities of the *BIA* (*Redwater ABCA*).

Redwater ABCA, supra para 7 at para 81.

48 The Court consistently maintains a nationally homogeneous system of bankruptcy priorities (*Husky Oil*). Oil and gas licences cannot be treated in isolation. Changing the rules for specific industries would "invite a balkanization of the scheme of bankruptcy priorities across the country and … tolerate the evisceration of Parliaments' exclusive jurisdiction over bankruptcy conferred by our Constitution" (*Husky Oil*).

Husky Oil, supra para 33 at paras 37, 76.

49 The AER is the author of its own fate. A system that triggers monetary or remedial action at the point when liabilities exceed assets is destined to fail with sustained decreased commodity prices (*Redwater ABCA*). The catalyst for action has a nexus with bankruptcy. There are no hard timelines to compel abandonment work. The Appellants have put themselves

in a precarious position. A lack of strategic foresight does not justify interfering with federal law. As stated by the Applications Judge, "It is not up to this Court to define policy. Statutory interpretations to ascertain purpose and proper application is the role of the Court" (*Redwater ABQB; AbitibiBowater SCC; Redwater ABCA*).

Redwater ABCA, supra para 7 at paras 92, 137.
Redwater ABQB, supra para 19 at para 133.
AbitibiBowater SCC, supra para 22 at para 33.

50 All three steps of the *AbitibiBowater* test have been met. The AER's order is a provable claim and thus subject to the *BIA*.

D. The Doctrine of Federal Paramountcy Applies

51 Federal Paramountcy is applicable where there is a genuine inconsistency between federal and provincial legislation. Where the "operational effects of provincial legislation are incompatible with federal legislation, the federal law prevails" (*Moloney*). Federal and provincial laws can conflict in two ways: (1) where there is an operational conflict because dual compliance is impossible; (2) where it is possible to comply with both laws, but the provincial law frustrates the purpose of the federal law (*Moloney*).

Moloney, supra para 5 at paras 16, 18.

52 The theory of cooperative federalism, which recognizes the inevitable overlap between the exercises of provincial and federal competencies, requires "conflict" to be defined narrowly (*Moloney*). If there is a reasonable interpretation of the federal statute that avoids interference with the provincial law, such interpretation is preferred (*Moloney*; *Canadian Western Bank*).

Moloney, supra para 5 at paras 27, 104.
Canadian Western Bank v Alberta, 2007 SCC 22 at paras 74-75 [*Canadian Western Bank*].

53 The Appellants and the Respondent agree that both the *BIA* and the Alberta Regime were validly enacted. The question is whether there is a "genuine inconsistency" rendering the provincial laws inapplicable to the extent of the conflict. To determine whether there is a conflict, both statutory schemes must be properly interpreted.

Moloney, supra para 5 at para 27.

E. The Alberta Regime Can Enforce Personal Liability on a Receiver or Trustee to Properly Abandon Sites

54 The *OGCA, PA, Directive 006* and *Directive 011* were enacted under Alberta's exclusive jurisdiction over property and civil rights pursuant to s 92(13) of the *Constitution*, matters of a

local or private nature pursuant to s 92(16), and jurisdiction to make laws in relation to the development, conservation, and management of non-renewable natural resources under s 92A.

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3.

55 Sections 1(1)(*cc*) of the *OCGA* and 1(1)(*n*) the *PA* include receivers and trustees in the definition of "licensee." As such, receivers and trustees are subject to the statutory obligations of the AER. The AER requires environmental remediation claims to be paid by licensees in priority of all other claims, including those of secured creditors. Where there is any contravention of the Alberta Regime and the AER has suspended or cancelled a licence, or where the AER believes that an asset which the receiver seeks to renounce (a "Renounced Asset") may constitute an environmental or safety hazard, section 3.012 of the *Oil and Gas Conservation Rules* requires the licensee to abandon the renounced asset.

