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 # 2019-05

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

AND TO: **ALL REGISTERED TEAMS**

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I. OVERVIEW AND STATEMENT OF FACTS

1. Two issues are submitted to this court, but the resolution of these issues depends on another question: how did Parliament intend s.14.06 of the *Bankruptcy and Insolvency Act* (the "*BIA*") to operate when dealing with an insolvent company that has not met its environmental obligations? Only by successfully answering this question can the Court determine how s. 14.06 interacts with Alberta's regulatory regimes for oil and gas. The Appellants respectfully submit that the questions stated on appeal should be considered from a position that acknowledges the exclusive jurisdiction of a province to regulate non-renewable natural resources.

2. For the reasons submitted below, the Appellants take the position that the lower courts erred in determining that end-of-life claims are provable in bankruptcy and that there is a conflict between the *BIA* and the provincial regulatory regime such that federal paramountcy is engaged.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-5 [*BIA*].

A. Overview of the Appellants' Position

3. The Appellants respectfully submit that the Majority of the Alberta Court of Appeal (the "Majority") took too broad of an interpretation of "real property" in s. 14.06(7)-(8) of the *BIA* when determining that a mineral rights lease fell within this definition. The intention of Parliament in implementing s. 14.06(7)-(8) was for these sections to apply to situations where the debtor had an ownership interest in the land itself, not just a commercial right to resource extraction.

4. By mistakenly applying s. 14.06(8), the Majority subsequently erred in finding that the Alberta Energy Regulator's (the "AER") environmental orders were claims provable in bankruptcy. This finding relied on the incorrect assumption that by issuing an order to comply with environmental obligations, the AER had become a creditor.

5. In interpreting s. 14.06, the focus must be on constructing a harmonious interpretation of provincial environmental legislation and federal insolvency legislation. The effective

functioning of our federal system requires nothing less. In disregarding co-operative federalism and putting disproportionate emphasis on creditor's rights, the Majority made fundamental interpretive errors. These interpretive errors led to an incorrect depiction of the relationship between the application of s. 14.06 to the AER's oil and gas regulatory regime.

6. Reading s.14.06 with co-operative federalism in mind, it becomes apparent that the provincial licensing obligations do not conflict with, or frustrate the purpose of, the federal insolvency legislation. Had the Majority read s.14.06 from this perspective, it would have found that both statutes can operate harmoniously and would not have applied the doctrine of paramountcy.

7. In the alternative, if the Majority's interpretation of s.14.06 were correct, this would be a rare situation where the doctrine of interjurisdictional immunity is necessary to protect the constitutional division of powers. By limiting the province's management of the energy industry to solvent entities, the Majority's interpretation of s.14.06 prevents the effective management of non-renewable resources by the province. Such a dramatic diminution of the province's exclusive jurisdiction would require the application of the corrective doctrine of interjurisdictional immunity.

B. Statement of the Facts

8. The background and facts of this case are set out in the Alberta Court of Appeal decision and are summarized below.

9. The 1867 *Constitution Act* granted provinces exclusive jurisdiction over public lands, property and civil rights. The 1988 addition of s. 92A expanded these general powers. S. 92A gives provinces exclusive jurisdiction to legislate in matters related to the exploration, development, conservation, and management of non-renewable natural resources. In Alberta, the Alberta Energy Regulator ("AER") oversees all aspects of energy development. Non-renewable resource development inherently includes an expiration date. Eventually, the environmental liabilities created by exploiting the resource will outweigh any remaining value in the site. The AER's regulatory regime for

the oil and gas industry accounts for the tipping point in an oil well's life cycle where it becomes a net liability rather than an asset.

> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c.11 at ss. 92(5), (13) and 92A. [*Constitution*].
>
> *Responsible Energy Development Act*, SA 2012, c R-17.3 at s. 2.
>
> *Oil and Gas Conservation Act*, RSA 2000 c.0-6 [*OGCA*].

10. The regulatory regime accounts for the unique circumstances of energy development in Alberta. Oil and gas developers need to obtain three separate types of authorization. The first of these are mineral rights, which are granted by the owner of the minerals – usually the Crown. A Crown mineral rights grant will include a term requiring that the grantee abides by the laws governing extraction and development of the resource in the province. The second type of authorization is an AER licence, which permits natural resource development in a specific site. The AER's licencing regulations set out rules of general application for licensees. Licensees include trustees and receivers administrating licensed sites. The final type of authorization is the right of surface access, usually negotiated separately with the landowner.

> *Orphan Well Association v Grant Thornton*, 2017 ABCA 124 at paras 11 and 31 [*Orphan Well*, ABCA].

