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 # **07**

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

AND TO: **ALL REGISTERED TEAMS**

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PART I -- OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Appellants' Position

1 Alberta has owned its natural resources since 1930, pursuant to the Natural Resources Transfer Agreement (*Alberta Energy)*. With the patriation of the Constitution in 1982, the provinces received express recognition of their exclusive jurisdiction to regulate natural resources extraction and conservation within their borders (*Constitution, 1982*). Alberta's first petroleum and natural gas conservation board was established in 1938. Since 2013, under the *Responsible Energy Development Act*, those responsibilities have rested with the Alberta Energy Regulator (AER) (*Alberta Energy*).

> Government of Alberta, "Alberta Energy History Prior to 1990's", online: *Alberta Energy* < www.energy.alberta.ca/AU/History/Pages/AEHP1970.aspx#1930s> [*Alberta Energy*].
>
> The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11 at [*Constitution, 1982*].

2 In *Redwater*, the respondents sought a pass on the restoration obligations found in Alberta's *Oil and Gas Conservation Act* (OGCA). Seizing on *Abitibi* – one might say as a red herring – they distorted the meaning and intent of section 14.06 of the BIA and they got lucky. They should not realistically have expected to succeed. The respondents intentionally minimized the very real social, environmental and constitutional consequences of using bankruptcy protection to avoid longstanding clean-up obligations under Alberta law. In so doing, they breached a fiduciary obligation. In fact, failing to treat Redwater's oil and gas assets and liabilities as an indivisible bundle breached the constructive trust with which that bundle was impressed pursuant to Alberta law.

> *Orphan Well Association v Grant Thornton Limited*, 2017 ABCA 124 at para 30 [*Redwater*].
>
> *Oil and Gas Conservation Act*, RSA 2000, c O-6, s 1(1)(a) [*OGCA*].
>
> *Newfoundland and Labrador v AbitibiBowater Inc*, 2012 SCC 67 [*Abitibi*].

3 The Appellants respectfully submit the following. First, end-of-life well remediation obligations are not claims provable in bankruptcy. They do not meet the test for identifying such claims set out in *Abitibi*. They certainly were never meant to be interpreted in a manner that would allow secured creditors to get a windfall at the expense of the public. Second, Canada is a confederation, a coming together of distinct entities for a common purpose. Those entities retain autonomy on matters that remain within their jurisdiction, including imposing limitations on

property and civil rights in the interest of sustainable development. The statutes of the two orders of government are presumed to be consistent with one another. Whenever possible – and it is possible here – they should be read in a manner that finds such consistency.

B. Statement of the Facts

(i) The Alberta Oil and Gas Industry Regulation and the AER

4 Sections 92(5) and (13) of the *Constitution Act* confer upon provinces legislative jurisdiction over public lands, property, and civil rights. Section 92(A) grants provinces the exclusive power to regulate the exploration, development, conservation, and management of non-renewable natural resources.

Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, s 92(5), (13), 92(A), reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act*].

5 In Alberta, the oil and gas industry is regulated by the AER, whose mandate is to ensure "the efficient, safe, orderly, and environmentally responsible development of energy resources" from cradle to grave (*REPA*). Anyone wishing to extract minerals in Alberta must obtain an AER licence. The AER fulfills its mandate by putting conditions on these licences.

Responsible Energy Development Act, SA 2012 c R-17.3, s 2(1)(a) [*REPA*].

6 Exploration for oil and gas also requires other authorizations. Ownership of the resource via a mineral lease is distinct from the right to occupy the surface to extract these minerals. Oil and gas companies must hold both rights (*SRA*). In most cases, the right to take possession of mineral resources takes the form of a mineral lease with the Crown (*Redwater*). A fundamental condition to the granting of mineral extraction leases is that the grantee will comply with the laws governing extraction, including the AER's end-of-life regulations. Surface access rights must be negotiated with the landowner. Some mining is conducted on private land, sometimes without landowners' consent (*OGCA*)

Surface Rights Act, RSA 2000, c S-24, s 12 [*SRA*].

Redwater, *supra* para 2 at para 30.

OGCA, *supra* para 2.

7 Every oil and gas well eventually stops producing. When this occurs, consistent with the "polluter pays" principle, license holders are required to dismantle the well and take measures to protect groundwater from becoming polluted (AER Directive 020; *EPEA; OGCA*)

Alberta Energy Regulator, *Directive 020: Well Abandonment*, (2018) [AER Directive 020];

Environmental Protection and Enhancement Act, RSA 2000, c E-12, s 137 [*EPEA*].

OGCA, *supra* para 2 at s 1(1)(a).

8 Under the regulatory scheme, AER approval is required for a licence transfer to a new holder. The AER's approval will be subject to conditions, including conditions intended to ensure that end-of-life well remediation obligations are met. If the value of a company's assets is smaller than the size of its estimated well clean-up obligations, the AER will not approve a licence transfer without additional security being posted, pursuant to its Licensee Liability Rating (LLR) program (AER Directive 006; AER Directive 011). This is critical, as the right to extract the resource cannot be exercised in the absence of a regulatory licence.