OGCA, supra para 2.
PA, supra para 2.
Oil and Gas Conservation Rules, Alta Reg 151/1971.

56 Sections 29 of the *OGCA* and 25 of the *PA* provide that, upon abandonment of a Renounced Asset, the licensee has continuing responsibility for the control or further abandonment of the asset and for the cost of the abandonment work. Under s 104(1)(a) of the OGCA, the AER may require the licensee to clean up oil, crude bitumen, water or any other substance that has appeared to have escaped the Renounced Asset.

OGCA, supra para 2.
PA, supra para 2.

57 Section 106 of the *OGCA* states that when a licensee fails to pay any debt or comply with any order made by the AER, the AER may suspend any operation of the licensee, refuse to consider an application to transfer the licence, require the licensee to submit abandonment and reclamation deposits before approving a transfer of licence, or require the submission of abandonment and reclamation deposits in an amount determined by the AER. As licensee, the receiver/trustee is, in effect, personally liable towards the AER for the full cost of abandonment obligations.

OGCA, supra para 2.
PA, supra para 2.

58 If the receiver does not comply with the AER's orders, according to sections 110(1) of the *OGCA* and 54(1) of the *PA* it will be guilty of an offence and may be subject to fines up to $500,000 for corporations or $50,000 for individuals. To merit the defence of due diligence, the receiver/trustee must show it took all reasonable steps to prevent the commission of the offence.

OGCA, *supra* para 2.
PA, *supra* para 2.

59 In the present case, the Appellants brought an application requiring the Respondent, as the receiver/trustee, to fulfil its obligations as "licensee" of Redwater. This included accountability for abandonment obligations and maintaining a satisfactory LMR.

60 By complying with the insolvency regime as legislated in the *BIA*, the Respondent did not, and could not, fulfil its obligations under the Alberta Regime with respect to renounced assets, thereby risking considerable personal liability.

F. The *BIA*'s Purpose is Equitable Distribution Among Creditors

61 Parliament enacted the *BIA* pursuant to its exclusive jurisdiction over bankruptcy and insolvency under s 91(21) of the *Constitution*. The SCC has stated two purposes of the *BIA*: (1) the equitable distribution of a bankrupt's assets among creditors, and (2) the bankrupt's financial rehabilitation (*Moloney*).

Constitution, *supra* para 54.
Moloney, *supra* para 5 at para 32.

62 As Redwater is a bankrupt corporation, the bankrupt's financial rehabilitation is not in issue. The equitable distribution of assets is the purpose considered in the present case. Under the court's supervision, the "trustee in bankruptcy" acts on behalf of the creditors to control the assets and liquidation. The equitable distribution of assets is achieved through a single proceeding model under which the bankrupt's creditors participate collectively. This ensures the bankrupt's assets are distributed fairly according to the scheme of distribution laid out in s 136 of the *BIA*.

BIA, *supra* para 1.

(i) *Section 14.06 Defines Environmental Liabilities as Claims*

63 Section14.06 was expressly legislated in response to decisions such as *Northern Badger*, wherein court officers were held liable for the environmental obligations of debtors. Section 14.06 balances the public's interest to remediate environmental damage with the rights of all other creditors to be treated equitably. The ABCA held that, while s 14.06 is a "complete code" for handling environmental liabilities in insolvency proceedings, the general bankruptcy regime applies to environmental claims (*Redwater ABCA*).

Northern Badger, *supra* para 32.
Canada, Parliament, *House of Commons* Debates, 35th Parl, 2nd Sess, Vol No 5 (27 May 1996) at 3030-1 (Mr. Morris Bodnar).

Redwater ABCA, supra para 7 at para 56.

64 Sections 14.06(4) and 20 of the *BIA* assume the right to renounce assets exists. Section 14.06(4) provides that the court officer is not responsible for environmental and remediation work if the court officer renounces the affected property.

BIA, supra para 1.
Redwater ABCA, supra para 7 at para 63.

