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 COURT OF APPEAL OF ALBERTA)

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 # 2019-06

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

AND TO: **ALL REGISTERED TEAMS**

TABLE OF CONTENTS

PART I -- OVERVIEW AND STATEMENT OF FACTS

1 In 1997, Parliament introduced amendments to the *Bankruptcy and Insolvency Act* ("***BIA***") to specifically address how to deal with the environmental liabilities of insolvent companies. Parliament intended section 14.06 of the *BIA* to be a complete code for all creditor claims concerning environmental obligations. Parliament has clearly legislated that receivers and trustees have the power to renounce environmentally damaged properties. The Alberta Energy Regulator ("**AER**") and the Orphan Wells Association ("**OWA**") now seek to circumvent Parliament's will and bind Grant Thornton Limited ("**GTL**") to provincial legislation that reorders the creditor distribution scheme set out under the *BIA*.

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

2 This appeal raises two issues: 1) whether environmental remediation obligations are provable claims in bankruptcy, and 2) whether the provincial environmental legislation that regulates the Alberta oil and gas industry is rendered inoperative by the doctrine of paramountcy to the extent that it conflicts with the *BIA*. Both the chambers judge and the Alberta Court of Appeal held that the inclusion of trustees as "licensees" under the provincial regime operationally conflicts with section 14.06 of the *BIA* and that the Abandonment Orders constitute a provable claim in bankruptcy. Further, both courts held that the provincial regime frustrates the *BIA*'s purpose to distribute assets among all creditors equitably.

3 The Appellants seek to reinterpret the *BIA* to give a super-priority to environmental liabilities that Parliament did not intend to create. If this Court reverses the decisions below, the provincial regime will allow the AER to assert claims and impose personal liability on trustees and receivers in a manner that is contrary to the language and intent of the *BIA*. The costs of remediation and the risk of personal liability will deter insolvency professionals from taking on insolvent debtor company mandates that have substantial environmental liabilities. The costs and risks will erect significant barriers to investment in the oil and gas sector including in the financial rehabilitation of insolvent entities and their assets. Without the assistance of insolvency professionals, it is more likely that all assets of an insolvent company will be placed the Orphan Fund rather than just the ones that are unsellable. Ultimately, this appeal should be dismissed with costs payable to the Respondent.

A. Overview of the Respondent's Position

4 To determine if the Abandonment Orders are provable claims in bankruptcy, the correct legal test to apply is the *Abitibi* test. The Alberta Court of Appeal correctly applied the *Abitibi* test and concluded that the Abandonment Orders are provable claims in bankruptcy. The AER was correctly identified as a creditor, and the Abandonment Orders issued by the AER are monetary in nature. In the alternative, if the Abandonment Orders are not monetary, it is sufficiently certain that either the AER or the OWA will undertake the abandonment work. By arguing that these orders are not provable claims, the Appellants are attempting to unfairly reorder the bankruptcy scheme of distribution set out under section 136 of the *BIA*.

Newfoundland and Labrador v AbitibiBowater Inc, 2012 SCC 67 [*Abitibi*].

5 The provincial statutory regime in issue further conflicts with the operation and legislative purposes of the *BIA*, thus engaging the doctrine of federal paramountcy. By imposing continuing obligations and liabilities upon GTL, the provincial scheme effectively subverts the protections and rights granted in section 14.06 of the *BIA*. This position renders the provincial provisions inoperative to the extent of the conflict. The Appellants undermine the intent of Parliament by prioritizing the provincial regime over federal protections and statutorily granted rights regarding environmental obligations of trustees under the *BIA*.

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

B. The Respondent's Position Concerning the Appellants' Facts

6 GTL offers the following additional facts as a supplement to the Appellants' facts.

a) Background Facts

7 In 2013, Alberta Treasury Branches ("**ATB**") advanced funds to Redwater, becoming its principal secured lender. By mid-2014 Redwater was experiencing financial hardship and was unable to meet its financial obligations. As a result, ATB demanded repayment of Redwater's loans and Grant Thornton Limited ("**GTL**") was appointed Receiver on May 12, 2015, under the *BIA*.

8 In a letter dated May 14, 2015, the AER stated that the transfers of AER licences required application and approval by the AER. The AER warned GTL that it would not approve any transfers of Redwater's oil and gas assets unless Redwater's Liability Management Rating ("**LMR**") ratio was maintained. Moreover, the AER asserted that:

1) it was not a creditor and did not assert a provable claim in bankruptcy;
2) GTL was legally and statutorily obligated to comply with Redwater's AER licence obligations;
3) the environmental obligations must be fulfilled prior to distributing funds to "creditors, secured or otherwise"; and,
4) Alberta and federal law supported the AER's position.

9 On July 3, 2015, GTL advised that it would take possession of approximately 20 of the 127 properties licenced by the AER. The AER responded by issuing abandonment orders dated July 14, 2015, and August 7, 2015 (the "**Abandonment Orders**") for AER licenced assets of which GTL did not take possession.

10 In the accompanying cover letter dated July 15, 2015, the AER stated that if Redwater failed to abandon the sites according to the dates outlined in the Abandonment Orders, the AER would "use its process to have the properties abandoned" and "exercise all remedies available to it to recover costs from the liable parties". Moreover, in accordance with its standard policies, it would not permit the transfer of producing wells unless the non-producing wells were sold with them or security was posted to cover the anticipated environmental obligations.

