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 #9

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

AND TO: **ALL REGISTERED TEAM**

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PART I -- OVERVIEW AND STATEMENT OF FACTS

1 At issue in this appeal, is if the Province of Alberta, in managing its resources under section 92(A) of the *Constitution Act,* impose conditions that require companies to restore land to its original state, which will survive subsequent claims by secured creditors. This environmental duty has been deemed by Alberta to be imperative in the right of drilling and "part of the general law of Alberta enacted to protect the environment and for the health and safety of all citizens." [*Northern Badger*]

> *PanAmericana de Bienes y Servicios v. Northern Badger Oil & Gas Limited*, 1991 ABCA 181 [*Northern Badger*]

2 This Court should approach these issues, bearing in mind that the doctrine of cooperative federalism should be interpreted and applied in a manner that does not render inoperative important powers at the core of provincial jurisdiction. With respect, the courts below did not take this approach.

3 The decision under appeal (the "**Majority Decision**") has upset the status quo by overturning a quarter-century of precedent, under which end-of-life environmental obligations were a public duty in accordance to the “polluter-pays principle”. In doing so, the Majority Decision erred in adopting an interpretation of a provision of the *BIA*, designed only to protect receivers from personal liability. Such an interpretation fails to recognize the exclusive jurisdiction of provinces to manage natural resource development.

4 The Majority Decision also incorrectly categorized regulatory obligations as provable claims in bankruptcy, essentially diminishing all environmental and safety obligations to unsecured monetary claims. This impairs the ability of the Alberta Energy Regulator ("**AER**") to effectively regulate Alberta's largest and most important industry.

5 One of the most significant unintended consequences of the Majority Decision is that the obligation of energy companies to restore land to its original state is no longer a relevant consideration by Lenders when issuing a loan. Secured creditors are also incentivized to place those companies into insolvency so that the obligations can be dumped onto the public as the Majority Decision permits them to do.

6 The outcome of the Majority Decision will be that secured creditors will be given the greatest opportunity possible to be compensated from the bankrupt party's assets, while guaranteeing that Alberta's oil and gas industry (and potentially taxpayers) pay the cost for the bankrupt party's reclamation and abandonment obligations.

> Fenner L. Stewart, "Orphan Well Association v Grant Thornton Limited: What's at Stake in Redwater" (15 November 2017), ABlaw (blog), https://ablawg.ca/2017/11/15/orphan-well-association-v-grant-thornton-limited-whats-at-stake-in-redwater/

7 The appellants submit that such an outcome is not what was intended by the legislature through its amendments to the *BIA* nor is it what was intended by this Court through its decision in *AbitibitBowater.*

A. Overview of the Appellants' Position

8 The Appellants' position is that the dissenting reasons of Martin J.A. (as she then was), not the reasons of the majority below, correctly express the law on all of the appellants' issues.

B. Statement of the Facts

9 The background and facts in this appeal are set out in detail in the Majority Decision, and key facts are summarized below

(i) The Alberta Oil and Gas Regulatory Regime and the AER

10 Section 92(5) and (13) of the *Constitution Act* provides that provinces have exclusive jurisdiction over provincial public lands, property, and civil rights. Section 92(A) of the Constitution Act confers exclusive jurisdiction on provinces to make laws related to the exploration, development, conservation, and management of non-renewable natural resources.

> *Constitution Act*, 1867, s. 92(5) and (13) and 92A

11 Alberta has created and implemented robust energy regulations alongside the AER. The AER acts as a quasi-judicial administrative and regulatory body that oversees all aspects of upstream energy development in the province. The purpose of the AER is to ensure the safe, efficient, orderly, and environmentally responsible development of energy resources over their entire life cycle.

Responsible Energy Development Act, SA 2012, c. R-17.3, s. 2

12 These regulations are expansive, detailed, and complex, and deal with technical and legal matters. As of October 2015, the AER regulated about 350,000 wells, 77,650 facilities, and 430,000 kilometres of pipeline

Orphan Well Association, et al. v. Grant Thornton Limited, et al. [2017] S.C.C.A. No. 231 (Factum of the Appellant at para 10)

13 In regards to when any form of development occurs on Alberta lands, it is intended that disruption will be minimal and temporary and that sites will be restored to their original condition following energy development and extraction. Oil wells must be safely abandoned, which refers to the permanent dismantlement of a well or facility in a manner prescribed by the regulations or rules.