65 Having no personal liability is not a condition precedent to renouncing property. Rather, the wording of s 14.06 in its plain and ordinary meaning indicates that no personal liability results by its operation. Section 14.06(5) permits the courts to grant a stay of an environmental remediation order on such notice and for such a period as the court deems necessary for the purpose of enabling the trustee to assess the economic viability of complying with the order. Section 14.06(5) clearly allows a trustee to consider factors beyond personal liability, such as economic viability, when determining whether to renounce the property. Otherwise, there would be no need for an assessment period as written into the legislation.

BIA, supra para 1.

G. The Alberta Regime and the BIA Conflict

66 The Alberta Regime and the *BIA* conflict at both branches of the test for federal paramountcy. The provincial laws operationally conflict with the *BIA* and frustrate the purpose of the *BIA*.

(i) *The Alberta Regime Operationally Conflicts with the BIA*

67 There is an operational conflict of laws where "compliance with one is defiance of the other" (*Multiple Access*). The provincial legislation is inoperative to the extent that it requires a trustee to prioritize environmental claims (*Redwater ABCA*).

Multiple Access Ltd. v McCutcheon, [1982] 2 SCR 161 at p 191 [*Multiple Access*].
Redwater ABCA, supra para 7 at para 63.

68 The *OGCA* and the *PA* do not allow a trustee to renounce assets, while the *BIA* does. The Respondent as trustee eliminated its risk of personal liability when it validly disclaimed the licensed properties pursuant to s 14.06(4) of the *BIA*. Given its lawful renouncement of assets, the Respondent cannot be compelled to comply with the AER's abandonment orders. Pursuant to the Alberta Regime, the Respondent remains liable for abandonment and remediation obligations with respect to the Renounced Assets, despite the fact that it disclaimed them under s 14.06(4) of the *BIA*. Because it contravenes the provincial regulatory regime, the Respondent may be found guilty of an offence, subjecting it to precisely the unquantified personal liability that s 14.06 was

enacted to avoid (*Industry Committee*). There is an irreconcilable inconsistency between the provincial and federal legislation when determining whether a trustee can renounce assets. Compliance with both the federal insolvency regime under the *BIA* and the Alberta Regime under the *OGCA* and the *PA* is thus not possible.

Industry Committee, supra para 28 at 15:50 (Jacques Hains), 17:05 (Mr. Shepherd).

69 Section 14.06 states that the *BIA* provisions are applicable "notwithstanding any provincial law." Trustees are not required to fulfil provincial regulatory obligations imposed on the bankrupt, and do not need to take on bad assets (*Redwater ABCA*).

Redwater ABCA, supra para 7 at para 57.

(ii) *The Alberta Regime Frustrates the Purpose of the BIA*

70 The purpose of the *BIA*, to equitably distribute the debtor's assets, is achieved through the collective proceeding (*Moloney*). Provincial legislation frustrates the purpose of the insolvency regime when it alters the priorities, intentionally or unintentionally, as listed in s 136 of the *BIA* by giving priority to one claim over another. Substance over form determines whether there is a conflict; if the effect of the provincial law alters the scheme of priorities laid out in the collective proceeding, it will be rendered inapplicable (*Husky Oil*).

Moloney, supra para 5 at para 34.
Husky Oil, supra para 33 at para 40.

71 The Alberta Regime removes the benefit otherwise available to trustees under the *BIA*. In doing so, it hinders the equitable distribution of a bankrupt's assets among creditors. Because the abandonment orders and requirement for security deposits satisfy the *AbitibiBowater* test for provable claims in bankruptcy, they constitute a debt toward unsecured creditors within the scheme of distribution laid out in s 136 of the *BIA*. Section 14.06(6) expressly states that claims for costs of remediation shall not rank as costs of administration. Accordingly, the cost to fulfil abandonment obligations are to be payed rateably in accordance with s 141 of the *BIA*.