11 According to the August 13, 2015 sworn affidavit evidence of the Executive Vice President and General Counsel for the AER, if Redwater's LMR ratio worsened, the AER would only consent to transfer licences if GTL: 1) posted a security deposit in an effort to reduce the liability; 2) abandoned and reclaimed some licenced properties so that deemed liabilities would decrease; or 3) sold asset packages in a way that essentially balanced good and bad assets so that the LMR was maintained. The AER acknowledged that its stance would inevitably reduce sale proceeds realized through the sales process.

12 On October 28, 2015, a bankruptcy order was issued appointing GTL as the trustee in bankruptcy. On November 2, 2015, GTL disclaimed the assets that it had previously renounced as receiver and indicated that it would not comply with the environmental remediation orders.

b) **The Provincial Regime**

13 The AER was established under the *Responsible Energy Development Act* and derives its authority to regulate the oil and gas industry from the *Oil and Gas Conservation Act* ("***OGCA***") and the *Pipeline Act* ("***PLA***") (together the "**provincial regime**"). Through this legislation, separate licences are granted to oil and gas wells and pipelines, and the licensees are subject to conditions pertaining to aspects of the operation, disposition and future end-of-life obligations. These end-of-life obligations aim to preserve public safety by ensuring that the well is "capped" and the surface remediated. The AER may issue Abandonment Orders requiring end-of-life obligations to be completed.

> *Directive 020: Well Abandonment; Environmental Protection and Enhancement Act*, RSA 2000, c E-12, s 137.
> *Responsible Energy Development Act*, SA 2012, c R-17.3.
> *Oil and Gas Conservation Act*, RSA 2000, c 0-6 [*OGCA*].
> *Pipeline Act*, RSA 2000, c P-15 [*PLA*].

14 The provincial regime utilized by the AER encompasses the holdings from *Northern Badger*. The issue in *Northern Badger* was whether the receiver could pay net sale proceeds to the secured creditors or whether it had to devote sufficient funds to cover Northern Badger's abandonment costs of seven wells. The chambers judge held that the creditors had priority. However, the Alberta Court of Appeal reversed this decision and found that the environmental obligations had priority for two reasons. First, the Board's order did not create a claim provable in bankruptcy because the Board was not a creditor; instead, the obligation was inchoate from the day of drilling. Second, enforcement of the policy was general law, not a recovery of money. The impact of *Northern Badger* was to make receivers responsible for discharging environmental obligations of an insolvent company and to place environmental remediation costs ahead of secured creditor claims. In 1994, the Alberta Legislature codified *Northern Badger* by including receivers and trustees into the definitions of "licensee" in its provincial regime.

> *Panamericana de Bienes y Sercicios, SA v Northern Badger Oil & Gas Ltd*, 1991 ABCA 181 [*Northern Badger*].
> *Orphan Well Association v Grant Thornton Limited*, 2017 ABCA 124 at paras 49, 52 [*Redwater, CA Decision*].

15 To assess the financial ability of licensees to meet abandonment obligations, the AER uses a Licensee Liability Rating ("**LLR**") that employs a formula to estimate the value of the assets of a company against the owed end-of-life obligations. This formula produces a the LMR value. If a licensee's LMR ratio ranks at 1.0 or higher, they have at least as many assets as liabilities, and therefore the financial capability to cover owed liability. If the ratio falls below 1.0, then the AER will generally not approve any transfer of licenced assets unless the purchaser has the financial resources to cover the end-of-life obligations of the spent wells.

Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process, and *Directive 011: Licensee Liability Rating (LLR) Program: Updated Industry Parameters and Liability Costs*.

16 In September 2015, Redwater's LMR was calculated to be 0.93. Redwater's anticipated environmental abandonment costs exceeded its asset value by at least $553, 000. As such, there was no positive net value in the Redwater estate.

Redwater, CA Decision, *supra* para 14 at paras 18, 20.

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

17 GTL agrees with the Appellants that the issues on appeal are as follows:

1) Are end-of-life obligations for AER licenced properties claims provable in bankruptcy?
2) Whether the provincial statutory regime that regulates the Alberta oil and gas industry conflicts with the *BIA* or frustrates its underlying purposes, thus engaging the doctrine of paramountcy?

18 The Respondent submits that end-of-life obligations are claims provable in bankruptcy. Additionally, the Respondent submits that the provincial regulatory regime both operationally conflicts with the *BIA* and frustrates its purpose. These issues must be reviewed on a standard of correctness.

Housen v Nikolaisen, 2002 SCC 33 at para 8.

PART III -- ARGUMENT

A. End of Life Obligations Are Provable Claims in Bankruptcy

a) Parliament Incorporated Environmental Obligations into the *BIA*

19 The primary purpose of the *BIA* is to ensure that coordinated insolvency proceedings provide creditors with greater certainty about priority and more equitable recovery as opposed to each creditor enforcing claims separately. This is achieved through the single proceeding model where creditors must prove and pursue their claims in one comprehensive process. The effect of the single proceeding model is maximization of recovery for all creditors while avoiding the chaos that would be caused by multiple simultaneous proceedings. The smooth liquidation of corporations provided for by the single proceeding model allows resources to be repurposed from inefficient uses to more valuable ones.

> *Abitibi*, *supra* para 4 at paras 21, 32, 47.
> *Moloney*, *supra* para 5 at para 37.
> *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 22 citing Roderick J Wood, *Bankruptcy and Insolvency Law*, 1st ed (Toronto: Irwin Law, 2009) at 2-3.
> Anna J Lund, "Lousy Dentists, Bad Drivers, and Abandoned Oil Wells: A New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law" (2017) 80 Sask L Rev 157 at 158.