14 The requirement to address end-of-life obligations is a condition of and integral to the Alberta regulatory regime to explore, drill and produce energy resource assets. This is a foundational principle upon which oil and gas regulatory regimes have been built, not only in Alberta, but in other provinces

Factum of the Appellant at paras 11-13 [FOA]

15 The Alberta Court of Appeal confirmed that end-of-life abandonment obligations are an inherent part of the issuance of a well licence and are not provable claims in bankruptcy [*Northern Badger*]. The Alberta Court of Appeal also considered whether the AER's predecessor was merely a creditor whose claim should be proven along with all others, and concluded it was not:

> There are two aspects to the question whether the board had a "provable claim" in the bankruptcy. The first is whether Northern Badger had a liability; the second is whether that liability is to the board so that it is the board which is the creditor. I respectfully agree that Northern Badger had a liability, inchoate from the day the wells were drilled, for their ultimate abandonment. It was one of the expenses, inherent in the nature of the properties themselves, taken over for management by the receiver. With respect, I do not agree, however, that the public officer or public authority given the duty of enforcing a public law thereby becomes a "creditor" of the person bound to obey it. The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life.
>
> …
>
> In my view, the board is not, at this point, a "creditor" of Northern Badger with a claim provable in its bankruptcy. The problem presented by this case is not to be solved, therefore, by determining whether the board ranks as a creditor of Northern Badger before or after the secured creditors. Rather it must be determined whether the receiver, which was the operator of the oil wells in question, had a duty to abandon them in accordance with the law
>
> *Northern Badger, supra* para 1 at paras 32-36

16 Consistent with the “polluter-pays” principle, the Province of Alberta's approach through the AER includes requirements to ensure that end-of-life obligations are addressed by the parties responsible for fulfilling them. Requirements include the AER’s licensee liability rating program ("**LLR Program**") and its licence transfer requirements. Both have existed for several years and are intended to perform a gatekeeper function and prevent costs associated with end of-life obligations from being borne by the public of Alberta and to minimize the risk to the Orphan Fund administered by the Orphan Well Association ("**OWA**").

(ii) The Orphan Well Association

17 The OWA is a non-profit organization that operates pursuant to the authority delegated to it by the AER which enables it to carry out end-of-life activities in relation to properties designated by the AER as "orphans". An orphan is an AER licensed property that has no viable

licensee and for which no other entity is readily available to conduct abandonment or reclamation.

18 The OWA is a predominantly industry-funded association. Its board of directors is composed of representatives of the Canadian Association of Petroleum Producers, the Explorers and Producers Association of Canada, the AER, and Alberta Environment and Parks. It was initially created to ensure that the number of orphan wells were appropriately handled, for the benefit of all stakeholders in the Province.

19 The purpose of the OWA is to act as method of last resort for abandoned wells. It can only complete abandonment if it receives appropriate funding. The purpose of the OWA was not to act as a method of dumping thousands of unremediated well sites. It additionally was not established as a way of circumventing the insolvency process, and as a way to benefit receivers and trustees

Factum of the Appellants at paras 18-20 [FOA]

20 The number of new orphan wells increased from 80 in 2013-2014 to 591 in 2014-2015. As of the summer of 2017, the total number of wells and sites exceeded 1,800, with another 1,100 expected in the near future. The potential cost as a result of the Majority Decision is up to $8.6 billion. An increase in the number of insolvent corporations abandoning wells and sites, has substantially increased the OWA's inventory well beyond its ability to reclaim these sites in any reasonable period of time.

> Dachis, B, Shaffer, B, and Thivirerge, V. (2017). C.D. Howe Institute, Commentary No. 492, All's Well that Ends Well: Addressing End-of-Life Liabilities for Oil and Gas Wells at p. 4

(iii) The Redwater Insolvency

21 Redwater Energy Corporation ("**Redwater**") was granted license eligibility and first obtained licenses in 2009. As part of becoming a licensee, Redwater was bound to comply with applicable requirements, including end-of-life obligations.

22 In 2014, Redwater held 84 well licences, 7 facility licences, and 36 pipeline licences, all in central Alberta. As a result of financial difficulties, Redwater attempted to sell its assets, but did not receive any offers that would fully repay its loan.

> *Orphan Well Association v. Grant Thornton Limited*, 2017 ABCA 124 (*Redwater CA*) at par 141

23 As a result, on May 12, 2015, ATB was granted a Court-appointed receiver over all of Redwater's assets. Shortly thereafter the receiver advised that it was only taking possession of 20 of Redwater's 127 AER-licensed sites. The receiver's position was that because of its renouncement, the Redwater estate had no obligation to fulfill any regulatory requirements associated with those sites and the AER could not apply its LMR program when the receiver went to sell the assets it retained. The AER issued closure and abandonment orders for the sites renounced by the receiver.