11. Consistent with s.92A, the regulatory regime governs the exploration, development, conservation, and management of non-renewable resources. The regime protects the people of Alberta's interest in the economic value of their oil and gas resources. The economic benefit of developing resources is balanced against the public interest in not burdening the taxpayers with unfair costs and risks arising from the development. The regulatory regime seeks to limit and prevent environmental and public health damages caused by resource development. It also protects the property rights of landowners and ensures that they are able to resume use of their land once a licenced site is no longer valuable. To achieve these goals, wells must be abandoned pursuant to regulations. This results in end-of-life obligations for all licenced sites. When there is no entity available to abandon a well, the AER can designate it an orphan well. To prevent the costs of abandoning orphan wells from falling on the public, the AER created the Orphan Well Association ("OWA"). The OWA is a non-profit organization, separate from the AER. It

is primarily funded through industry levies to an Orphan Fund ("OF"). The OWA's mandate is to carry out abandonment of orphaned wells.

Constitution, *supra* at s. 92A.

OGCA, *supra* at ss. 4(c) and 70.

Orphan Fund Delegated Administration Regulation, AR 45/2001 [*OFDAR*].

Orphan Well, ABCA, *supra* at para 22.

12. The regulatory regime accounts for the inevitable end-of-life obligations through the Licence Liability Rating Program ("LLR Program") and the associated licence transfer requirements. The LLR views all sites licensed to an entity as a single package. Every month, a Liability Management Ratio ("LMR") is calculated for the deemed assets and liabilities of a licence package. Licensees are expected to maintain an LMR of greater than 1. An LMR above 1 indicates that a developer has enough deemed assets to cover the expected cost of all of licence obligations. The AER typically refuses to authorize a transfer or sale of licence that would cause the LMR of the seller or purchaser to fall below 1. The LLR Program aims to prevent the end-of-life costs for a licenced site from depleting the OF, or falling on the public. The OWA is intended to be a last resort, not an alternative to a developer carrying out environmental obligations. The OWA's ability to fulfill its mandate depends on the OF. Currently, the OF cannot cover the abandonment of all the orphan wells in Alberta, and that situation is expected to worsen. In 2013/2014 there were 80 orphan wells in the province. In the fall of 2018, there were 2061.

Orphan Well, ABCA, *supra* at paras 15 and 23.

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

Alberta, Alberta Energy Regulator, *Orphan Wells to be Abandoned*, (September 13, 2018) <orphanwell.ca/wp-content/uploads/2018/10/List-of-Orphan-Wells-to-be-Abandoned.pdf>, accessed 15 January 2019.

(i) The Insolvency

13. Redwater Energy Corporation ("Redwater") was an oil and gas company. In 2014, Redwater had AER licences for 127 sites in central Alberta. In 2013, the Alberta Treasury Board ("ATB") advanced funds to Redwater. ATB commissioned a third party report on Redwater's assets and liabilities before advancing the funds. Shortly thereafter,

Redwater experienced financial difficulties. Redwater attempted to sell assets to secure sufficient funds to repay their creditors but was unable to do so. ATB made an application to the court with respect to Redwater's debt.

> *Grant Thornton v Alberta Energy Regulator*, 2016 ABQB 278 at paras 10, 11 and 22 [*Orphan Well*, ABQB].
>
> *Orphan Well,* ABCA, *supra* at para 141.

14. On May 12, 2015, Grant Thornton Ltd. ("GTL") was appointed Receiver for Redwater's assets. The Receiver advised the AER that it would only take control of 20 of Redwater's licenced sites. The renounced sites were those with environmental obligations greater than the remaining value of the wells. The Receiver took the position that they were not obligated to fulfill end-of-life obligations for the renounced sites and that these obligations should therefore not be included when calculating the LMR for the remaining 20 sites. In response, the AER issued the usual environmental abandonment and remediation orders for the renounced sites and directed them to the Receiver.

> *Orphan Well,* ABCA, *supra* at para 6.

15. ATB made an application seeking a bankruptcy order with respect to Redwater, which was granted on October 28, 2015. GTL was appointed Trustee of Redwater's estate. The Trustee, relying on s.14.06 of the *BIA*, took the position that they were not required to comply with the environmental remediation orders. The AER brought applications to have the Receiver's renouncement declared void, and to compel the Trustee to comply with the environmental orders. The Trustee brought a cross-application for approval of the sale and transfer of the 20 sites they had taken control of. The Trustee also brought an application challenging the constitutionality of the AER's position.

> *Orphan Well,* ABCA, *supra* at paras 4, 7 and 8.

(ii) Trial Court Decision

16. The Alberta Queen's Bench dismissed the AER's application, finding that the Trustee could decline to take possession of some of the licenced assets under s.14.06 of the *BIA*. The court applied the *AbitibiBowater* test and concluded that the AER's abandonment orders were claims provable in bankruptcy and would be subject to the same distribution

scheme as other creditors. In the reasons for judgment, Chief Justice Wittmann found that the *AbitibiBowater* test was not satisfied in a narrow and technical sense, but still found the AER to be a creditor because there was a possibility that the sites would be remediated by the OWA in the future. The court found that the AER requiring security for abandonment obligations and refusing to allow a transfer and sale of Redwater's valuable licenced sites would conflict with the *BIA* and would frustrate the distribution scheme by granting the AER a super-priority.

Orphan Well, ABQB, *supra* at paras 170-173, and 179.
Newfoundland and Labrador v. AbitibiBowater Inc., 2012 SCC 67 [*AbitibiBowater*].