20 Of course, in a bankruptcy process, all creditor claims cannot be recovered in full. Thus, Parliament has had the particularly difficult task of balancing important but competing policy objectives. Parliament did not undertake this task lightly, and their legislative decisions cannot be rewritten by a provincial regulator. In 1997, Parliament expanded the *BIA* to expressly include environmental obligations as claims provable in bankruptcy. Prior to explicitly adding environmental obligations into the bankruptcy scheme of distribution, Parliament balanced the public's interest in remediating environmental damage against the rights of creditors to equitable treatment during insolvency proceedings.

> *Redwater Energy Corporation (Re)*, 2016 ABQB 278 at para 176 [*Redwater, QB Decision*].

21 The Appellants suggest that if the Abandonment Orders do not seek specific monetary compensation, then the Abandonment orders are not provable claims in bankruptcy as per the conclusions in *Northern Badger*. This is a not correct statement of the current law. Insolvency legislation has significantly changed since *Northern Badger*. Through section 14.06 of the *BIA*, Parliament reversed the position taken by the Alberta Court of Appeal of Alberta in *Northern*

Badger. Environmental claims, whether contingent or "inchoate from the day the wells were drilled", are now provable claims in bankruptcy under section 14.06(8) if the claims are sufficiently expressed in monetary terms, regardless of whether they arose before or after the bankruptcy. Thus, the 1994 amendments to the Alberta provincial regime that added receivers and trustees to the definition of "licensee" have no effect on the outcome of these appeals because section 14.06 states that the *BIA* provisions apply "notwithstanding any provincial law".

Redwater, CA Decision supra para 14 at paras 53, 57.
Abitibi, supra para 4 at paras 26, 47.
BIA, supra para 1 at s 14.06(4).

b) **Statutory Interpretation of Section 14.06 of the *BIA***

22 Parliament has the exclusive jurisdiction to legislate matters concerning bankruptcy and insolvency, and the *BIA* was enacted under this jurisdiction. The *BIA* is a complete code governing bankruptcy which "sets out which claims are treated as provable claims and which assets are distributed to creditors, and how." Any creditor claims deemed to be provable in bankruptcy are addressed under the single proceeding model offered by the *BIA*.

Moloney, supra para 5 at para 40.

23 While the *BIA* "depends on the survival of various provincial rights", this is true only to the extent that the substance of provincial laws relating to property do not conflict with the *BIA*. Where there is a conflict between the substantive provisions of provincial legislation regarding property and the *BIA*, it is the *BIA* that must prevail because federal laws are paramount. Parliament explicitly accounted for the doctrine of paramountcy in section 72(1) of the *BIA* which states that where there is a genuine inconsistency between provincial laws regarding property and civil rights and federal legislation bankruptcy, the *BIA* prevails. The same intention is found in section 14.06(4), where Parliament expressly stated that trustees have the power to disclaim "[n]otwithstanding anything in any federal or provincial law".

Husky Oil Operations Ltd v Minister of National Revenue [1995] 3 SCR 453 at para 85, [1995] SCJ No 77 [*Husky Oil*].
Bank of Montreal v Hall, [1990] 1 SCR 121 at p 155, [1990] SCJ No 9.
Moloney, supra para 5 at paras 16, 29, 40.
GMAC Commercial Credit Corp — Canada v TCT Logistics Inc, 2006 SCC 35 at para 47.

24 Section 14.06 incorporates environmental claims into the bankruptcy regime:

> While these provisions should be regarded as a "complete code", in the sense that they provide the only exceptions to the general bankruptcy regime applicable to environmental claims, they are not a "stand-alone code". They assume that the general bankruptcy regime applies to environmental claims, except for the particular rules found in s. 14.06 itself.

Redwater, CA Decision, supra para 14 at para 57.

25 It is clear that Parliament took into account environmental policy considerations when it created section 14.06. As Justice Deschamps stated in *Abitibi*, when the history and purpose of insolvency is taken into account, it is near impossible to come to the conclusion that Parliament meant to exempt environmental orders from the insolvency process as their exemption would be inconsistent with the insolvency legislation. Thus, it is an error to undo Parliament's careful balancing by interpreting section 14.06 of the *BIA* narrowly as the Appellants have suggested.

Redwater, QB Decision, supra para 20 at para 133.
Abitibi, supra para 4 at paras 33.

26 Section 14.06 should be considered as a whole. Section 14.06 was designed for trustees to be able to take control of a property, assess whether there is an environmental problem and then determine whether it is worth cleaning up as opposed to disclaiming. Parliament purposively left this decision in the hands of receivers and trustees, not provincial regulators like the AER. Environmental claims do not have higher or special priority under the *BIA*. If Parliament had intended that the debtor always satisfy all remediation costs, it would have granted the Crown a super-priority against all of the debtor's assets. Parliament did not do this, and so the Courts should not interpret section 14.06 in a way that allows environmental obligations to be unfairly paid out ahead of other validly pursued provable claims.