> *Redwater CA supra* para 22 at para 4

24 While the AER has the discretion to carry out abandonment work, in its evidence before the court, the AER stated that it is extremely rare for the AER to conduct abandonment of AER-licensed sites and that it did not intend to perform any abandonment work at any of Redwater's AER-licensed sites. On October 28, 2015, a bankruptcy order was issued for Redwater to appoint the receiver to the additional role as trustee over the estate of Redwater. The AER and OWA applied to have the renouncements declared void and to compel the receiver and trustee to comply with the environmental orders. The receiver and trustee brought a cross application for approval of its sales process and challenged the constitutionality of the positions of the AER and OWA

> *Redwater CA supra* para 22 at paras 6-8

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

25 On May 19, 2016, Chief Justice Wittmann of the Alberta Court of Queen's Bench released his reasons for judgment, dismissing the applications of the AER and OWA and awarding judgment in favour of the receiver, trustee and the ATB. He held that a trustee can renounce licensed assets under section 14.06 of the *BIA* and paragraph 3(a) of the receivership order, pursuant to which the trustee only took possession and control of certain AER-licensed assets. Given this finding, he concluded that there was an operational conflict between the *BIA* and provisions under provincial legislation that deem a receiver to be a licensee and subject to environmental liabilities, including compliance with abandonment orders.

> *Redwater Energy Corporation (Re)*, 2016 ABQB 278 ("*Redwater QB*") at paras 150-156

26 The Court also applied the three-part test set out in the *AbitibiBowater* decision to determine whether, the AER's abandonment orders are provable claims as opposed to regulatory obligations. He found that in the narrow and technical sense it was not sufficiently certain that the AER would carry out the abandonment work. However, he ultimately found that the *AbitibiBowater* test was satisfied based on his acceptance that the sites (at least the ones without working-interest participants) would likely be deemed to be orphans and that they may be addressed by the OWA at some future time. The fact that compliance with AER requirements required posting of security for abandonment obligations was found to frustrate the distribution scheme under the *BIA*.

> *Newfoundland and Labrador v. AbitibiBowater Inc*., 2012 SCC 67 ("*AbitibiBowater*") at para 26

(v) The Decision of the Court of Appeal

27 The majority of the Court of Appeal (the "**Majority**") dismissed the appeal and focused on the rights of secured lenders to enforce security in a predictable and profitable manner. They held that the *BIA* takes precedence over provincial legislation in the event of a conflict and found that "financial conditions" imposed by the AER disrupt the priority regime in the *BIA*.

28 In her dissent, Justice Martin relied on the principles of cooperative federalism. She emphasized the importance of interpreting federal and provincial laws as existing harmoniously wherever possible, and in the absence of a clear conflict, she found that the doctrine of paramountcy would not render provincial law inoperative.

29 Justice Martin framed the issue as, "given Alberta's exclusive jurisdiction to regulate its oil and gas resources, do the licence obligations created by provincial legislation conflict with or frustrate the scheme of priorities set out in the *BIA*?" She found that there was no conflict or frustration and that the schemes can continue to coexist

Redwater CA supra para 22 at para 112

30 In finding that provincial legislation does not result in a "monetary claim" as defined in *AbitibiBowater,* Justice Martin contrasted the licensing and regulatory regime to the facts at play in *AbitibiBowater.* She noted the evidence that the AER did not intend to perform the abandonment work and that even if the OWA eventually did the abandonment work, it would involve a significant timeline and would not result in the abandonment work being performed by or funded by the provincial government. It was not "sufficiently certain" that a regulatory body or the provincial government would perform the work and be in a position to assert a monetary claim.

31 In relation to the AER's LMR and transfer requirements, she noted these are ongoing regulatory obligations that apply to all licensees and that predate bankruptcy. Any requirement to post security does not turn the AER into a creditor because it is simply seeking to enforce licence conditions

Redwater CA supra para 22 at paras 166-188

32 The Appellants respectfully submit this Court should adopt Justice Martin's Dissent for the reasons outlined below.

PART II -- QUESTIONS IN ISSUE

33 The issues in play in this appeal are as follows:

(a) Did the Court of Appeal err in its application of the test established in *AbitibiBowater*?

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

PART III -- ARGUMENT

A. The Court of Appeal Erred in its Application of the Test Established in *AbitibiBowater*

(i) Overview of *Northern Badger*

34 In *Northern Badger*, the provincial regulator (the predecessor of the AER) sought compliance with its order to carry out proper abandonment procedures on seven suspended oil wells. The issue was whether the receiver-manager of the insolvent and bankrupt oil company was prevented from complying by the terms of the *BIA*

35 The Alberta Court of Appeal disagreed with the trial judge's characterization of the regulator's actions, and rejected the contention that, in enforcing the requirement for the abandonment of oil and gas wells, the regulator was acting as a creditor. They concluded that the obligation in regards to abandoning the wells was a regulatory obligation, not a provable claim in the bankruptcy. Chief Justice Laycraft stated