Alberta Energy Regulator, *Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process*, (2013) [AER Directive 006].

Alberta Energy Regulator *Directive 011: Licensee Liability Rating (LLR) Program - Updated Industry Parameters and Liability Costs*, (2015) [AER Directive 011].

9 Absent the rules in Alberta's OGCA, a licensee in financial distress would probably sell off its producing wells and default on its remediation obligations. Note that the definition of licensee includes trustees and receivers in bankruptcy (*OGCA*; *PA*). In other words, there are rules preventing asset splitting, and those rules apply to bankruptcy and insolvency professionals.

OGCA, *supra* para 2.

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

(ii) <u>The Orphan Well Association</u>

10 The Orphan Well Association (OWA) is a non-profit organization that remediates orphan wells under authority from the AER (*OFDAR*). Orphan wells are designated by the AER when the licence holder is financially unable to abandon the well (*OGCA*). This typically occurs after the insolvency process is completed and is considered a last resort. The OWA funds its remediation primarily through an orphan fund levy (*OGCA*), a mandatory annual security deposit remitted to the AER by licensees based on expected abandonment liabilities (*Redwater*). In 2015, the OWA had 695 wells to abandon and 503 sites to reclaim; these numbers are expected to rise (*Redwater*). The OWA lacks the resources to complete these reclamations (*Redwater*).

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

OGCA, *supra* para 2 at s 70(1).

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

Redwater, *supra* para 2 at paras 142, 144, 180.

(iii) Redwater Energy Corporation

11 Redwater Energy Corporation is an oil and gas company and a licensee under the AER's jurisdiction currently in bankruptcy proceedings. Grant Thornton Ltd (GTL) is the receiver and trustee for Redwater's assets under the *Bankruptcy and Insolvency Act* (the BIA). The Alberta Treasury Branches (ATB) is Redwater's principal secured creditor. ATB was aware of Redwater's end-of-life obligations when it extended financing, as evidenced by internal documents acknowledging that the significant abandonment costs are incorporated in their lending practices (*Redwater*).

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

Redwater, *supra* para 2 at para 141.

12 Anticipated remediation costs for Redwater's non-producing wells exceed the value of its productive oil and gas assets. Its 20 producing wells, considered alone, are profitable. The receiver decided that of Redwater's 127 wells, it would take possession of only those 20. In response, the AER issued closure and abandonment orders, directing the receiver to carry out abandonment of the non-producing wells in accordance with AER requirements. The AER refused to assent to the transfer of the licences for the producing wells unless the non-producing wells were sold as well or security was posted. Acting as trustee, GTL disclaimed the non-profitable assets. The AER and OWA applied to have the renouncements declared void and to compel GTL to comply with the orders. GTL brought a cross-application for approval of its proposed sale process, and challenged the constitutionality of the regulator's position.

Redwater, *supra* para 2 at paras 4-10, 16.

13 The duty of receivers and trustees in bankruptcy to comply with closure and remediation obligations in priority of the claims of secured creditors forms the basis of this appeal.

(iv) Decision of the Alberta Court of Queen's Bench

14 The Court dismissed the OWA and AER's applications and awarded judgment in favor of ATB and GTL. Justice Wittemann concluded there was a conflict between the BIA and provincial legislation that rendered the provisions pertaining to well remediation inoperative (*Redwater*). The Court also applied the three-part test established in *Newfoundland and*

Labrador v AbitibiBowater Inc to determine whether the AER's abandonment orders were claims provable in bankruptcy and found the requirements of the test were met.

Redwater, *supra* para 2 at paras 150-156.

Abitibi, *supra* para 2.

(v) Decision of the Alberta Court of Appeal

15 Justice Slatter, writing for the majority of the Alberta Court of Appeal (ACA), dismissed the appeal, finding that personal liability of insolvency professionals is not a *sine qua non* for invoking subsection 14.06(4) of the BIA. Justice Slatter also found that *Abitibi* overruled *PanAmericana de Bienes y Servicios SA v Northern Badger Oil & Gas Ltd* and that the doctrine of paramountcy rendered the Alberta legislation inoperative to the extent there is a conflict with the BIA.

16 Justice Martin, on dissent, concluded that the province's licensing rules do not constitute monetary claims, nor did the AER become a creditor simply by enforcing licence conditions. She reaffirmed that end-of-life obligations imposed in exchange for natural resources are duty owed to the public and that even if s.14.06 allows for some renouncement of environmental obligations, allowing receivers to pick and chose which obligations they wish to forego would be a power so great, it would require a clear articulation in the law. (*Redwater*). Furthermore, Justice Martin underscored the importance of cooperative federalism and concluded that, given the absence of a clear conflict, both schemes can coexist, making it unnecessary to consider the doctrine of paramountcy (*Redwater*).