(iii) Alberta Court of Appeal Decision

17. The Majority dismissed the appeal. The decision found that s.14.06(4) of the *BIA* was not limited to personal liability of a trustee or receiver and that a mineral lease is an interest in real property which would be subject to s. 14.06. The court found that the operation of the regulatory regime enhanced the financial position of the AER beyond where it would be with a claim provable under the *BIA.* This created an operational conflict between the regulatory regime and the *BIA*'s scheme of distribution to creditors and triggered the constitutional doctrine of paramountcy.

Orphan Well, ABCA, *supra* at paras 63, 68 and 91.

18. In the dissenting opinion (the "Dissent"), Justice Martin focused on cooperative federalism and the importance of prioritizing a harmonious interpretation of legislation. The Dissent found there was no conflict that would trigger paramountcy. The AER licences were not real property and s.14.06 could therefore not be used to avoid the environmental obligations. The Dissent found that s. 14.06 was not intended to apply to the Alberta oil and gas context, noting that s.14.06(7) creates a trade-off where a super-priority is granted to the Crown to the extent of the cost the Crown expends to remediate the property. This trade-off is inapplicable in the Alberta oil and gas industry, as the remediated property will almost never belong to the insolvent licensee.

Orphan Well, ABCA, *supra* at paras 107 and 210.

19. The Dissent also found that *AbitibiBowater* is distinguishable on its facts and that in any event the *AbitibiBowater* test was not met. There is no "monetary claim" as defined in *AbitibiBowater* as there was no "sufficient certainty" that a regulatory body would carry out the work and would be in a position to assert a claim.

20. The AER does not intend to carry out the abandonment of the renounced sites. If the OWA does abandon the sites, it will be at an uncertain point in the future and will be funded primarily by industry. The OWA has no power to make a claim against Redwater's estate because it is not a government body, and therefore is not within the contemplation of s. 14.06(7). The Dissent found that LLR Program and the transfer requirements are obligations that apply to all AER licensees, and predated the insolvency. The simple requirement of posting a security was not enough to turn AER into a creditor.

Orphan Well, ABCA, *supra* at paras 172, and 179-188.

II. QUESTIONS IN ISSUE

21. The questions stated on this appeal are as follows:

1. Did the Court of Appeal err in finding that end-of-life obligations for licenced properties are claims provable in bankruptcy and therefore do not have super-priority in bankruptcy proceedings?
2. Did the Court of Appeal err in holding that the licence obligations created by provincial legislation conflict with or frustrate the scheme of priorities set out in the BIA?

III. ARGUMENT

A. Issue 1: Claim Provable in Bankruptcy

(i) *Northern Badger* Established the Applicable Statement of Law in Alberta

22. In *Northern Badger*, the Alberta Court of Appeal found that orders to remediate oil and gas wells are not generally claims provable in bankruptcy. The court ruled that the legal obligation to remediate oil and gas wells exists as part of the general law of the

province. As such, the duty to remediate is owed to the public as a whole, not to a provincial regulatory body. The court went on to state that it is only when the provincial regulator opts to undertake this remediation work itself and subsequently seeks compensation that this public duty is converted into a monetary obligation, and thus a claim provable in bankruptcy. The Majority acknowledged that *Northern Badger* has formed the basis for both provincial law and industry practice in Alberta since 1991. The AER has operated on the understanding that the principles espoused in *Northern Badger* are correct. Amendments to the *OGCA* which added receivers and trustees to the definition of "licensee" confirms Alberta's adoption of *Northern Badger*.

> *Panamericana de Bienes y Sercicios, SA v Northern Badger Oil & Gas Ltd*., 1991 ABCA 181 at para 33 [*Northern Badger*].
>
> *Orphan Well*, ABCA *supra* at para 52.
>
> *OGCA*, *supra* at s.1(1)(bb)

(ii) The Effect of the *AbitibiBowater* Decision on the Conclusions of *Northern Badger*

23. In *AbitibiBowater*, the court found that an environmental order may be a claim provable in bankruptcy even if the order is not directly in monetary terms as long as it is intended to operate indirectly to the same effect. When determining whether an order is a provable claim, the court identifies three criteria which must be met: (1) the obligation must be owed to a creditor, (2) the obligation must be incurred before the debtor is bankrupt, and (3) it must be possible to attach a monetary value to the debt. The court, in part, justifies moving away from the standard in *Northern Badger* by referencing the evolution of insolvency legislation since that decision's release. A large part of this evolution was the amendment of the *BIA*, specifically the addition of s.14.06. As stated in the Dissent, both the statutory language of the section and Hansard evidence suggest that Parliament's purpose in introducing these provisions was to protect the insolvency professionals from *personal* liability for environmental clean-up costs. It was not intended to apply where no claim of personal liability had been made to aid secured creditors in their pursuit of the bankrupt's assets.

> *AbitibiBowater*, *supra* at paras 31, 26, and 47.
>
> *Northern Badger*, *supra*.

Orphan Well, ABCA, *supra* at para 197.