Abitibi, supra para 4 at paras 19, 33, 40.

c) **A Purposive Interpretation of Section 14.06 Necessitates Applying the *Abitibi* Test**

27 The Appellants assert that the *Abitibi* test does not apply to the Alberta oil and gas property interest because sections 14.06(7) and (8) of the *BIA* apply only if the debtor company has an interest in the environmentally damaged land or the "real property". However, section 14.06(4) is not conditional on the Crown benefitting from the super-priority created by section 14.06(7). The super-priority is intentionally limited to certain situations and shows Parliament's intent to have other environmental remediation claims dealt with as unsecured claims in the *BIA* scheme of distribution. Moreover, the lower courts correctly held that Redwater had an *in rem* real property interest in the disclaimed assets. The Appellants are attempting to have this Court adopt a narrow reading of the provisions. But this position ignores the fact that Parliament intended section 14.06 to act as a stand-alone code when dealing with environmental liabilities and that Parliament's true intentions can only be understood when the section 14.06 is read as a whole.

28 Parliament had the power to restrict the operation of section 14.06(4) by using narrow language that expressly limited the trustee's power to disclaim property to fee simple interests only. Instead, Parliament used exceptionally broad language to capture a variety of property rights. Section 14.06(4) specifically refers to "any interest" in "any real property", not just real property itself. Section 14.06(4) does not itself define "real property", and so the expansive definition of property found at section 2 of the *BIA* must be applied. That definition includes *profits à prendre.* Thus, Redwater's mineral leases are *profits à prendre* and are regarded as interests in real property and the *Abitibi* test must be applied to the facts of this case.

Redwater, CA Decision, supra para 14 at paras 32, 33.

d) **The *Abitibi* Test**

29 To determine if the Abandonment Orders are provable claims in bankruptcy, the legal test set out in *Abitibi* must be applied. The *Abitibi* test is used to determine when a contingent environmental claim is a provable claim under the *BIA.* The *Abitibi* test confirms that if an environmental obligation or liability is framed in monetary terms, it will qualify as a provable claim in bankruptcy and thus be captured within the scheme of distribution set out in the *BIA*. In cases where the environmental obligation is not yet framed in monetary terms, the Court must determine if it will "ripen into a financial liability", having regard to the "factual matrix and the applicable statutory framework." The *Abitibi* test has three factors that must be considered:

1) There must be a debt, liability or obligation to be a creditor;
2) The debt, liability or obligation must be incurred at the relevant time in relation to the insolvency; and
3) It must be possible to attach a monetary value to the debt, liability or obligation. Based on the standard of "sufficient certainty", the claim may be contingent as long as it is not too remote or speculative to be included with the other claims. In other words, it must be sufficiently certain that the regulatory body will undertake the environmental remediation work.

   Abitibi, *supra* para 4 at paras 2-3, 26, 30-31, 36.

30 When the Abitibi test is applied to the facts of this case, it is clear that the Abandonment Orders are provable claims in bankruptcy. The provincial regime operates as a debt collection mechanism by preventing GTL from discharging its duties as trustee unless the AER's environmental obligations are met.

(a) ***The AER is a "Creditor"***

31 The only determination that has to be made at this stage of the *Abitibi* test is whether the AER exercised its enforcement power against GTL. Where a regulatory body exercises its enforcement powers against a debtor, it is a creditor for the purposes of insolvency proceedings. As Justice Deschamps emphasized, the Court must first consider whether the regulator is empowered to enforce the obligations that the statute imposes and second, whether that power was actually exercised. This is a low threshold. As Justice Deschamps suggested, "[m]ost

environmental regulatory bodies can be creditors". This emphasizes that regulatory bodies cannot escape the *BIA* scheme of distribution under the guise of enforcing public duties. Although not all enforcement actions taken by a regulatory body will render it a creditor, the AER's actions in this case, render it a creditor under the *Abitibi* test.

Abitibi, *supra* para 4 at para 27.
Redwater, *QB Decision*, *supra* para 20 at para 164.

32 Significantly, both the AER and the OWA conceded that this stage of the test was established both at the court of first instance and the Alberta Court of Appeal. These concessions in the early stages of this litigation sufficiently satisfy the first branch of the test. However, even if these concessions are disregarded, the actions taken by the AER suggest that it was a legitimate creditor rather than a disinterested regulator. When the AER issued the Abandonment Orders and required the payment of security deposits, it exercised its statutorily delegated enforcement powers. In a letter that was sent to GTL on July 15, 2015 the AER stated that it would seek reimbursement remediation costs for any abandonment work that was completed. By seeking payment of a security deposit prior to approving any licence transfer the AER was acting as a creditor. Notably, the chambers judge rejected the notion that the AER has no intention of doing the abandonment work.

Redwater, *QB Decision*, *supra* para 20 at paras 49, 164, 168.
Redwater, *CA Decision*, *supra* para 14 at para 73.

(b) The Obligation Was Incurred at the Time of Insolvency

33 The Abandonment Orders were issued prior to Redwater's date of bankruptcy. There is no factual dispute as to when the claim arose. Significantly, the Appellants conceded that this factor was met at the court of first instance and the Alberta Court of Appeal. Section 14.06(8) of the *BIA* provide that environmental liabilities can be provable claims even if they arise *during* the insolvency proceedings as long as they arise before "the time limit for inclusion in the insolvency process".

Abitibi, *supra* para 4 at paras 26, 27, 29.
Redwater, *QB Decision*, *supra* para 20 at para 164.
Redwater, *CA Decision*, *supra* para 14 at para 73.

(c) ***The Third Factor of the Abitibi Test Has Been Satisfied***

34 The third factor of the test is that it must be possible to attach a monetary value to the debt, liability or obligation owed by the debtor. Whether or not a monetary value can be attached determines if the Abandonment Orders fall inside or outside of the single proceeding model offered under the *BIA*. If the Abandonment Orders can have a monetary value attached to them, this Court is required to treat the orders as a provable claim under the *BIA*.