PanAmericana de Bienes y Servicios SA v Northern Badger Oil & Gas Ltd, 1991 ABCA 181, 81 DLR (4th) 280, [*Northern Badger*].

Redwater, *supra* para 2 at paras 166-188, 112.

17 The Appellants respectfully submit that this Court should allow the appeal for the reasons outlined below.

PART II -- QUESTIONS IN ISSUE

18 The issues in this case can be summarized 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?

Official Problem, Willms Shier Environmental Law Moot 2019 at p 2.

PART III -- ARGUMENT

A. The Court of Appeal erred 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

19 The majority of the ACA erred in its finding that the AER's regulatory order constituted a claim provable in bankruptcy per the test established in *Abitibi*. It determined that the AER was a creditor and that the remediation orders were sufficiently monetary in nature.

20 AbitibiBowater Inc (Abitibi) conducted logging and operated pulp and paper mills in Newfoundland and Labrador. When it ceased operations in the province, the provincial legislature expropriated effectively all its remaining assets in the province (*Abitibi*). The Province issued site remediation orders under its *Environmental Protection Act* (*EPA*) requiring Abitibi to decontaminate land that now belonged to the province (*Abitibi*). The province argued that the federal *Companies' Creditors Arrangement Act* did not bar it from enforcing environmental protection orders as such orders could not be considered "claims" under the CCAA (*Abitibi; CCAA*). In its decision, the Supreme Court of Canada (SCC) established a three-part test to determine when claims are subject to the insolvency process (*Abitibi*).

(1) There must be a debt, a liability or an obligation to a creditor;

(2) The debt, liability or obligation must be incurred as of a specific time; and

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

The appellants respectfully submit that Redwater's duty to properly abandon its wells is not a claim provable in bankruptcy as it does not meet the first and third branches of the *Abitibi* test.

Abitibi, *supra* para 2 at paras 5-9, 10, 26.

Companies' Creditors Arrangement Act, RSC 1985, c C-36 [*CCAA*].

Environmental Protection Act, SNL 2002, c E-14.2 [*EPA*].

(i) *Redwater* is distinguishable from *Abitibi*; therefore, the AER is not a creditor, per the rule established in *Northern Badger*

21 The majority of the ACA erred in finding that the abandonment orders issued by the AER and the LLR program meet the first branch of the *Abitibi* test.

22 A statutory obligation owed to a regulatory body can be classified as either (1) a public duty owed by the licensee under laws of general application to the population as a whole or (2) a debt owed to the Crown (*Northern Badger*). The test in *Abitibi* was developed on facts that correspond to the second type of obligation. Redwater's obligations under AER Directive 020 are an example of the first.

Northern Badger, *supra* para 16 at p 7.

23 *Northern Badger* held that regulations requiring proper abandonment of oil and gas wells are part of the general law. A regulatory body enforcing such a statutory obligation is not a creditor.

Northern Badger, *supra* para 16 at pp 3, 7.

24 The Court in *Northern Badger* determined that Alberta's regulatory scheme does not conflict with the BIA. Receivers and trustees are responsible for discharging the environmental obligations of insolvent companies. Remediation costs come ahead of and are outside the BIA's claims ranking process (*BIA*).

Northern Badger, *supra* para 16.

BIA, *supra* para 11 at s 136.

25 The ACA interpreted *Abitibi* to mean that every regulatory body enforcing every regulatory order is a creditor (*Redwater*). The appellants respectfully submit that this fails to appreciate the distinction between a regulator who is enforcing a duty owed to the public and a regulator who stands to benefits financially from an order. In *Northern Badger*, the regulator was acting to enforce a public duty, not to recover money. In *Abitibi*, the provincial government stood to benefit financially from clean-up of the properties it had acquired through expropriation.

Redwater, *supra* para 2 at para 63.

Northern Badger, *supra* para 16 at p 7.

Abitibi, *supra* para 2 at para 9.

26 In the case at hand, the AER will not benefit financially from compliance with the remediation order, nor is there a duty owed to the AER. As Justice Martin noted in dissent at the ACA, the obligation to remediate the wells is a condition inherent in the regulatory licence

(*Redwater*). This accords with the reasoning in *Northern Badger*, which, as noted above, distinguishes between debts owed to the Crown and duties owed to the public. Redwater's duty is to comply with laws of general application in the province, a duty which is owed to the public. Although compliance with the regulatory order will likely reduce the proceeds of sale of Redwater's assets and thereby reduce the creditors' returns (*Redwater*), this does not by itself turn the AER into a creditor.

Redwater, supra para 2 at paras 185, 75, 187.

Northern Badger, supra para 16 at p 7.