72 By attempting to enforce the Respondent's compliance with the abandonment obligations and requiring security deposits for renounced assets, the AER is attempting to collect provable claims outside of the single proceeding model. If the Appellants' argument is accepted, the financial impact of the licensing obligations will prevent secured creditors from collecting assets and frustrate the purpose of the *BIA*.

H. The Doctrine of Interjurisdictional Immunity Does Not Apply

73 The Appellants submit the doctrine of interjurisdictional immunity (IJI) is triggered because s 14.06 of the *BIA* is an impairment of the province's exclusive jurisdiction with respect to laws in relation to the development, conservation, and management of non-renewable natural resources under s 92A of the *Constitution.* IJI is not engaged. Environmental remediation obligations do not have priority over all other creditors. If the impugned provisions of the *OGCA* and the *PA* were immune from federal paramountcy, personal liability would be imposed on receivers and trustees as "licensees." As noted by the ABCA, the consequence would be, "[t]he prudent lender in the circumstances would simply walk away from its loan, and all of the wells would truly become 'orphaned'."

> *Constitution, supra* para 54.
> *Redwater ABCA, supra* para 7 at para 20.

74 Exclusive jurisdiction over natural resources does not grant the province exclusive jurisdiction over environmental matters. Neither Parliament nor the provinces have exclusive power to legislate over the environment. Rather, laws relating to the environment may be enacted by either level of government where it appropriately relates to a power granted to it by the *Constitution*. While it is appropriate for the Alberta Regime to include environmental matters as they relate to the regulation of natural resources, the Alberta Regime does not have the authority to change the priorities of the *BIA*.

I. Conclusion

75 A careful consideration of the *AbitibiBowater* provable claims test shows that end-of-life obligations for licenced properties are claims provable in bankruptcy. Therefore, according to the scheme of distribution in the *BIA*, such claims do not enjoy super priority in bankruptcy proceedings.

76 Because licencing obligations are provable claims, the Alberta Regime's effect of reprioritizing the distribution ahead of secured creditors is in conflict with the federal insolvency regime. Cooperative federalism recognizes the inherent overlap between the jurisdiction to make laws at each level of government. However, where any reasonable interpretation of the federal act is at odds with a provincial regime, the constitutional principle of federal paramountcy dictates that the federal law must prevail. There is an operational conflict in the present case as

dual compliance with both regimes is not possible. In addition, the Alberta Regime frustrates the purpose of the *BIA* to provide equitable distribution of the bankrupt's assets among its creditors.

77 Alberta has the tools to fix this problem. It can enact legislation to ensure that industry pays. After the Alberta Court of Queen's Bench decision on *Redwater*, the AER doubled the LMR from 1.0 to 2.0 (Bulletin 2016-06). The AER refrained from applying this retroactively as a security deposit may inadvertently trigger more bankruptcies. The AER increased the OFL from $30 million to $45 million for the 2018/19 year (Bulletin 2018-07). The OFL could be increased even more to account for (1) the increase in orphan wells due to sustained decreased commodity prices, and (2) the underestimated expense of abandonment that may be more than fourfold the current estimation (worst-case scenario). The AER could collect more funds for abandonment work using a two-stage bonding and insurance requirement (CD Howe).

> Alberta Energy Regulator, "Licensee Eligibility – Alberta Energy Regulator Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision," *Bulletin 2016-06* (Calgary: AER, 20 June 2016) [Bulletin 2016-06].
> Alberta Energy Regulator, "2018/19 Orphan Fund Levy," *Bulletin 2018-07* (Calgary: AER, 9 April 2018) [Bulletin 2018-07].
> Dan Healing, "AER says $260-billion energy cleanup estimate based on a 'worst-case' scenario", *The National Post* (1 November 2018), online <business.financialpost.com/pmn/business-pmn/aer-says-260-billion-energy-cleanup-estimate-given-by-exec-highly-unlikely> [worst-case scenario].
> CD Howe Institute, "All's Well that Ends Well: Addressing End-of-Life Liabilities for Oil and Gas Wells" (September 2017) at 3, online (pdf): *CD Howe Institute* <www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/Commentary_%20492_0.pdf> [perma.cc/8HNN-H8NZ] [CD Howe].