Abitibi, *supra* para 4 at para 28.

(1) ***The Abandonment Orders are Monetary Obligations***

35 The Abandonment Orders have monetary value. In order to attach a monetary value to environmental obligations, it must be sufficiently certain that the regulator will liquidate the obligation and seek to recover it from the debtor. Environmental obligations become part of the insolvency process when they are "in substance monetary and in substance a provable claim". At this stage of analysis in the *Abitibi* test, it is imperative that the court considers what the practical effect would be of requiring the debtor to comply with the order on the insolvency process.

Nortel Networks Corporation (Re), 2013 ONCA 599 at para 32 [*Nortel*].
Abitibi, *supra* para 4 at paras 37-38.

36 At the court of first instance, the AER argued that the Abandonment Orders were regulatory in nature, not monetary, and so GTL was required to comply with them since they fell outside of the bankruptcy scheme contemplated by the *BIA*. However, as Justice Deschamps stated in *Abitibi*, "if the Province's actions indicate that, in substance, it is asserting a provable claim within the meaning of federal legislation, then that claim can be subjected to the insolvency process." In this case, the AER demanded that GTL post security deposits to cover abandonment liabilities before it would agree to the transfer of any licences. The obligation to pay security deposits in the LMR Program is framed in monetary terms, which satisfies the third factor of the *Abitibi* test. Essentially, the AER is using the licence transfer approval process to collect a claim that is provable in bankruptcy.

Redwater, *QB Decision*, *supra* para 20 at paras 42, 79.
Abitibi, *supra* para 4 at para 19.

(2) The "Sufficient Certainty" Threshold Was Surpassed

37 In the alternative, if the Abandonment Orders are not monetary in nature, the Court should look at the substance to determine whether the third part of the *Abitibi* test is satisfied. For environmental protection orders, it must be sufficiently certain that the regulator will perform the remediation work in relation to the contingent environmental claim in order for that claim to be subjected to the insolvency process. In order to assess whether it is sufficiently certain that the AER will undertake the remediation work in this case, the Court is free to examine the entire factual context. The Court may consider the following factors:

1) whether the debtor is in control of the property;
2) whether the debtor has the means to comply with the order;
3) whether there are other parties responsible for the remediation; and
4) the effect that compliance with the order would have on the insolvency process.

Abitibi, *supra* para 4 at para 38.

38 Based on the findings of fact, GTL did not have control over the Redwater properties, thus GTL did not have the ability to perform any kind of remediation work on the assets. GTL disclaimed the properties under section 14.06 of the *BIA* but was unable to sell the producing wells because the AER had a condition that all non-producing wells needed to have security posted prior to any sales being allowed or to use the funds from the sales to perform the abandonment work. The Alberta Court of Appeal correctly found that the threshold had been met in a "technical and substantive way" because of the security condition placed on the sale. As the Alberta Court of Appeal noted, "requiring the depositing of security, or diverting value from the bankrupt estate to ensure that the remediation will be done" not only meets but clearly surpasses the sufficiently certain threshold required by the third factor of the *Abitibi* test.

Abitibi, *supra* para 4 at paras 31, 36, 46.
Redwater, QB Decision, supra para 20 at paras 165, 170.
Redwater, CA Decision, supra para 14 at paras 76, 80.

39 Moreover, there were no financial means for GTL to comply with the Abandonment Orders. Compliance would require over $5,000,000 in expenditures which would render the sales process uneconomical given Redwater's relatively small size. No other parties could be held responsible for the remediation given that there is no evidence that Redwater could reorganize and undertake the work. Further, there is no evidence of a subsequent purchaser who could take on the work with the exception of Working Interest Participants ("**WIPs**") who could be held responsible for approximately 20% of the disclaimed assets.

Redwater, QB Decision, supra para 20 at paras 145, 170.

40 Although there were WIPs in this case, that does not undermine the sufficient certainty standard. In *Nortel*, it was not sufficiently clear that the Ministry would incur the remediation costs because there were current and former owners that were made jointly and severally liable for the costs of remediation. The potential that these other owners would incur the costs created too much uncertainty to satisfy the third factor of the *Abitibi* test. This case is distinguishable from *Nortel* because the AER can only apportion liability for abandonment costs to WIPs in proportion to their involvement in the disclaimed assets. Redwater's share will still be undertaken by the AER.

Nortel Networks Corp, Re, supra para 35.
Redwater, QB Decision, supra para 20 at para 171.

41 It was a finding of fact at trial that the AER did not have any alternatives but to perform the remediation work itself or deem the wells to be orphans, thereby indirectly undertaking the work through the OWA. In *Northstar*, the Ontario Court of Appeal found that the "sufficient certainty" standard *was* satisfied because there was no purchaser that could be compelled by the regulator to complete the work. Similar to the case of *Northstar*, in this case, there is no other party who could be compelled to do the remediation work. There is evidence that either the AER or the OWA will perform the work, and the AER has expressly stated an intention to seek reimbursement for the costs of abandoning the renounced assets. Further, the AER has completed similar work in the past. Finally, there is no evidence that the AER has any realistic alternatives to performing the remediation work itself other than deeming the renounced assets orphan wells.

Northstar, Aerospace Inc, Re, 2013 ONCA 600.
Redwater, CA Decision, supra para 14 at para 80.
Redwater, QB Decision, supra para 20 at paras 168, 172.