> The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding on every citizen of the Province. All who become licensees of oil and gas wells are bound by them. ... The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed
>
> *Northern Badger, supra* para 1 at para 33

(ii) The Supreme Court of Canada's Decision in *AbitibiBowater*

36 As stated by Martin J.A. (as she was known then), in her dissent at the Court of Appeal:

> The respondents submit that the reasoning in *Northern Badger* has been completely overtaken, indeed overruled by the Supreme Court of Canada's more recent decision in Abitibi and by s 14.06 of the *BIA*…The Supreme Court in *Abitibi* did not overturn *Northern Badger*, but rather emphasized the need to consider the substance of provincial regulation in assessing whether it creates a claim provable in bankruptcy. That is precisely what this Court did in *Northern Badger*, and what I am doing here. In *AbitibiBowater*, the Supreme Court of Canada established a three-part test to determine whether a particular order is a "claim provable in bankruptcy" within the meaning of section 2 of the BIA, thereby subjecting that order to the insolvency process. The three requirements of the *AbitibiBowater* test are that (1) there must be a debt, a liability, or an obligation to a *creditor*; (2) the debt, liability or obligation must be *incurred before the debtor becomes bankrupt*; and (3) it must be possible to attach a *monetary value* to the debt, liability or obligation (emphasis of Deschamps J).
>
> *Redwater CA supra* para 22 at paras 163 to 168

37 Under this test, not every provincial regulatory order is a claim provable in bankruptcy. Only those orders that are monetary in value and that will develop into financial liabilities owed to the regulatory body are subject to the insolvency process. This requires sufficient certainty that money will be spent and ultimately claimed against the estate. As was noted by the Honourable Chief Justice McLaughlin in her *AbitibiBowater* dissent, there is "a fundamental distinction between ongoing regulatory obligations owed to the public, which generally survive the restructuring, and monetary claims that can be compromised."

> *AbitibiBowater supra* para 26 at paras 70-74

38 The definition of "provable claim" should be interpreted narrowly, to protect both the public and the environment, while still allowing for a method of restructuring or disbanding of insolvent corporations. Doing so would allow for the distribution of the estate's assets in accordance with the rules that the debtor was bound by at the time of the licensing. Not only would this uphold the Supreme Court's prior recognition that not all orders issued by regulatory

bodies are provable claims, it would also ensure a level playing field for companies and creditors by establishing that all parties are bound by the rules regardless of insolvency proceedings.

39 While the decision in *AbitibiBowater* clarified as to when some regulatory orders may be converted into monetary claims provable in bankruptcy, it did not overrule what had previously been established in *Northen Badger*. *AbitibiBowater* will be applied when it appears that the three prongs of the test it established are met.

(iii) The AER was not Acting as a "Creditor"

40 The Majority Decision erred in their finding that the abandonment orders issued by the AER and the AER's LLR program requirements meet the first branch of the *AbitibiBowater* test. In this situation, the AER was not acting as a creditor as they were not enforcing a debt, but well known regulatory requirements in the interest of the general public. If the enforcement of these types of requirements were obligations owed to a creditor, then any sort of ruling that cost money to comply with, would be demoted to a "provable claims".

41 This line of logic would render the first step of the test meaningless as the first part of the *AbitibiBowater* test borrows language from *Northern Badger* which distinguished between debts owed to the Crown and duties owed to the public.

42 A nuanced examination of the relationship between a regulator and regulated actor is required where a regulator is considering whether to authorize the continued use of a bankrupt party's assets by others in a regulated industry on a going-forward basis. As was stated by the Supreme Court in *AbitibiBowater*, insolvency does not confer a licence to pollute or to otherwise engage in highly regulated activities without regard to the rules that apply to that activity.

> *AbitibiBowater supra* para 26 at para 41

43 The first branch of the *AbitibiBowater* test is discussed at length by Justice Martin in her dissent:

> In my view, the regulatory regime also does not satisfy the first requirement of the Abitibi test for monetary claims – that the regulatory body is a creditor of the insolvent

> debtor. The obligation to abandon a well and reclaim the well site, imposed on a licensee by provincial legislation, is not, in my view, the claim of a creditor. This was the view of Laycraft CJA in Northern Badger at para. 32-33, when he noted that the cost of abandoning licensed wells "was one of the expenses, inherent in the nature of the properties themselves, taken over for management by the Receiver". That cost is not owed to the Regulator, or to the province

Redwater CA supra para 22 at para 185

44 The obligation to restore the property to its original state is both a term of the lease, and a fundamental duty owned and accepted as a condition of ownership and the right to drill. It is not something that is trumped by the subsequent grant of security as it is part of the fundamental character of the asset and activity. As Justice Deschamps noted in *AbitibiBowater*, "As a matter of principle, reorganization does not amount to a license to disregard the rules".