BIA, supra at s.14.06.

24. The Majority relied heavily on *AbitibiBowater* in claiming that the conclusions of *Northern Badger* are no longer valid. However, the effect of the *AbitibiBowater* decision was not to invalidate the findings of *Northern Badger*, but only to reduce their scope. *Northern Badger*'s conclusion that environmental orders which do not seek specific monetary compensation are not "provable claims" applies to the facts at issue in this appeal. The test articulated in *AbitibiBowater* does not.

Orphan Well, ABCA *supra* at para 63.

BIA, supra at s.14.06.

AbitibiBowater, *supra.*

(iii) The *AbitibiBowater* Test Does Not Apply to the Facts at Issue.

25. The Appellants submit that the application of s.14.06(7)-(8) of the *BIA* is a necessary precondition to the applicability of the test in *AbitibiBowater*. The court in *AbitibiBowater* explicitly identifies the statutory compromise of s. 14.06(7)-(8) of the *BIA* (by referencing an analogous provision of the *Company Creditors Amendment Act*) as being relevant to their formulation of the three-step test. The statutory language of s.14.06 of the *BIA*, as well as the discussion of the provision in *AbitibiBowater*, indicate that the section was drafted to deal with environmental orders for the remediation of *real property* of the debtor. The statutory compromise of s.14.06(7)-(8) of the *BIA* is inapplicable to the Alberta oil and gas regulation due to the unique nature of the licensee's interest in the contaminated property.

BIA, supra at s.14.06.

AbitibiBowater at paras 32 and 31.

Company Creditors Arrangement Act, RSC 1985 c.C-36 at s.11.8(8) [*CCAA*]..

26. In Alberta, the oil and gas licensee possesses a unique property right conveyed by a mineral lease, alternatively conceptualized as a *profit a prendre*. However, the statutory language of s.14.06 refers to "real property of the debtor", s.14.06(7)-(8) was premised on the idea that the debtor has some ownership interest in contaminated real property. If the debtor is unable or unwilling to remediate the property themselves, s.14.06(7) allows

the remediation costs borne by the regulator to be secured by a charge on the real property of the debtor's that has been remediated. What makes the Alberta oil and gas regime unique is that the owner of the contaminated real property is not the debtor, but a third party. The regulator's remediation costs cannot be secured by the "real property of the debtor" identified in s.14.06(7). For this reason, the facts at issue are distinguishable from cases where the *AbitibiBowater* test was applied, such as *Nortel* and *Northstar*. Both of these cases dealt with clean-up orders regarding real property in which the debtor had an ownership interest

> *BIA, supra* at s.14.06.
> *AbitibiBowater, supra.*
> *Nortel Networks Corporation (Re),* 2013 ONCA 599 [*Nortel*].
> *Northstar Aerospace Inc (Re),* 2013 ONCA 600 [*Northstar*].

27. Even if the "real property of the debtor" can be conceptualized as the mineral lease of the debtor, such property will be practically valueless. The remediation process occurs after the substantial benefit of the mineral lease has been exhausted. As recognized by the Majority, once a well is remediated the debtor has "no property interest of value left". Accordingly, there is no property interest in possession of the debtor which is capable of fulfilling one side of the bargain struck by Parliament in enacting s.14.06(7)-(8) of the *BIA*. The governmental entity that undertakes the remediation is provided with no priority to assets of value from which to recoup its costs. As s.14.06(7)-(8) does not apply to the facts at issue, it follows that using a test premised on these sections being applicable is incorrect. Absent the application of the *AbitibiBowater* test, the statement of law in *Northern Badger* continues to govern.

> *Orphan Well,* ABCA, *supra* at para 56.
> *BIA, supra* at s.14.06(7)-(8).
> *AbitibiBowater, supra.*
> *Northern Badger, supra.*

(iv) Policy Implications of Conceptualizing Non-Monetary Regulatory Orders as "Provable Claims"

28. There are problematic policy implications associated with allowing non-monetary environmental obligations to be "provable claims" when the debtor's property interest is intrinsically valueless after the land is remediated. Finding environmental regulatory orders to be provable claims puts sizeable financial burdens on both the public and the solvent oil and gas industry. As acknowledged by the Majority, when insolvent oil and gas companies fail to meet their regulatory duties the financial burden falls on the solvent participants in the industry, third-party landowners, and society at large. The Majority dismissed these troubling policy implications by stating that such considerations "cannot override the plain wording of the statute". The fact this case has been subject to multiple appeals and has generated a lengthy and compelling dissent from Justice Martin arising largely from fundamental disagreements regarding the interpretation of s.14.06 of the *BIA*, suggests that the statutory wording is not as plain as the Majority asserts. The Majority also states that any issues of fairness were weighed and considered by Parliament in amending the *BIA*, and cites of *AbitibiBowater* to support this proposition. However, the parliamentary balancing discussed by the court in *AbitibiBowater* does not apply to the facts at issue in this case. The balance described in *AbitibiBowater* requires real property of the debtor's that the regulator can place a charge upon under s.14.06(7) of the *BIA*. Without this mechanism allowing the regulator to secure some measure of its remediation costs, it cannot be said that Parliament truly considered the policy implications for the facts at issue in this appeal.