42 If the Court demands compliance with the Abandonment Orders, the insolvency process as a whole will be impacted. If creditors are unable to maximize their recovery, this could reduce the likelihood that lenders are willing to advance credit to other oil and gas companies in the future, which has negative consequences for the insolvency process as well as the oil and gas industry in Alberta going forward. This will leave junior oil and gas companies particularly vulnerable. Moreover, if trustees and receivers are not able to renounce negatively valued assets and are forced to pay for environmental remediation costs outside of the *BIA* scheme of distribution, insolvency professionals will cease to take on any mandates that involve environmentally damaged property.

43 Overall, all of these factors overwhelmingly demonstrate that the sufficient certainty test has been satisfied and that the Abandonment Orders are in substance monetary claims. It is sufficiently certain that the AER will perform the remediation work on its own or will delegate that work to the OWA.

B. The Doctrine of Paramountcy Renders the Provincial Provisions Inoperative

44 In rare occasions where Parliament intentionally legislates to overturn provincial enactments, and has the constitutional authority to do so, the courts cannot be used to invalidate that intention. In the case at hand, Parliament intentionally amended the *BIA* to overturn provisions in the *OGCA* and the *PLA* that bound a trustee to complete the abandonment obligations for wells and pipelines, as well as those that held trustees liable for failing to do so. The doctrine of paramountcy recognizes that when federal and provincial legislation conflict, the federal law must be favoured. The fact that Parliament intentionally caused the conflict cannot be entirely dismissed from the analysis.

a) Application of the Doctrine of Paramountcy

45 Paramountcy is engaged when there is a genuine conflict or inconsistency between valid federal and provincial enactments. In such cases, the federal law must prevail. As the validity of neither the *BIA* nor the provincial regulatory regime was contested in previous proceedings, the Court should continue with a conflict analysis.

Redwater, CA Decision, *supra* para 14 at para 24.

46 There are two types of conflict that invoke paramountcy: 1) operational conflict where compliance with both laws is impossible, and 2) where compliance with both laws is possible, but the operation of the provincial law frustrates the purpose of the federal law. The focus in these assessments is on the relationship between the federal law and the effects of the provincial legislation, as an intention to intrude upon a federal power is not necessary for a finding of conflict. Where either branch of the test is satisfied, paramountcy is triggered.

Moloney, *supra* para 5 at preamble p 329.
Husky Oil, *supra* para 23 at para 39.

b) **Cooperative Federalism Does Not Operate as a Presumption of Intent**

47 The Court is required to conduct a statutory interpretation of section 14.06 in the *BIA* to assess conflict. However, there is uncertainty as to how cooperative federalism operates in this analysis. In a conventional interpretation, the words of the provision should be "read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." If used as a presumption, cooperative federalism will inappropriately override the true intention of Parliament.

Marine Services International Ltd v Ryan Estate, 2013 SCC 44 at para 77 [*Marine Services*].

48 The dissent at the Alberta Court of Appeal cited *Moloney*: "it is presumed that Parliament intends its laws to co-exist with provincial laws." This precedent articulates a general intent of Parliament but does not preclude its ability to oppose specific provincial laws.

Redwater, CA decision, supra para 14 at para 150.
Moloney, supra para 5 at para 27.

49 *Attorney General of Canada v Law Society of BC* describes cooperative federalism:

> When a federal statute can be **properly interpreted** so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between two statutes. [Emphasis added].

Attorney General of Canada v Law Society of BC, [1982] 2 SCR 307 at p 356, [1982] SCJ No 70.

50 Proper statutory interpretation is based on the true intent of Parliament, even if that intent does not align with cooperative federalism. The Appellants submit that cooperative federalism is a presumption, and therefore Parliament will always intend for its laws to harmoniously co-exist with provincial laws. However, if the *BIA* must be read harmoniously with the provincial statutory regime, the true intent of Parliament will be contradicted.

51 The facts demonstrate that Parliament intended to legislate against *Northern Badger* and the provincial regime. At the time of *Northern Badger*, the *BIA* was unclear as to how the environmental liabilities of insolvent companies should be addressed. In 1991, the Alberta Court of Appeal held trustees responsible for these obligations, and the province codified this ruling in 1994 amendments to legislation governing the oil and gas industry. However, Parliament amended the *BIA* in 1997 to include section 14.06, which resolved the uncertainty of environmental liability in insolvency but intentionally contradicted the conclusions reached in *Northern Badger* and the provincial amendments. Therefore, the Court's interpretation of section 14.06 in conflict assessments must be made in accordance with this true intention.

Northern Badger, *supra* para 14.
Bill 5, *Oil and Gas Conservation Amendment Act*, 2nd Sess, 23rd Leg, Alberta, 1994 (assented to 25 May 1994), SA 2000, c 0-6.

c) The Provincial Regime Operationally Conflicts with the *BIA*

52 Operational conflict occurs when one law says "yes" and the other says "no", making action compliant with one statute invariably breach the other. This analysis should not be limited to the literal words of the statute but assessed robustly to determine whether there is a genuine, substantive conflict. Furthermore, an operational conflict cannot be remediated by forcing a person to waive federal protection or provincial privilege.

Moloney, *supra* para 5 at preamble p 329-330.

(a) The Trustee Has the Right to Renounce Property Interest

53 Sections 14.06(4) and 20 of the *BIA* grant trustees the right to renounce property interest and any attached obligation. This right ensures the maximization of the asset pool available to creditors by allowing the renunciation of property with negative value. However, the provincial regime prevents the effective exercise of these rights by requiring the trustee to comply with well and pipeline abandonment procedure, and by imposing continuing obligation on the trustee.