AbitibiBowater supra para 26 at para 2

45 Where a regulator is exercising their discretion to impose licence conditions, they are acting on behalf of the public and does not have the same creditor-like relationship with a party as Newfoundland did with AbitibiBowater. This applies even if the regulator's actions impose costs on the regulated entity.

46 The first step of the test should, as the Alberta Court of Appeal did in *Northern Badger*, acknowledge that some regulatory duties are owed to the regulator as a creditor, while others are owed to the public as a whole

Northern Badger, supra para 1 at para 33

47 As Justice Laycraft held in *North Badger* and Justice Martin reiterated the obligation to comply with the conditions imposed on regulatory licences is "inherent in the nature of the properties itself."

Redwater CA supra para 22 at paras 185-187

48 When a regulator requires evidence that regulatory requirements will be complied with before approving a licence transfer, it is not acting as a creditor of the transferor, even though its actions may have an indirect impact on the price which can be obtained for the licences. Rather, the regulator is acting in the public interest to ensure that compliance with the regulatory requirements that form an inherent element of those licences will continue post-transfer.

(iv) Not All Orders That Involve the Expenditure of Funds Have an Attachment of Monetary Value

49 A principal consideration under the third branch of the *AbitibiBowter* test is whether there are "sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process."

50 The Supreme Court did not suggest that any regulatory order which required the trustee or a third party to expend money in order to comply with it would meet the third step of the test. In its place, it held that "orders relating to the environment may or may not be considered provable claims". A regulatory order will only be held to be monetary in nature if is sufficiently certain that the regulator itself will eventually have a claim for reimbursement from the bankrupt party.

AbitibiBowater supra para 26 at para 36, 46

51 As the Ontario Court of Appeal explained in *Nortel*, if any order that required the expenditure of money met the third step of the test, virtually every regulatory order would be a provable claim:

> As I read it, the Supreme Court's decision is clear: ongoing environmental remediation obligations may be reduced to monetary claims that can be compromised in CCAA proceedings only where the province has performed the remediation work and advances a

> claim for reimbursement, or where the obligation may be considered a contingent or future claim because it is "sufficiently certain" that the province will do the work and then seek reimbursement.

Nortel Networks Corporation (Re), 2013 ONCA 599 at para 31-32 [*Nortel]*

52 Such an approach fails to give appropriate deference to a regulator and creates a presumption that regulators are seeking an unfair financial benefit just because compliance may cost money. The Ontario Court of Appeal in Nortel warned against such an approach when it stated that the presumption that as long as an order requires an expenditure of funds it is monetary in nature, is far too broad.

53 To find that the third step of the test is met whenever a regulatory order results in "diverting value from the bankrupt estate" sets the bar too low. It ignores the Supreme Court's admission that the regulatory order must have the potential to "ripen into a financial liability owed to the regulatory body that made the order" before it can be considered a provable claim. It is not enough to have sufficient certainty that the regulator could perform remediation itself; there must be sufficient certainty both that it will do so and that it will then seek reimbursement from the bankrupt party's estate.

Redwater CA supra para 22 at para 74
AbitibiBowater supra para 26 at para 3

54 Parties who participate in highly regulated activities must meet a wide range of regulatory conditions which all have associated costs. Finding that a regulatory obligation on a licence is monetary in nature simply because financial value can be attached to it would be to transform virtually every regulatory obligation into a claim provable in bankruptcy, contrary to what the Supreme Court found in *AbitibiBowter*.

55 The third step of the test should be based on if the AER would conduct remediation itself and pursue a monetary claim against Redwater's estate, and not on whether compliance with

Alberta's regulatory scheme will require the expenditure of funds. As discussed in *AbitibiBowter*:

> An environmental order issued by a regulatory body can be treated as a contingent claim, and ... such a claim can be included in the claims process if it is sufficiently certain that the regulatory body will make a monetary claim against the debtor.
>
> *AbitibiBowater supra* para 26 at para 59

56 In applying the test to the AER's abandonment order, the certainty that the AER will conduct the remediation is low. The AER has no statutory obligation to carry out abandonment work and has specifically stated that it has no intention of performing the work in this instance. The purpose of the AER is not to perform the abandonment work itself, and it rarely does so. As stated by Martin J.A.:

> The evidence of the AER's affiant was that it rarely, if ever, conducts abandonment work on behalf of its licensees, and when it does so it virtually never asserts a claim for reimbursement. Specifically, with respect to the Redwater assets, the AER does not intend to perform the abandonment work. Abandonment is the obligation of the licensee.
>
> *Redwater CA supra* para 22 at para 179

57 In this context, the AER directs interested participants to seek a transfer of the site or to carry out abandonment and reclamation activities. Where there is no working interest participant, or other responsible parties, the AER declares the sites "orphans" and refers the sites to the OWA. As both the Honourable Chief Justice Wittmann and Justice Martin have noted, the OWA has no power to seek reimbursement from the licensee.