(ii) The regulatory order is not monetary in nature and therefore fails to meet the 3rd branch of the *Abitibi* test

27 The majority of the ACA further erred in finding that the third branch of the *Abitibi* test was met in *Redwater*.

28 *Abitibi* established that a regulatory order not framed in monetary terms may still qualify as a claim provable in bankruptcy if it meets two conditions: (1) there are "sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work" and that (2) the regulatory body will "assert a monetary claim to have its costs reimbursed." It follows that the SCC in *Abitibi* did not intend for every regulatory order to become subject to bankruptcy but rather only a small subset of such orders (see also *Northstar*). The wording of these conditions makes it clear that for an order to be a provable claim, more is required than merely demonstrating that complying with the condition attached to a licence requires spending money.

Abitibi, supra para 2 at para 36.

Northstar Aerospace Inc (Re), 2013 ONCA 600 at para 14 [*Northstar*].

29 In the present case, there is no certainty that the AER will perform well closure work itself. In fact, as Justice Martin, for the dissent, and Justice Slatter, for the majority of the ACA noted, the AER does not itself perform well abandonment and has no statutory obligation to do so (*Redwater*). Responsibility for orphan wells falls to the OWA, which is an underfunded and overextended non-profit organization. As Justice Martin highlighted, there is no sufficient certainty that the OWA will perform the remediation (*Redwater*).

Redwater, supra para 2 at paras 179, 78, 180.

30 Nor does the regulatory order meet the reimbursement condition of the third branch of the *Abitibi* test. The reimbursement requirement was confirmed in *Nortel Networks Corporation (Re)* and *Northstar Aerospace Inc (Re)*. The appellants respectfully submits that the ACA erred in disregarding this requirement. The AER rarely if ever seeks reimbursement (*Redwater*) and there is no reason to expect that it would in this case. The OWA does not have the authority to seek reimbursement (*Redwater*). To require security to be posted before approving the transfer of the licences is not, as the ACA found, an attempt by the AER to recover remediation costs on the part of the government (*Redwater*). It is a means to ensure compliance with a regulatory duty owed to the public.

Northstar, supra para 28 at paras 31-32.

Nortel Networks Corporation (Re), 2012 ONSC 1213 at para 91 [*Nortel*].

Redwater, supra para 2 at paras 78, 179, 180, 78.

31 Further, the appellants agree with Justice Martin who stated in dissent that the licence requirements behind the remediation order at issue in this appeal are "fundamentally different from the clean-up orders at issue in *Abitibi*" (*Redwater*). As discussed above, the order issued by the AER is not monetary in nature; it is a measure intended to prevent a kind of asset stripping. The licenses whose conditions the AER seeks to enforce are tied to a pool of assets. The AER requires that the wells be sold as a bundle or security be posted (*Redwater*). This makes sense when one considers that pursuant to Alberta law, from the outset and throughout the operating life of a company, the AER looks at all its wells together when calculating the company's asset-to-liability ratio. By issuing its order, the AER was simply defending the asset pool – and the public interest – against the actions of the trustee.

Redwater, supra para 2 at paras 187, 16.

B. The Court of Appeal erred in holding that the licence obligations created by provincial legislation conflict with or frustrate the scheme of priorities set out in the BIA

32 Alberta's well clean-up rules are license requirements that must be met by the owner of the asset pool. They are not claims and there is no creditor.

33 As discussed above, the facts in *Redwater* do not fit the criteria set out in *Abitibi* for identifying a claim provable in bankruptcy. Furthermore, properly interpreted, the OGCA and the BIA work alongside one another. However, should the Court still find that they are in

conflict, we respectfully submit that the principle of cooperative federalism should be applied in light of precedent in similar matters.

(i) Alberta's regulatory scheme falls outside of the scope of the BIA

34 Alberta's regulatory scheme falls outside the scope of the BIA as the assets under licence are protected by a constructive trust.

35 The OGCA secures well remediation in two ways: the licensee pays an annual orphan fund levy and the licensee's assets are used to counterbalance its liabilities when calculating its solvency ratio. Too many liabilities and a licensee will need to post more security. Underlying this system is the concept of an asset pool. The assets in the pool are held in trust. A constructive trust. The assets secure the owner's fiduciary duty toward the public, namely the duty to abandon wells properly. Stripping assets from the pool is a breach of trust. The AER order sought to prevent a breach of trust by the receiver.

36 A constructive trust is an equitable remedy by which a court corrects a situation where one side has been wronged as a result of another party obtaining or holding legal property that it was not meant to possess (*Virgo*). The sale of part of the assets from the asset pool was a breach of trust. The appellant respectfully requests that this court declare the sale null and void. The secured creditors neither expected to receive assets without liabilities nor is it fair that they should (*Cornell Law School*).

> Graham Virgo, *The Principles of the Law of Restitution*, 2nd Edition (Oxford Clarendon Press, 2006) at p 606-607.
>
> Cornell Law School, "Wex: Constructive Trust", online: *Legal Information Institute* < www.law.cornell.edu/wex/constructive_trust>.