54 Section 14.06(4) of the *BIA* grants a trustee the right to renounce, described as the trustee's ability to "**abandon**", "**divest**", "**release**", "**dispose**", or "**renounce**" a property interest. These terms are undefined in the *BIA*. As stated previously, the provision must be read in its ordinary sense meaning, harmoniously with the scheme and object of the Act, as well as the intention of Parliament. The terms in their ordinary sense import a relinquishment of the possession, control and rights related to the property, as well as any attached obligation or liability. Repetition within the provision of the trustee's right to renounce property despite any environmental condition or damage, or despite any order effectively requiring environmental remediation is consistent with the above understandings.

Marine Services, *supra* para 47.
BIA, *supra* para 1 at s 14.06.

55 'Abandonment' under the provincial regime is not a relinquishment of obligation or liability, but an importation of it. The abandonment of a well or pipeline includes remediation work, and costs to cover that work. Duties to remediate are mandatory under section 27(1) of the *OGCA* and section 24 of the *PLA*. In this case, the AER issued Abandonment Orders, which effectively required the remediation of the property. Under the *BIA*, the trustee is not liable for failing to comply with any order that effectively required environmental remediation. The sections stipulating a duty to abandon prevent the trustee from being able to renounce any obligation tied to a property, and further conflict with the trustee's ability to choose whether to comply with any order requiring environmental remediation.

56 Section 29 of the *OGCA* also conflicts by imposing continuing obligation and liability on the trustee, even if abandonment procedures have been completed. Trustees may have to pay costs of "further abandonment" and are liable for failing to do so. These obligations, particularly for the payment of future costs, are what section 14.06 sought to protect against. The trustee cannot fully renounce any obligation or liability whether they complete abandonment procedure or not.

(b) ***Conflicting Imposition of Liability***

57 The provincial regime and the *BIA* give conflicting directives to the courts as to trustee liability. Under *BIA* section 14.06, the trustee is not liable for any environmental condition or damage that arises before or after their appointment, except for when the trustee has committed gross negligence or wilful misconduct. Furthermore, the provision expressly states that a trustee is not personally liable for failing to comply with any order that effectually requires remediation of a property involved in bankruptcy. As deemed licensees subject to the provincial regime, trustees can be convicted of a regulatory offence for failing to comply with abandonment orders or any provision of the *OGCA* or the *PLA*. They have continuing liability for the completion of abandonment procedures and payment of associated costs. This fundamentally conflicts with the wording and purpose of section 14.06.

> *BIA*, *supra* at s 14.06(2).
> *OGCA*, *supra* para 13 at ss 109-110.

58 Trustees who renounce interest in a property under the *BIA* and fail to comply with an abandonment order are liable under the provincial regime, but are simultaneously exempt from personal liability under the *BIA*. Theoretically, compliance with both laws could be achieved if the trustee waived protection under the federal law, but as discussed in the previous section, operational conflict is not remedied through this waiver. In reality, trustees would never waive this protection.

(c) ***Reordering the Priority of Provable Claims***

59 As established in the first part of the Respondent factum, the end-of-life obligations and costs sought by the AER are claims provable in bankruptcy. The provincial regime effectively creates a super-priority for these environmental claims, supplanting secured creditors as the first to collect. Section 136 lists the order of priority in which the proceeds of an estate will be paid out, with all claims (a-j) subject to the rights of the secured creditors. The end-of-life costs should also be subject to the rights of the secured creditor, but the provincial legislation causes remediation costs be paid first. As such, the federal legislation directs secured creditors to collect first, while the effect of the provincial regime is the reverse.

d) **The Provincial Regime Frustrates the Purpose of the *BIA***

60 Paramountcy is also engaged when a provincial law frustrates or thwarts the purpose of a federal law.

Moloney, *supra* para 5 at para 18.

(a) ***Interfering with the Equitable Distribution of Assets***

61 The equitable distribution of the debtor's assets is widely recognized as one of the fundamental purposes underlying the *BIA*. If the court finds that the costs sought by the AER are not claims provable in bankruptcy, the AER subverts the purpose of the *BIA* priority scheme by interfering with this purpose.

62 The priority design of bankruptcy is instrumental in promoting the equitable distribution of assets by maximizing the recovery of creditors as a group, rather than that of a single claimant. Without a bankruptcy priority scheme, the creditors who are able to seize assets before the others will benefit, but this is to the detriment of the creditors as a group. There would be a strong incentive for the first individual to seize all assets even though a more orderly liquidation would produce a higher return for the group. The reality of bankruptcy is that a debtor often does not have the assets to pay all of the creditors owed. If all of the Redwater assets were used to neutralize the environmental liabilities, the estate would continue to owe $553, 000, and the AER would be the only creditor to collect. The AER may be benefitted, but the situation of the group would be worsened.

Roderick J Wood, *Bankruptcy and Insolvency Law*, 2nd ed (Toronto: Irwin Law, 2015) at 39.
Redwater, *CA Decision*, *supra* para 14 at para 18.

63 The priority scheme also ensures that claims can be processed quickly and efficiently. The amount of money and time necessary to complete remediation will change and may increase as unforeseen costs arise, and the bankruptcy proceedings may be delayed. If estimated costs are paid out prior to completion of the remediation, the party responsible for the abandonment, whether it be the AER or the OWA, will be vulnerable to unexpected costs. If they claim costs beyond the estimation of necessary costs to cover unforeseen expenses, they are unjustly minimizing the asset pool available to creditors with the risk that such insurance will not be

necessary. Regardless of the method chosen, if the AER must be paid first, the intention that claims be processed quickly will be frustrated.