> *Redwater QB supra* para 25 at para 169
> *Redwater CA supra* para 22 at para 180

58 As the OWA is neither the regulator, nor the Crown, the Appellants further submit that the *AbitibiBowater* test does not apply because it requires that the abandonment will be

completed by the regulator. The OWA is an organization at arm's length from the AER with a different mandate. Its role is to carry out abandonments and reclamation activities for orphan sites to the extent that it has funds available.

59 Unlike *AbitibiBowater*, where abandonment was to be conducted by the Newfoundland Ministry of Environment, the abandonment work done by the OWA is not funded by the taxpayers.

Factum of the Appellant at para 97 [FOA]

60 As Justice Martin found, the AER is "enforcing laws and licence conditions designed to protect the public interest, the environment, and the rights of third-party landowners," not "seeking an unauthorized priority in bankruptcy." The fact that the AER's decision may have impacted the sale price of Redwater's assets does not transform a regulatory decision whether to approve a transfer into a monetary order to recover a debt owing to the AER.

Redwater CA supra para 22 at para 15

B. The Court of Appeal Erred in Holding that the License Obligations Created by Provincial Legislation Conflicted with or Frustrated the Scheme of Priorities Set Out in the *BIA*

(i) Based on the Principle of Federalism, Paramountcy Must Be Narrowly Interpreted

61 As cited in the dissent written by Justice Martin, in *Moloney*, Gascon J reaffirmed the holding in *Multiple Access Ltd v McCutcheon*:

> In principle, there would seem to be no good reasons to speak of paramountcy…except where there is actual conflict in operation as where one enactment says "yes" and the other says "no" …compliance with one is defiance of the other

Redwater CA supra 22 at para 230.

62 In *Lemare Logging*, the Supreme Court emphasized the principle of cooperative federalism, and affirmed harmonious interpretations of allegedly conflicting legislation:

> Given the guiding principle of cooperative federalism, paramountcy must be narrowly construed. Whether under the operational conflict or the frustration of federal purpose branches of the paramountcy analysis, courts must take a 'restrained approach', and harmonious interpretations of federal and provincial legislation should be favoured over interpretations that result in incompatibility.
>
> *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53 at para 21 [*Lemare Lake*]

63 In *Moloney*, the Supreme Court provided a direction for statutory interpretation when applying the doctrine of paramountcy:

> In keeping with co-operative federalism, the doctrine of *paramountcy is applied with restraint.* It is presumed that Parliament intends its laws to co-exist with provincial laws. Absent a genuine inconsistency, courts will favour an interpretation of the federal legislation that allows the concurrent operation of both laws. ... Conflict must be defined narrowly, so that each level of government may act as freely as possible within its respective sphere of authority.
>
> *Alberta (Attorney General) v. Moloney,* 2015 SCC 51 at para 27 [*Moloney*].

64 In *Canadian Western Bank*, the court held that:

> [t]he fact that Parliament has legislated in respect of a matter does not lead to the presumption that in so doing it intended to rule out any possible provincial action in respect of that subject": The fundamental rule of constitutional interpretation is, instead, that "[w]hen 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 the two statutes"
>
> *Canadian Western Bank v. Alberta,* 2007 SCC 22 CWB at para 74 [*Western Bank*].

65 The guiding approach for paramountcy analysis is that "where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial

legislation is inoperative to the extent of the inconsistency" [*Lemare Lake*]. The two potential conflicts are an operational conflict or frustration of purpose. An operational conflict occurs where compliance with both the federal and provincial law is impossible. Frustration of purpose transpires where provincial law frustrates the purpose of the federal law [*Multiple Access*].

Lemare Lake supra para 62 at paras 15-17

Multiple Access Ltd. v McCutcheon 1982 2 SCR 161 at para 191 [*Multiple Access*].

(ii) There is No Operational Conflict Between the Federal and Provincial Legislation Because Operation Conflict Requires a True Conflict

66 As L'Heureux-Dubé J establishes:

> The applicable test to determine "whether an operational conflict arises" is set out in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at pp. 187 and 189. There must be an actual conflict, in the sense that compliance with one set of rules would require a breach of the other. This principle was recently re-examined and restated by Binnie J. in M & D Farm Ltd. v. Manitoba Agricultural Credit Corp., [1999] 2 S.C.R. 961, at paras. 39-42. The basic test remains the impossibility of dual compliance.

114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), 2001 SCC 40 at para 46 [*Spraytech*]

67 Côté J and McLaughlin J held that an impossibility of dual compliance is established "only if provincial law allows the very same thing the federal law prohibits". In *Moloney*, although the provincial law gives a creditor a general leverage to compel payment, it does not expressly contradict the federal provision that prohibits recovery.