37 While the constructive trust has primarily been used as a remedy against unjust enrichment, courts have broadened its scope in order to hold parties to "high standards of trust and probity and prevent them from retaining property which in 'good conscience' they should not be permitted to retrain" (*Soulos*). The "good conscience" standard can apply in situations where (1) the property was obtained by a wrongful act of the defendant; namely through breach of fiduciary duty or breach of duty of loyalty or (2) where the defendant has not acted wrongfully in obtaining the property, but where they would unjustly benefit to the plaintiff's detriment (*Soulos*).

> Soulos v Korkontzilas, [1997] 2 SCR 217 at paras 17, 36, 34, 45, [1997] SCJ No 52 [*Soulos*].

38 Per *Soulos*, in order for a court to order this remedy, four conditions must be satisfied:

(1) The defendant must have been under an equitable obligation, that is, an obligation of the type that courts of equity have enforced, in relation to the activities giving rise to the assets in his hands;

(2) The assets in the hands of the defendant must be shown to have resulted from deemed or actual agency activities of the defendant in breach of his equitable obligation to the plaintiff;

(3) The plaintiff must show a legitimate reason for seeking a proprietary remedy, either personal or related to the need to ensure that others like the defendant remain faithful to their duties and;

(4) There must be no factors which would render imposition of a constructive trust unjust in all the circumstances of the case (*Soulos*).

As detailed below, GTL's actions in this case warrant a finding of constructive trust in order to send a clear signal to receivers across Canada that *Abitibi* is not a license to do an end run around provincial resources law.

Soulos, *supra* para 37 at paras 17, 36, 34, 45.

First, GTL was under an equitable obligation to discharge its obligations in a manner consistent with the trust with which Redwater's assets are impressed. The wells can be put up for sale, but only as a whole package. In so doing, whoever acquired the package would take on the end-of-life obligations that need to be met in respect of the defunct wells. Whether this makes the bundle worthless is out of the hands of the receiver. Nor should it matter that it means there remains less money for the secured creditors. The secured creditors should have no expectation of a return on their investment in respect of an asset pool with outstanding clean-up obligations the price of which exceeds the sale value of the assets. The equitable obligation is thus that of not breaking the trust. Second, the assets came in the hands of ATB as a result from GTL's breach of trust and violation of license obligations owed to the province. The creditors were very aware, as lenders in the oil and gas industry, that the *Redwater* assets are self-funding. The *Redwater* ratio fell below 1 and so whatever revenue can be anticipated from the producing wells is charged by the trust with paying for the remediation of the defunct wells. This mechanism operates internally to the asset pool and cannot be interfered with by the receiver without overstepping its rights and infringing on the province's powers. Third, it is necessary to seek this proprietary

remedy in order to ensure that oil and gas companies and their lenders take license obligations seriously. Finally, finding a constructive trust would not lead to unjust results for creditors but rather an expected outcome, as expanded upon in the section below.

(ii) The ACA misinterpreted the scope of section 14.06 of the BIA

39 That the personal liability of the trustee must be at stake is a condition precedent to the application of subsection 14.06(4) of the BIA. The appellants respectfully submit that the ACA misinterpreted this subsection as applying even when the personal liability of the trustee is not at issue. This goes against the plain words of subsection 14.06(4).

40 The modern approach to statutory interpretation as articulated by Elmer Driedger was confirmed in *Rizzo & Rizzo Shoes Ltd (Re)*: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." What's more, if a legislative provision can be read both in a way that is constitutional and in a way that is not, the former reading should be adopted (CED).

> *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193 *[Rizzo Shoes]* citing Elmer A Driedger, *Construction of Statutes*, 2nd ed (Toronto: Buttersworth, 1983).
>
> CED 4th (online), *Statutes* (Ont), "Statutory Provisions and Aids to Interpretation: Federal Statutory Provisions: Constitution Act, 1982" (III.2.(a).(ii)) at § 50 [CED].

41 First, the ACA erred in accepting a tortuous reading of subsection 14.06(4). With respect, that was unnecessary and uncalled for. The plain language of subsection 14.06(4) explicitly restricts the provision to the trustee's liability. The appellant respectfully disagrees with the ACA when it found that since subsections 14.06(4)(b) and 14.06(5) "contemplate the trustee considering the 'economic viability' of the assets" this necessarily "goes well beyond the trustee's personal liability" (*Redwater*). An assessment of "the economic viability of complying with the order" simply allows for the trustee to determine if the remaining assets of the bankrupt will cover compliance with the order. To interpret it otherwise would be to contradict "the golden rule of reading Acts of Parliament" that "the grammatical and ordinary sense of the words is to be adhered to" (*Canadian Northern Railway*).

> *Redwater*, *supra* para 2 at para 68.
>
> *R v Canadian Northern Railway*, [1923] 2 WWR 836 at para 29, 64 SCR 264 [*Canadian Northern Railway*].