Orphan Well, ABCA, *supra* at para 95, 32, and 44.
BIA, supra at s.14.06(7).
AbitibiBowater, *supra.*

(v) The Appellate Decision is Contrary to the "Polluter-Pay" Principle

29. Finding these types of regulatory obligations to be provable claims also runs contrary to the "polluter-pay" principle that forms the underlying theory of both provincial and federal environmental law, as recognized in *Imperial Oil*. This principle imposes on

polluters the costs of remedying the effects of environmental damage they have caused. In this case, the party who has directly undertaken the polluting activity is insolvent and is incapable of bearing the costs. Given the polluter's insolvency, the fundamental question becomes who should bear the financial burden. The result of applying the Majority puts the burden largely on taxpayers and third-party landowners. The Appellants submit that the polluter-pay principle suggests that the more appropriate answer is for Redwater's creditors to bear the burden of remediation costs. Secured creditors who finance oil and gas producers are not uninterested third-parties who have been exposed to unanticipated risk. As noted in the Dissent, lenders have factored the cost of compliance with regulatory obligations into their risk assessment and resulting interest rates. By financing oil and gas production, the secured creditors have also facilitated the polluting activity and reaped the benefit of interest payments that have been generated through the polluting activity. Given these facts, the polluter-pay principle would suggest that s.14.06 should not be interpreted so as to grant the secured creditors a windfall by giving them better security than they had originally bargained for.

Imperial Oil Ltd. v. Quebec (Minister of the Environment), 2003 SCC 58 at para 23 [*Imperial Oil*].

Orphan Well, ABCA, *supra* at para 34 and 239.

(vi) The Environmental Orders Are Not Provable Claims Pursuant to the Test in *AbitibiBowater*

30. Even if this court accepts that the test for provable claims in *AbitibiBowater* is applicable to situations where there is never any remediation of the real property owned by the bankrupt and subject to the creditor's security, the Appellants submit that these orders are still not provable claims. Under the test laid out in *AbitibiBowater*, to be a provable claim the liability must be owed to a creditor, the obligation giving rise to the liability must be incurred before the debtor becomes bankrupt, and it must be sufficiently certain that the regulatory body will perform the remediation work. The orders at issue are not provable claims under this framework, as the AER is not a creditor of Redwater, and it is not sufficiently certain that the AER will conduct the remediation work and exert a monetary claim.

AbitibiBowater, *supra* at para 26 and 46

(vii) The AER is Not a Creditor of Redwater

31. In enforcing the regulatory obligations imposed by the *OGCA*, the AER did not become a creditor of Redwater. The court in *Northern Badger* recognized a fundamental distinction between enforcement of regulatory public duties and the monetary claims of a creditor. Under *Northern Badger* and *AbitibiBowater*, the regulator only becomes a creditor when it has satisfied the regulatory obligations on behalf of the insolvent party and has submitted a monetary claim, or when there is "sufficient certainty" that the regulator intends to do so.

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

32. The court in *AbitibiBowater* laid out a broad description of when a regulator identifies themselves as a creditor, stating that if the regulator has exercised its enforcement power against the debtor, it is a creditor. However, the Appellants submit that "exercise of enforcement power" has to be read narrowly, and within the factual context of *AbitibiBowater*. One can see the absurd consequences that flow from identifying a regulator as a creditor for any and every exercise of its enforcement duties.

AbitibiBowater, *supra* at para 27.

33. It is apparent that "exercise of enforcement power" must have a narrow interpretation, limited by the factual context in which it was formulated. *AbitibiBowater* involved an order by the province that compelled Abitibi to remediate certain contaminated lands. These lands were owned by the province, having been expropriated from Abitibi by the province. As such, the entity ordering enforcement had a direct interest in the land's remediation. The facts at issue here are quite different. The contaminated lands in question are owned by third parties, not the entity ordering enforcement. The AER does not have any monetary interest in the subject of its enforcement order. It is issuing these orders to ensure that a public duty will be discharged. It should not be conceived of as a creditor solely because of its insistence on compliance with the provincial licensing regime.

AbitibiBowater, supra at para 6

(viii) It is not "Sufficiently Certain" that a Monetary Claim Will Be Made by the Regulator

34. In order to meet the third step of the *AbitibiBowater* test, there must be "sufficient certainty" that the regulator will perform mediation work and assert a monetary claim. It is not sufficient, as the Majority suggests, that complying with the order would require a monetary expenditure by the insolvent licensee. This would lower the standard to the point that any regulatory order with financial consequences would be a "provable claim" and cannot be what the court in *AbitibiBowater* intended. In *Nortel*, the court warns against this type of reasoning and clarifies that the "sufficiently certain" criterion is not limited to the facts in *AbitibiBowater* but is a general feature of contingent claims in bankruptcy. The court in *Nortel* went on to find that the order in question was not a provable claim because it was not sufficiently certain the regulator would perform the remediation that had been ordered. In *Nortel's* companion case *Northstar*, the court found there was "sufficient certainty", as the Ontario Ministry of Environment had already begun clean-up work on the property. However, once again, the court acknowledged that the "sufficient certainty" criterion is a required part of this analysis.