Moloney supra para 63 at para 110

68 In her dissent in *Redwater*, Justice Martin stated the following:

> The continued application of the regulatory regime following bankruptcy *does not determine or reorder priorities among creditors*, but rather values accurately the assets available for distribution. The value of the debtor's estate must take into account the end-of-life obligations associated with the licenses that form a part of that estate. If this means

> that, in the end, there is less value available for distribution to the creditors, that is part of the bankruptcy scheme and the risk that the creditor takes when lending on the basis of the debtor's assets, with their associated obligations.

Justice Martin's argument is consistent with other case law [*Northern Badger*]

Redwater CA supra para 22 at para 240
Northern Badger supra para 1 at para 237

(iii) There Would Be Conflict Only If the AER's Legislation is Interpreted as Imposing Personal Liability as a Trustee

69 The AER does not impose liability on receivers or trustees beyond the value of the assets they administer. Indeed, Justice Martin reasoned that, "on a proper interpretation of s. 14.06(4), it does not apply in this situation to permit the trustee to renounce its regulatory obligations. The BIA does not, therefore, release the Trustee form its ongoing obligations with respect to Redwater's licensed assets". [*Redwater CA*]

70 The logical conclusion stemming from this line of reasoning, is that if there is no entitlement to renounce the obligation under the BIA, there is no operational conflict in enforcing those obligations under the provincial regulatory regime. [*Redwater CA*]

Redwater CA supra 22 at paras 230, 233.

(iv) Dual Compliance Is Not Impossible

71 As discussed above, in *Spraytech,* Justice L'Heureux-Dubé J confirms that the basic test for operational conflict is the *impossibility of dual compliance*. As submitted by the intervenor Greenpeace, there is no such impossibility in the case at hand:

> Even if this Court finds that the trustee may renounce environmental liabilities, the trustee is ***never required*** to renounce or disclaim the debtor's property. The BIA does not demand that trustees renounce assets, nor does it provide that a trustee's ability to disclaim assets is unfettered. The permissive nature of the BIA suggests that there will be

> situations in which a trustee will be precluded from renouncing certain assets. Indeed, it is not contested that the provincial and federal legislation at issue has operated in harmony for over 25 years — a fact suggesting the BIA allows the provinces to operate in a non-disruptive way
>
> *Orphan Well Association, et al. v. Grant Thornton Limited, et al.* [2017] S.C.C.A. No. 231 (Factum of the Intervenor, Greenpeace at para 27).

72 Undoubtedly, the BIA does not ***require*** an action which the Alberta end-of-life environmental regulations ***prohibit*** or vice versa. Therefore, since dual compliance is not impossible, both pieces of legislation are not in conflict and can operate harmoniously.

73 Analogously to the secured creditor who challenged provisions of the *Saskatchewan Farm Security Act* in *Lemare Lake,* there is no operational conflict here. In *Lemare Lake,* the secured creditor could comply with both sets of laws by observing the longer periods required for the appointment of a receiver under provincial law.

> *Orphan Well Association, et al. v. Grant Thornton Limited, et al.* [2017] S.C.C.A. No. 231 (Factum of the Intervenor, Alberta (Attorney General) at para 41).

(v) Alberta's Regulations Do Not Frustrate the *BIA's* Federal Legislative Purpose

74 In order to examine whether such frustration of purpose is in place, the federal legislative purpose must be first identified. The *BIA's* purpose was identified in *Industrial Acceptance Corporation v Lalonde* as "the equitable distribution of bankrupt's assets among creditors and the bankrupt's financial rehabilitation"

75 According to the Supreme Court in Hus*ky Oil*, "there is frustration of purpose only where the effect of a provincial law is to conflict with or alter the priorities established by the BIA; where the provincial law purports to give *priority to one claim over others"*

> *Husky Oil Operations Ltd. v. Minister of National Revenue,* 453 SCC at para 235 [*Husky Oil*].

76 In *Moloney*, Gascon J held that bankruptcy law "creates a collective proceeding the enables a more efficient recovery of the assets". Once the assets are distributed according to the scheme of distribution in bankruptcy, the distributive goals of bankruptcy have been satisfied. Gascon J also held that "provincial provisions did not change the assets that are available to the creditors or the ranking of the claims of those assets".

Moloney supra para 63 at para 88

77 In *Northern Badger*, the SCC considered the nature of Alberta's oil and gas industry's regulatory regime and similarly held that "it did not involve a reordering of bankruptcy priorities and did not conflict with the BIA".