42 Next, the ACA looked at the wording of subsection 14.06(2) and inferred that subsection 14.06(4) must extend beyond mere personal liability or else be redundant (*Redwater*). Again, this was unnecessary and with respect, it is incorrect. Subsection 14.06(2) pertains generally to any costs associated with an environmental condition or damage whereas subsection 14.06(4) applies narrowly to failure to comply with an order or the costs associated with complying with an order to remedy an environmental condition or damage. That is, subsection 14.06(4) makes it such that even if the trustee is negligent, it will not be personally liable for the costs associated with complying with the order if, pursuant to subsection 14.06(4)(a)(ii), it disclaims any interest in real property. It may, however, be personally liable for other costs associated with the environmental damage, such as fines or fees. What subsection 14.06(4) does is provide an additional layer of protection to trustees.

43 The ACA failed to consider subsection 14.06(4)'s broader context both within the four corners of section 14.06 and the BIA as a whole. This ignores the interpretive principle that a subsection must be understood in the context of the entire subsection. As Justice Martin noted in her dissent, "Subsection 14.06(4) does not stand in "splendid isolation" in the BIA, or even within s 14.06. It is part of an interconnected set of provisions that must be interpreted together" (*Redwater*). Holistically, section 14.06 addresses environmental liabilities upon bankruptcy and protects trustees from personal liability (*Redwater*).

Redwater, *supra* para 2 at paras 69, 207, 49.

44 Third, the ACA failed to consider Parliament's intentions in enacting the 1997 amendments as elucidated by the preamble to the BIA and the Parliamentary debates for these amendments. Debates in the House of Commons Standing Committee on Industry clearly indicate that Parliament's purpose was to protect insolvency practitioners from personal liability, expressing concern that trustees and receivers would avoid risky estates where otherwise they may have tried to salvage the business and jobs that depend on it (House of Commons).

"Bill C-5, an act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act", 2nd reading, *House of Commons Debates*, 35th Parl., 2nd Sess., No. 50 (27 May 1996) at 3031 (Hon John Manley) [House of Commons].

45 In addition, Jacques Hains, who was involved with the amendments, noted that Parliament's intention "was to provide a relief to insolvency practitioners" since under environmental laws "they could have been subject to personal liability to clean up the environment. I am speaking of personal liability here, meaning 'out of their own pockets.'"

(Standing Committee). This clearly indicates that Parliament's intent was to address a specific issue – protecting trustees from a real, personal risk associated with clean-up orders – not to provide a means for companies and their creditors to do an end-run around provincial resources law.

> Senate, Standing Committee on Banking, Trade and Commerce, Evidence, No 13 (4 November 1996) (Hon Jacques Hains) [Standing Committee].

(iii) The ACA's interpretation of s. 14.06 of the BIA would lead to absurd consequences

46 To interpret subsection 14.06(4) as allowing trustees to disclaim assets regardless of whether their personal liability is at stake would be to give the trustee more rights than the bankrupt. This is contrary to the principle that "[t]he trustee simply steps into the shoes" of the bankrupt (*Saulnier*). It would also contradict the principle that creditors should not be placed in a "better position than they would be in absent the bankruptcy" (*Royal Bank*; *Anthony*). To interpret subsection 14.06(4) in a manner that leads to these results would produce absurd consequences, contrary to the well-established principle of statutory interpretation that the legislature does not intend to produce such consequences (*Rizzo Shoes*). An absurd consequence is one which "leads to ridiculous or frivolous consequences, … is extremely unreasonable or inequitable … is extremely illogical or incoherent, or … is incompatible with other provisions or with the object of the legislative enactment" (*Rizzo Shoes*). As discussed above, a result allowing trustees to disclaim assets beyond what is needed to protect them from personal liability and therefore interfere with provincial jurisdiction is inconsistent with the object of the BIA. Allowing trustees to pick apart an asset pool whose balance of pluses and minuses is at the heart of the regulatory framework is unconscionable.

> *Saulnier v Royal Bank of Canada*, 2008 SCC 58 at para 50 [*Saulnier*].
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> *Royal Bank of Canada v North American Life Assurance Co*, [1996] 1 SCR 325 at para 16, [1996] S.C.J. No. 17 [*Royal Bank*].
>
> *Canada (Minister of National Revenue – MNR) v Anthony*, [1995] NJ No 110 at para 18, 124 DLR (4th) 575 [*Anthony*].
>
> *Rizzo Shoes*, *supra* para 40 at para 27.

47 The unfairness of allowing the receiver to go against the regulator and sell the valuable assets while disclaiming the defunct wells comes into focus when we consider that all industry participants, including ATB and other creditors, are aware of well clean-up obligations, and in fact account for this in their lending (*Redwater*). This is not, as was the case in *Abitibi*, an

unexpected expense. Far from it. It would be ridiculous and unreasonable to twist the meaning of the law to allow companies to shirk anticipated duties and secured creditors to unduly benefit. We respectfully submit that the ACA was mistaken in believing that Parliament envisaged this type of situation when it crafted section 14.06(4) of the BIA and incorrectly minimized the adverse outcome of such a finding by misframing the issue as one of Parliament's concern that a superpriority would drive away investors (*Redwater*). This presupposes (1) that lenders are unaware of the risks and (2) that subsection 14.06(4) conflicts with Alberta's regulatory scheme and applies to the AER's regulatory orders. As argued above, this is not the case. Just as creditors should not be shortchanged by last-minute government clean-up orders, nor should they get a windfall because a trustee invoked section 14.06(4) to treat a longstanding, public duty regulatory obligation like an unsecured claim.