AbitibiBowater, supra at para 46.
Nortel, supra at para 31.
Northstar, supra at para 21.

35. Given the "sufficient certainty" criterion, the Appellants submit that the third step of the *AbitibiBowater* test is not met. There are two reasons for this conclusion. First, it was acknowledged in the Trial Decision that the AER very rarely performs remediation work itself. This is not a case like *Northstar* where the regulator has already been instructed to begin remediation work. When the AER does perform this work, it almost never claims reimbursement for the expense of remediation. As explained in the Dissent, if remediation was to be performed it would likely be performed by the OWA. Secondly, even if the OWA could be construed as "the regulator" in conducting the remediation (which the Appellants dispute), the OWA does not have the ability to seek compensation for its expenses from Redwater or any licensee. Not only is it not "sufficiently certain" that a monetary claim will be exerted by the regulator or OWA, but it is also extremely

unlikely that the regulatory orders at issue will be the subject of a monetary claim. Accordingly, the third step of the *AbitibiBowater* test is not met, and the AER orders at issue are not provable claims.

AbitibiBowater, supra.
Orphan Well, ABQB, *supra* at para 173.
Northstar, supra at para 21.
Orphan Well, ABCA, *supra* at para 179 and 180.

B. Issue 2: There is No Conflict Between the Regulatory Regime and the *BIA*

36. Cooperative federalism exists both as a principle of statutory interpretation and as an aspirational guide in shaping the landscape of constitutional law in Canada. Cooperative federalism is particularly essential when it comes to environmental regulation, as provincial and federal jurisdiction overlap in that area. Courts should ensure that legislative interpretation is sufficiently flexible to allow provincial regulatory laws to operate absent a clear indication that Parliament intended to oust them. Wherever possible, courts should prefer a harmonious interpretation of legislation.

R v Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401 [*Zellerbach*].
Canadian Western Bank v Alberta, 2007 SCC 22 at paras 74-75 [*CWB*].

37. The Appellants respectfully submit that the lower courts erred by framing the issues on appeal as a question of creditor's rights, rather than approaching the case from the perspective of cooperative federalism. Bankruptcy necessarily touches on the provincial jurisdiction over property and civil rights and must align as harmoniously as possible with provincial laws governing that area.

38. The unique context of oil and gas regulation in Alberta was the basis of the *Northern Badger* decision. Prior to the trial court decision in the case at bar, *Northern Badger* reflected the law on how the *BIA* operates in the context of Alberta's energy industry. Neither *AbitibiBowater* nor s. 14.06 were meant to operate in a system where the environmental harms of industry fell on land owned by a third party, and they should not overturn a legal decision developed for that exact scenario. For the past 25 years, the regulatory regime and the *BIA* have coexisted. The Respondent's interpretation of s.14.06 allows federal legislation to force the AER to accept a sale and transfer of a provincially

regulated licence. This would allow a trustee to bypass the AER's licencing requirements and would hobble the AER's ability to regulate the development of non-renewable resources. The federal government does not have the jurisdiction to override those requirements for a solvent licence seller, and it would take an impermissibly expansive interpretation of s.91(12) to find that federal jurisdiction extends that far for an insolvent seller.

Orphan Well, ABCA, *supra*.
Constitution, *supra* at s. 91(12).

39. There is an accepted principle that a province cannot do indirectly what they cannot do directly. Disallowing this appeal is tantamount to saying that the federal government can.

Alberta (Attorney General) v Moloney, 2015 SCC 51, at para 28 [*Moloney*].

(i) The Licence Obligations Do Not Conflict With or Frustrate the Purposes of the *BIA*

40. The doctrine of paramountcy operates as an exception to the principle of cooperative federalism. It renders an otherwise valid provincial statue inoperative to the extent that it conflicts with federal legislation. Courts apply paramountcy sparingly, and only when there is a clear conflict between provincial and federal legislation. This allows both levels of government the greatest possible flexibility in legislating over their respective jurisdictions.

Moloney, *supra* para 27.
Saskatchewan (Attorney General) v Lemare Lake Logging Ltd., 2015 SCC 53 at para 21 [*Lemare*].

41. Paramountcy applies when there is an operational conflict between a provincial and a federal law, or when a provincial law frustrates the purpose of a federal law. The burden for establishing that paramountcy applies is on the party alleging the conflict and is not easy to discharge. Courts should avoid using paramountcy to render legislation enacted in the public interest inoperative. Alberta's regulatory regime is meant to protect the environment and public safety, and the Court should carefully consider the test for paramountcy in light of that. The Appellants submit that the paramountcy doctrine does

not apply in this case, and that harmonious interpretation of the legislation is the correct approach.

CWB, supra at paras 27 and 69 [*CWB*].
Moloney, supra at para 62.