Northern Badger supra para 1 at para 238

78 In Justin Martin's reasoning in *Redwater CA*, she pointed out that the principle that "creditors should not gain on bankruptcy any greater access to the debtors' assets than they possessed *prior to* bankruptcy", is a fundamental principle of bankruptcy and further stated that:

> The continued application of the regulatory regime following bankruptcy does not determine or reorder priorities among creditors, but rather *values accurately* the assets available for distribution.

79 Lenders' risk assessment process takes into account the end-of-life obligations associated with licenced assets-the licensee's lenders are aware of the regulatory system [*Redwater CA*]. Therefore, the Appellants submit that the state of bankruptcy should not authorize lenders to simply ignore end-of-life obligations while selectively accessing the value of other licenced assets.

Redwater CA supra para 22 at paras 240-241

80 Provincial laws do not frustrate the purpose of federal insolvency legislation if they require the allocation of funds and impact the monetary value of the debtor's estate as a result (*Western Bank*). In *Husky Oil*, the court held that:

> It is trite to observe that the Bankruptcy Act is contingent on the provincial law of property for its operation. The Act is superimposed on those provincial schemes when a debtor declares bankruptcy. As a result, provincial law necessarily affects the "bottom line", but this is contemplated by the Bankruptcy Act itself. Indeed, it is no exaggeration to say that there is no "bottom line" without provincial law
>
> *Western Bank supra* para 64 at para 28
> *Husky Oil supra* para 75 at para 51

81 In determining whether a regulatory action frustrates the BIA priority scheme, courts must focus on whether the provincial law aims to redeem a monetary obligation or whether the compliance with a regulatory scheme incidentally impacts the amount of assets available to credits.

82 In her dissenting reasoning in *Redwater CA*, Justice Martin emphasizes this approach by stating that:

> A mere effect on bankruptcy generally, such as an effect on the value of a bankrupt's estate or the amount that is available for distribution under the bankruptcy regime, does not frustrate the purpose of the BIA, and does not render a provincial law inapplicable in bankruptcy
>
> *Redwater CA, supra* para 22 at para 156

83 A mere effect on bankruptcy generally, such as an effect on the value of a bankrupt's estate or the amount that is available for distribution under the bankruptcy regime, does not frustrate the purpose of the BIA, and does not render a provincial law inapplicable in bankruptcy and moreover, the enforcement of end-of-life environmental regulations do not have such effect.

84 If such co-operative approach is not taken, enterprises will be allowed to avoid or evade the end-of-life responsibilities attached to their licences, resulting in even more orphaned wells.

Redwater CA, supra para 22 at para 244

(vi) The Importance of Public Interests Within the Paramountcy Analysis

85 It is imperative to emphasize the potential consequences of allowing the separation of the benefits of oil production or being a licensee from the abandonment and reclamation end-of-life obligations attached to the licence in insolvency proceedings.

86 Such evasion of environmental obligations would result in a shift of the environmental clean-up and safety costs from licensees to other oil and gas companies, landowners, or the public. The Canadian Association of Petroleum Producers argues that "unlike creditors, who profit from the debtor's enterprise and are aware of end-of-life obligations upon extending credit, other oil and gas companies are "true" third parties in that they have no financial interest in the outcome of the debtor's enterprise.

Orphan Well Association, et al. v. Grant Thornton Limited, et al. [2017] S.C.C.A. No. 231 (Factum of the Intervenor, CAPP at para 32 [FOCAPP]).

87 Under any articulation of the public interest, it cannot be that imposing the cost of one party's bankruptcy on strangers achieves a just result" Alberta's statutory framework and decades of cooperation between industry and regulator cannot be avoided "under the guise of constitutional conflict"

88 CAPP argues that "It is difficult to see how the public interest could be served by extinguishing an insolvent company's regulatory obligations, thereby granting a receiver greater rights in bankruptcy than the solvent debtor company had as a licensee. That is an undesirable result that is contrary to the basic tenets of bankruptcy law". In *Northern Badger*, the Alberta Court of Appeal held that the duty to comply with the general duty is a duty that is owed to the public as cited by CAPP

FOCAPP supra para 86 at para 32

89 The public interest is successfully protected only by upholding Alberta's regulatory regime and allowing both legislative frameworks to continue to co-exist. Alternatively, public health and safety, the environment, third party property interests and society at large are all exposed to detrimental risks due to an increase of the already high number of orphan wells. In the meantime, bankrupt enterprises would be enabled to selectively choose to shift their responsibility of environmental remediation as the public bears the burden by paying the steep price of pollution.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

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

PART V -- ORDER SOUGHT

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

(a) The declarations the Court of Queen's Bench and the Court of Appeal set aside;

(b) An order that the proceeds from the sale of the Redwater assets be used to address Redwater's end-of-life obligations; and

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

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

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Name of Counsel

Jordan Cantor
Name of Counsel

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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