(b) ***Expanding the Trustee's Liability***

64 Section 14.06 limits the personal liability of trustees in relation to environmental orders and obligations. It is evident that Parliament intended to limit trustee liability to allow them to independently assess the value of the properties (see sections 14.06(1.2), (1.3), (2) and (4)). This federal protection against personal liability ensures that the trustee is able to decide how to exercise their right to renounce a property interest in a way that maximizes recovery for creditors, without concern that they will be personally liable should they choose wrongly.

65 The provincial regime expands the trustee's personal liability by imposing liability for contravention of the *OGCA*, the *PLA*, as well as any rules, regulations or orders made pursuant to these statutes. The continuing liability for end-of-life costs, actions or further provision breaches compromises the trustee's independence. Trustees as independent actors may refuse mandates with environmental obligations to avoid personal liability. Insolvent oil and gas companies will have difficulty commencing bankruptcy proceedings, and an entire industry's access to insolvency as a legal process will be unfairly restricted.

OGCA, *supra* para 13 at ss 109-110.
OGCA, *supra* para13 at s 29.

e) **The Provincial Provisions are Rendered Inoperative**

66 As the provincial regulatory regime both operationally conflicts and frustrates the purposes of the *BIA*, paramountcy is engaged, and the provincial provisions must be rendered inoperative to the extent of the conflict.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

67 The Respondent requests its costs of this appeal.

PART V -- ORDER SOUGHT

68 The Respondent requests that the appeal be dismissed.

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

_____
Ashley Reid

_____
Kimberly Gosel

Counsel for the Respondent
Grant Thornton Limited

PART VI -- TABLE OF AUTHORITIES

JURISPRUDENCE	**Paragraph No.**
Attorney General of Canada v Law Society of BC, [1982] 2 SCR 307, [1982] SCJ No 70.	49
Alberta (Attorney General) v Moloney, 2015 SCC 51.	5, 19, 22, 23, 46, 48, 52, 60
Bank of Montreal v Hall, [1990] 1 SCR 121, [1990] SCJ No 9.	23
Century Services Inc. v Canada (Attorney General), 2010 SCC 60.	19
GMAC Commercial Credit Corp — Canada v TCT Logistics Inc, 2006 SCC 35.	23
Husky Oil Operations Ltd v Minister of National Revenue [1995] 3 SCR 453, [1995] SCJ No 77.	23, 46
Housen v Nikolaisen, 2002 SCC 33.	18
Marine Services International Ltd v Ryan Estate, 2013 SCC 44.	47, 54
Newfoundland and Labrador v. AbitibiBowater Inc, 2012 SCC 67.	4, 19, 21, 25-27, 29, 31, 33-38
Nortel Networks Corporation (Re), 2013 ONCA 599.	35, 40
Northstar, Aerospace Inc, Re, 2013 ONCA 600.	41
Orphan Well Association v Grant Thornton Limited, 2017 ABCA 124.	14, 16, 21, 24, 28, 32-33, 38, 41, 45, 48, 62
Panamericana de Bienes y Sercicios, SA v Northern Badger Oil & Gas Ltd, 1991 ABCA 181.	14, 51
Redwater Energy Corporation (Re), 2016 ABQB 278.	20, 25, 31-33, 36, 38-41

SECONDARY SOURCES

Anna J Lund, "Lousy Dentists, Bad Drivers, and Abandoned Oil Wells: A New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law" (2017) 80 Sask L Rev 157.	19
Roderick J Wood, *Bankruptcy and Insolvency Law*, 1st ed (Toronto: Irwin Law, 2009).	19
Roderick J Wood, *Bankruptcy and Insolvency Law*, 2nd ed (Toronto: Irwin Law, 2015).	62

LEGISLATION

Bankruptcy and Insolvency Act, RSC 1985, c B-3.	1, 21, 54, 57
Bill 5, *Oil and Gas Conservation Amendment Act*, 2nd Sess, 23rd Leg, Alberta, 1994 (assented to 25 May 1994), SA 2000, c 0-6.	51
Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process.	15
Directive 011: Licensee Liability Rating (LLR) Program: Updated Industry Parameters and Liability Costs.	15
Directive 020: Well Abandonment.	13
Environmental Protection and Enhancement Act, RSA 2000, c E-12.	13
Oil and Gas Conservation Act, RSA 2000, c 0-6.	13, 57, 65
Pipeline Act, RSA 2000, c P-15.	13
Responsible Energy Development Act, SA 2012, c R-17.3.	13

PART VII -- LEGISLATION AT ISSUE

***Bankruptcy and Insolvency Act*, section 14.06**

14.06(1) No trustee is bound to act

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.

14.06(1.1) Application

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.

14.06(1.2) No personal liability in respect of matters before appointment

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.

14.06(1.3) Status of liability

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

14.06(1.4) Liability of other successor employers

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

14.06(2) Liability in respect of environmental matters

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.

14.06(3) Reports, etc., still required

Nothing in subsection (2) exempts a trustee from any duty to report or make disclosure imposed by a law referred to in that subsection.

14.06(4) Non-liability re certain orders

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.

14.06(5) Stay may be granted

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.

14.06(6) Costs for remedying not costs of administration

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.

14.06(7) Priority of claims

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.

14.06(8) Claim for clean-up costs
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 # 2019-06

Ashley Reid
Kimberly Gosel

Counsel for the Respondent,
Grant Thornton Limited

Document #: 1439819