(ii) Operational Conflict

42. The alleged operational conflict ceases to exist when s.14.06 is correctly interpreted, as submitted above. An operational conflict must be a genuine, not merely a speculative, inconsistency between two laws that makes simultaneous compliance impossible. Even a superficial possibility of dual compliance is enough for a court to find there is no operational conflict.

Moloney, supra at paras 20 and 109.

43. When cooperative federalism is the starting presumption while reading s.14.06, it only grants receivers and trustees the power to avoid personal liability. To the extent that the regulatory regime might impose liability on a trustee beyond the value of the administered assets, it would conflict and paramountcy would rightly apply. However, the AER has never sought fulfillment of a regulatory obligation at a trustee's personal expense, either directly or by reducing the value of the estate to the point where the trustee could not recover its fees, and it is not doing so here. Including a trustee as a licensee under the regime does not inherently create a conflict. The purpose is to allow the trustee to operate licensed assets. Exempting receivers and trustees from regulatory requirements is an intrusive step. It should not be read into the *BIA* without an explicit indication of Parliamentary intent. To find otherwise is to grant bankruptcy estates and secured creditors with the kind of sweeping immunity from provincial laws of general application that the SCC has deemed to be constitutionally unacceptable.

CWB, supra at para 38.

(iii) Frustration of Federal Purpose

44. The regulatory regime does not frustrate the purposes of s.14.06 so as to trigger the application of federal paramountcy. Courts must carefully and narrowly define the purpose of the federal legislation when applying paramountcy. The conflict must be between the operation of the provincial law and the purpose of the federal provision involved, not the overarching value of Parliament legislating in the area. The mere existence of federal legislation in the area of environmental obligations in bankruptcy does not mean that Parliament intended to preclude all provincial legislation in that area. To ascribe too broad of an interpretation of Parliament's purpose risks reviving the "occupied field" theory of paramountcy.

> *Lemare, supra* at paras 20 and 21.

45. The first step in applying the frustration of federal purpose test is to determine the purpose of the federal statute. SCC jurisprudence has determined that the purpose of the BIA is twofold: (1) to ensure the orderly and fair distribution of the bankrupt's property among its creditors, and (2) to rehabilitate the insolvent. As Redwater is a corporation, only the first purpose applies. The next step is to determine whether the provincial legislation frustrates that purpose.

> *Husky Oil Operations Ltd. v Minister of National Revenue*, [1995] 3 SCR 453 at para 7 [*Husky Oil*].
>
> *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39 at para 66 [*COPA*].

46. The AER's regulatory regime does not frustrate the purpose of the *BIA*. In *Northern Badger*, the court found that the predecessor legislation of the regulatory regime was a law of general application regulating oil and gas wells, and not aimed at changing the priority distribution scheme of the *BIA*. Instead, the effect of the regulatory regime is to preserve the true value of the bankruptcy estate. The net value of a bundle of licences is intentionally indivisible under the regulatory regime. Ascribing a value to the licenses that ignores the liabilities does not accurately reflect the actual value of the asset. The AER is not a creditor under the *BIA*, and enforcing the environmental obligations is not an attempt to jump to the front of the line. The purpose of the BIA is not, and has never

been, to increase the value of distributable assets from what it would be under provincial law.

Northern Badger, supra at para 63.

47. In addition to the principle of cooperative federalism, a conflict between the provincial regime and the *BIA* would go against the presumption that Parliament only enacts laws that are valid and consistent with existing legislation. The federal *National Energy Board Act* (*"NEBA"*) contains comparable provisions to order costs for the abandonment and environmental remediation of pipelines. S. 21 of the *NEBA* regulates permit transfers, which require authorization from the National Energy Board, and are subject to existing and additional terms. Disallowing the appeal puts the *NEBA* provisions in danger of frustrating the *BIA*. It is presumed that Parliament was aware of the s.14.06 when enacting the *NEBA* amendments in 2015, and would have explicitly indicated an intention to exempt trustees and receivers from those obligations rather than leaving it open to the courts to employ a harmonious interpretation.

Newfoundland and Labrador (Workplace Health, Safety and Compensation Commission) v Ryan Estate, 2013 SCC 44 at para 81 [Ryan].

National Energy Board Act, R.S.C. 1985, c. N-7 at ss. 21 and 48.11-48.17 [*NEBA*].

48. Parliament has also referentially incorporated Alberta's regulatory regime through s. 4(c) of the *Indian Oil and Gas Regulations*. Allowing s.14.06 to render the AER's regulatory regime inoperative would have the anomalous result of rendering resource development laws and regulations for federally controlled Indian reservations inoperative as well. To suggest that the *IOGR*'s environmental and safety regulations can be overruled by the *BIA* would bring into issue the duty and honour of the Crown in respect to dealings with First Nations in Canada.

Indian Oil and Gas Regulations, 1995 (SOR/94-753) at s. 4(c).