Redwater, supra para 2 at paras 130, 223, 141, 95-96.

48 In applying an understanding of subsection 14.06(4) that expands trustees' ability to disclaim assets beyond what is necessary to protect them from personal liability, the ACA inappropriately encroached on Alberta's exclusive legislative jurisdiction. Even if subsection 14.06(2) states that the provision will apply notwithstanding anything in federal or provincial law, the purpose of the BIA is to create bankruptcy rules that fit with the provinces' property and civil rights law, not to invalidate it. The purpose of section 14.06, according to the plain reading of all its subsections, is to protect trustees from personal liability with regard to environmental orders. It is not intended to erase liabilities under provincial legislation that can be readily be read in conjunction with the BIA. Even a liberal construction of the plain wording of the section, taken in context and keeping in mind the intention of the legislature, points to only one factor: personal liability (*Rizzo Shoes*; *IA*).

Rizzo Shoes, supra para 40.

Interpretation Act, RSC 1985, c I-21, s 12 [*IA*].

(iv) <u>The ACA failed to apply the principle of cooperative federalism</u>

49 Alberta's legislation does not conflict with section 14.06 of the BIA in such a way as to engage the doctrine of paramountcy. As stated by the SCC in *Multiple Access Ltd v McCutcheon*, the doctrine of paramountcy only applies when there is a clear conflict and it appears that both laws cannot coexist; that is, "where there is actual conflict in operation as where one enactment says 'yes' and the other says 'no'; 'the same citizens are being told to do inconsistent things';

compliance with one is defiance of the other." Justice Martin, in her dissent at the ACA, confirmed this approach (*Redwater*). Indeed, in *Canadian Western Bank v Alberta,* the majority held that "The 'dominant tide' finds its principled underpinning in the concern that a court should favor, where possible, the ordinary operation of statutes enacted by both levels of government." Only an overbroad interpretation of section 14.06 would engage paramountcy, which would free receivers and trustees from compliance with provincial regulations they do not wish to follow. Additionally, this directly opposes the precedent, established in *Canadian Western Bank v Alberta,* that Courts should avoid frustrating provincial public interest measures.

Redwater, *supra* para 2 at para 121.

Multiple Access Ltd v McCutcheon, [1982] 2 SCR 161 at p 191, 138 DLR (3d) [*Multiple Access*].

Canadian Western Bank v Alberta, 2007 SCC 22 at paras 37, 42 [*Western Bank*].

50 *Western Bank* further emphasized the important reality that overlapping powers are unavoidable in a contemporary understanding and application of Canadian federalism:

> Canadian federalism is not simply a matter of legalisms. The Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts have rightly observed the importance of co operation among government actors to ensure that federalism operates flexibly. (*Western Bank*)

As such, and in applying the principles of cooperative federalism established in previous decisions such as *Western Bank*, the SCC has stated that the doctrine of paramountcy is to be narrowly construed and its application restrained to avoid infringing on provincial autonomy (*Lemare Lake*; *Moloney*). As the SCC stated in *Western Bank*, the living tree approach should guide the interpretation of relationships between the branches of government, which must "evolve and must be tailored to the changing political and cultural realities of Canadian society." Our modern constitutional landscape "is painted with the brush of co-operative federalism" whose principal objective is to foster cooperation between governments in the name of public interest (*NIL/TU, O*; *Western Bank*). We therefore respectfully submit that the ACA erred in applying the doctrine of paramountcy rather than the principle of cooperative federalism.

Saskatchewan (Attorney General) v Lemare Lake Logging Ltd, 2015 SCC 53 at paras 20-21 *[Lemare Lake]*.

Alberta (Attorney General) v. Moloney, [2015] 3 SCR 327, 2015 SCC 51 at para 27 [*Moloney*].

Western Bank, *supra* para 49 at paras 23, 22.

NIL/TU,O Child and Family Services Society v BC Government and Service Employees' Union, 2010 SCC 45 at para 42 [*NIL/TU,O*].

(v) The ACA failed to consider the federal government's silence

51 The Attorney General of Canada's lack of participation in this proceeding goes against finding Alberta's laws to be inoperable on account of paramountcy. Indeed, the courts have cautioned against invalidating provincial legislation where the federal government does not contest its validity (*OPSEU; confirmed in Kitkatla Band*). It follows that this caution should be extended to cases of inoperability. In 2015, the SCC released three cases exploring the interplay of the BIA and provincial legislation. In *Moloney*, the Superintendent of Bankruptcy was an intervener, requesting that provincial legislation be found *ultra vires* the province. In *407 ETR Concession Co v Canada (Superintendent of Bankruptcy)*, Canada, this time acting as respondent, again asked that provincial legislation be deemed inoperative. In both these cases, the SCC found the provincial law to be unconstitutional insofar as it frustrated the federal purpose. Note that, in *Lemare Lake*, where Canada did not intervene, the Court found that the provincial law did not frustrate the BIA's purpose.