78 A successful appeal will not provide the provincial coffers adequate funds to properly abandon orphan wells. Creditors will reconsider lending to highly leveraged companies, such as the oil and gas industry. Junior oil companies will be forced out of the market. The very companies that arguably misled the AER to underfund the OFL will now benefit from less competition. A successful appeal will create barriers to entry rather than ensuring the "polluter pays". Small companies will be precluded from efficiently extracting economic value as wells near the end of their producing years. Overall, both efficiency and competition will decrease.

79 The result of allowing the appeal will not achieve the Appellants' desired outcome of fewer orphan wells in Alberta. Trustees will accept fewer appointments for contaminated property. The provincial legislature and the AER must improve the Alberta Regime to lessen the environmental impact associated with orphaned wells. Impeding Parliament's jurisdiction over bankruptcy and insolvency is an unconstitutional and ineffective mode of problem solving.

While the province's intention to address environmental impacts associated with orphan wells is laudable, the means chosen to achieve it – by trying to oust the proper application of the federal bankruptcy regime – is doctrinally incorrect.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

80 The Respondent respectfully requests its costs of this appeal.

PART V -- ORDER SOUGHT

81 The Respondent respectfully requests that the appeal be dismissed.

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

_____
Cassidy Newfield

_____
Shannon Peddlesden

Counsel for the Respondent
Grant Thornton Limited

PART VI -- TABLE OF AUTHORITIES

Paragraph No.

Jurisprudence

Secondary Authorities

(video): SCC www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=37627&id=2018/2018-02-15--37627&date=2018-02-15 **34, 39, 44**

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Jeff Lewis et al, "Hustle in the oil patch: Inside a looming financial and environmental crisis", *The Globe and Mail* (24 November 2018), W1 **7, 14**

Kelly Bourassa, Ryan Zahara & Chris Nyberg, "Restructuring Challenges in the Oil and Gas Sector: the Treatment of Regulatory Orders Post-Redwater" (2016) 54:2 Alta L Rev 383 at 385 **13, 14**

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Alberta Energy Regulator, "Licensee Eligibility – Alberta Energy Regulator Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision," *Bulletin 2016-06* (Calgary: AER, 20 June 2016) **77**

Alberta Energy Regulator, "2018/19 Orphan Fund Levy," *Bulletin 2018-07* (Calgary: AER, 9 April 2018) **77**

Alberta Energy Regulator, "Licensee Liability Rating (LLR) Program and Licence Transfer Process," *Directive 006* (Calgary: AER, 17 February 2016) **2, 12**

Alberta Energy Regulator, "Licensee Liability Rating (LLR) : Updated Industry Parameters and Liability Costs," *Directive 011* (Calgary: AER, 1 August 2015) **2**

Alberta Energy Regulator, "Well Abandonment," *Directive 020* (Calgary: AER, 6 December 2018) **8**

Alberta Energy Regulator, "Who We Are" (2018), online: www.aer.ca/providing-information/about-the-aer/who-we-are **9, 43**

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Constitution Act, 1867 (UK), 30 & 31 Vict, c 3 **54, 61, 73**

Motor Vehicle Accident Claims Act, RSA 2000, c M-22 **24**

Oil and Gas Conservation Act, RSA 2000, c O-6 **2, 8, 11, 55, 56, 58**

Pipeline Act, RSA 2000, c P-15 **2, 8, 11, 55, 56, 58**

Surface Rights Act, RSA 2000, c S-24 **15**

Traffic Safety Act, RSA 2000, c T-6 **25**

PART VII -- LEGISLATION AT ISSUE

Section 14.06 of the *BIA*

No trustee is bound to act

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.

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 #2019-04

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Document #: 1488379