49. The *BIA* does not grant a trustee more rights than the bankrupt. A trustee in bankruptcy simply steps into the shoes of the bankrupt. The trustee cannot dispose of assets the bankrupt does not have. Redwater cannot unbundle their licences to sever the environmental obligations of the renounced sites from the value of the profitable ones. If the Respondent's position is accepted by this Court, the effect is to allow the Trustee to

dispense unburdened assets in a manner that would be impermissible outside of an insolvency proceeding.

Saulnier (Receiver of) v Saulnier, 2008 SCC 58 at para 50 [Saulnier].

(iv) The Respondent's Position Gives Rise to Provincial Interjurisdictional Immunity

50. In the alternative, even if the majority's interpretation of s. 14.06 were correct, this is a rare situation where the doctrine of federal paramountcy would give way to the corrective constitutional doctrine of provincial interjurisdictional immunity ("IJI").

51. IJI protects Canada's constitutional division of powers. These powers are granted exclusively to one level of government. The provincial and federal governments have equal power to legislate within their own spheres. When legislation of one government intrudes on the sphere of the other beyond acceptable constitutional limits, the doctrine renders the intruding legislation inapplicable to the extent of the unacceptable impairment on the protected core. The doctrine is applied sparingly, but it has not been eliminated as it provides a failsafe against the degradation of the division of powers. IJI is reciprocal and can be used to protect provincial heads of power. Provincial IJI is necessary to ensure that the operation of federal paramountcy does not undermine the values of cooperative federalism.

Moloney, supra at para 15.
COPA, supra at para 42.
Ryan, supra at para 56 and 57.
CWB, supra at para 35.

52. There are two-prongs in the test to trigger IJI. This test balances the protection of exclusive heads of power with the overarching importance of cooperative federalism. The first prong of the test looks at whether a statute of one government trenches on the protected core of the other. In practice, it is nearly impossible for one level of government to legislate effectively without infringing on the jurisdiction of the other to an extent. Because of this, the second prong of the test determines whether the trenching is sufficiently serious to trigger IJI. Appropriately, the burden on a party seeking to

engage IJI is not easy to meet. The Appellants submit that the burden has been met in this instance.

COPA, supra at para 27.

53. The first step in applying the test for IJI is to determine if s.14.06, as interpreted by the Respondent, trenches on a protected core of provincial power. A protected core is the authority that is absolutely necessary to enable a level of government to achieve the purpose for which exclusive jurisdiction over an area was conferred by the *Constitution.* The protected core must be defined narrowly and specifically. In the past, provincial reliance on IJI has been denied because the defined core was too broad. That is not the case here. In s. 92A(1), the *Constitution* grants provinces exclusive power to explore, conserve and manage non-renewable natural resources. This exclusive jurisdiction is bolstered by s. 92A(3), which specifies that federal laws enacted in relation to s. 92A(2) have precedence, but notably does not extend this precedence to s. 92A(1). This inherently requires that provinces have the discretion to allow or disallow resource development and to specify the manner and extent of that development. Without this discretion, s. 92A(1) is meaningless. The AER's regulatory regime is how Alberta has chosen to fulfill this exclusive constitutional mandate. The Respondent's interpretation of s.14.06 undoubtedly trenches on this protected core, by purportedly allowing the Trustee to ignore the regulatory regime's requirements.

COPA, supra at paras 35 and 37.
PHS Community Services Society v Canada (Attorney General), 2011 SCC 44 at para 60 [*PHS*].
Constitution, supra at s. 92A.

54. The second prong of the test requires that the trenching be sufficiently serious as to be constitutionally unacceptable. This is a high threshold, as the trenching must impair the core competence, not merely affect it. In this instance, if the appeal is not allowed s.14.06 limits the AER's management of the energy industry to solvent entities. It would be almost impossible for the AER to effectively manage and conserve oil and gas resources if a trustee can sidestep industry regulations with a court order. The Respondent's definition of s.14.06 would trigger the doctrine of provincial IJI and would be inapplicable with respect to the AER's regulatory regime.

COPA, supra at para 42 and 43.

CWB, supra at para 48.

IV. SUBMISSIONS IN SUPPORT OF COSTS

55. The Appellants do not seek costs, and submit that no costs should be awarded against them.

V. ORDER SOUGHT

56. The Appellants request that the appeal be allowed and that the following additional orders be granted:

1. The court order to allow the transfer and sale of the licenses be revoked; and
2. The Trustee be compelled to comply with the AER's environmental orders for abandonment of the renounced sites.

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

_____
Jordyn Bogetti

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Nicholas Tollefson

Counsel for the Appellants
Orphan Well Association and Alberta Energy Regulator

VI. TABLE OF AUTHORITIES

Paragraph No.

Cases

Legislation

Other

ORPHAN WELL ASSOCIATION and ALBERTA ENERGY REGULATOR
APPELLANTS
(Appellants)

-and-

GRANT THORNTON LIMITED
RESPONDENT
(Respondent)

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

SUPREME ENVIRONMENTAL MOOT
COURT OF CANADA

FACTUM OF THE APPELLANTS ORPHAN WELL ASSOCIATION and ALBERTA ENERGY REGULATOR

TEAM # 2019-05

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