Ontario (Attorney General) v OPSEU, [1987] 2 SCR 2 at para 29, [1987] SCJ No 48 [OPSEU].

Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture), 2002 SCC 31 [*Kitkatla Band*].

Moloney, *supra* para 50 at para 57.

407 ETR Concession Co v Canada (Superintendent of Bankruptcy), 2015 SCC 52 [407 ETR Concession].

Lemare Lake, *supra* para 50.

52 GTL is testing the BIA in an attempt to sidestep Alberta's licensing system as Redwater's trustee. The Canadian federation, and the careful balancing of powers, was established to reconcile, balance and accommodate geographic, cultural and linguistic diversity (*Secession*; see also Canada). Concepts such as paramountcy were certainly not intended to be used as a shield by a party to a dispute wishing to be exempted from compliance with longstanding obligations under provincial laws of general application established in the public interest.

Reference re Secession of Quebec, [1998] 2 SCR 217 at para 43, 161 D.L.R. (4th) 385 [*Secession*].

"Federalism in Canada" (25 July 2018), online: *Government of Canada* <www.canada.ca/en/intergovernmental-affairs/services/federation/federalism-canada> [Canada].

(vi) A judgment that concords with cooperative federalism is required for Canada to uphold the 'polluter pays' principle

53 The 'polluter pays' principle found in the 1992 Rio Declaration is now at home in Canadian law *(Rio Declaration, Imperial Oil Ltd v Quebec (Minister of the Environment*) and each order of government is bound to make this principle a reality in matters coming within its jurisdiction.

> *Rio Declaration on Environment and Development, AG (NU) 12 August 1992, A/CONF.151/26 (Vol. I), Report of the United Nations on Environment and Development [Rio Declaration]*.
> *Imperial Oil Ltd v Quebec (Minister of the Environment)*, 2003 SCC 58 at paras 23-24 [*Imperial Oil*].

54 As noted by Justice Martin in her dissent, stripping the AER of its power to force bankrupt companies to remediate defunct wells before issuing the license transfers for producing wells would effectively incentivize companies to reorganize their affairs to avoid their clean-up obligations (*Redwater*). As stated by Justice Martin:

> "If that entity goes bankrupt or is re-organized, there is the fear that these public duties would be washed away from the entity and placed on others. … If they are allowed to avoid or evade the end of life responsibilities attached to their licences, abandonments and reclamation, so necessary for the environment, would likely be among the first sacrifices made in times of fiscal difficulty" (*Redwater*).
>
> *Redwater, supra* para 2 at para 244.

Since the oil and gas industry is very volatile and insolvency is always near, Alberta built a system that relies on tracking the ratio of assets to liabilities in a notional asset pool so that companies can avoid onerous obligations for posting financial security with the regulator. In *Spraytech v. Hudson*, the Supreme Court of Canada recognized that a municipality could ban a pesticide even though the federal government has already covered the field of pesticide control and did not ban that pesticide. The Appellants respectfully submit that this court should find a constructive trust to uphold Alberta's system for enforcing the 'polluter pays' principle in the same way as it upheld precaution as exercised by the town of Hudson in *Spraytech*. Indeed, the Court should consider the longstanding efforts of the federal and provincial governments toward making "polluter pays" a reality, as well as previous rulings which have aligned themselves with this objective, and avoid rendering a judgment that would undo our understanding of what is meant by "cradle to grave." Just as there was nothing unconstitutional about the town of Hudson

banning a pesticide that was not banned by the federal government, there is nothing incompatible with the BIA in requiring a trustee to treat an insolvent company's non-producing wells as part and parcel with its active wells (*Spraytech*). This case is not about the trustee. It is about sustainable development.

> *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 SCR 241, 2001 SCC 40 [Spraytech]*.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

55 The Appellants do not seek costs and submit that costs should not be ordered against them.

PART V -- RELIEF SOUGHT

56 The Appellants respectfully request that this appeal be allowed and the following additional relief be granted:

a) An order that any proceeds from the sale of the Redwater assets be used to address Redwater's end of life obligations;

b) A declaration confirming that Redwater assets be treated as a bundle for the purpose of a sale in the context of the bankruptcy proceedings; and

c) A declaration confirming that provincial obligations to abandon and reclaim oil and gas assets are public duties.

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

Valérie Black St-Laurent

Alexandra Klein

Counsel for the Appellants
Orphan Well Association and Alberta Energy Regulator

PART VI -- TABLE OF AUTHORITIES

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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

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