WILLMS & SHIER ENVIRONMENTAL LAW MOOT COURT COMPETITION 2019

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

IN THE SUPREME ENVIRONMENTAL MOOT COURT OF CANADA

(ON APPEAL FROM THE ALBERTA COURT OF APPEAL)

B E T W E E N:

ORPHAN WELL ASSOCIATION and ALBERTA ENERGY REGULATOR

APPELLANTS
(Appellants)

- and -

GRANT THORNTON LIMITED

RESPONDENT
(Respondent)

FACTUM OF THE RESPONDENT
GRANT THORNTON LIMITED

Pursuant to Rule 12 of the
Willms & Shier Environmental Law Moot Official Competition Rules 2019

TEAM #2019-10

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

AND TO: **ALL REGISTERED TEAMS**

TABLE OF CONTENTS

Page No.

PART I -- OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Respondent's Position

1. At the center of this appeal is the Province's attempt to avoid the bankruptcy priorities as established by the federal government in the *Bankruptcy and Insolvency Act* (the "**BIA**"). The Appellants are attempting to enforce a claim in bankruptcy that is contrary to federal law. The efforts of the Alberta Energy Regulator (the "**AER**") to bind Grant Thornton Limited with remediation orders is a clear attempt by the Province to evade the priority of claims set out in the BIA.

2. The purpose of the BIA is to ensure the orderly and fair disposition of bankruptcy proceedings. The priority-ranking scheme in section 136 is essential to achieving this purpose.

3. In this appeal, the Appellants seek to force the trustee in bankruptcy, Grant Thornton Limited, to pay the remediation costs ahead of secured creditors, contrary to the priority-ranking scheme set out in section 136. Parliament considered orders for environmental remediation by assigning such orders a security against real property, not a super-priority that stands outside of the insolvency process entirely.

4. The Appellants' discontent with the federal priority regime endangers not only efficient and fair bankruptcy proceedings, but also the Province's own regulatory system. Rather than encouraging the successful remediation of oil wells, the provincial regulatory regime instead encourages the secured creditor to simply walk away from oil industry debtors, leaving Alberta with more orphaned wells. The Appellants' unwillingness to abide by the federal bankruptcy scheme is illegal, threatening both the financial position of the industry and the ability of the Province to successfully remediate oil wells.

5. The Respondent requests that this Court uphold the decisions of Alberta's Court of Queen's Bench (the "**Trial Court**") and Court of Appeal. The lower courts were correct in finding that the Appellants acted contrary to federal law. In dismissing this appeal, this Court would ensure that federal law prevails over a creative regulator aiming to escape the clear priorities set out in the BIA.

B. Respondent's Position with Respect to the Appellants' Statement of the Facts

6. The Respondent adopts the facts set out in the Appellants' Factum, subject to the following additions and corrections.

7. Redwater Energy Corp. ("**Redwater**") held several licences provided by the AER to extract oil and gas from properties in Alberta. These licences imposed environmental obligations on Redwater such as remediation of the wells, facilities and pipelines on those properties.

8. The AER delegated some of its powers to collect levies and perform remediation to the Orphan Well Association ("**OWA**"). Section 3.1 of Alberta Regulation 45/2001 states that the AER delegates the authority to collect levies and remediate wells to the OWA. Section 3.2 of Alberta Regulation 45/2002 provides that the OWA follow the orders and directives of the AER.

9. Immediately after Redwater became insolvent in 2015, the Respondent, Grant Thornton Limited acting as receiver, renounced Redwater's interest in wells that carried net liabilities higher than the value of the wells due to the environmental remediation costs required to abandon them ("**valueless wells**"). Acting as trustee, Grant Thornton Limited again exercised its right to disclaim the valueless wells. At no time did Grant Thornton Limited accept ownership or control over the valueless wells.

10. The AER stated that Grant Thornton Limited could not exercise its right to renounce assets unless Grant Thornton Limited posted sufficient security to meet the AER's requirements.

11. The AER issued remediation orders for the wells that Grant Thornton Limited had lawfully renounced. Grant Thornton Limited could not comply with the orders.

12. The AER informed Grant Thornton Limited by letter that the AER would exercise all of its available remedies to ensure the remediation costs were paid.

13. The Appellants applied to the Trial Court for (i) a declaration that Grant Thornton Limited's abandonment of some of Redwater's assets was invalid and (ii) for an order for compliance for the remediation orders.

14. The Trial Court held that the provincial legislation governing the AER licences frustrated the purpose of the BIA. The Appellants appealed to the Court of Appeal.

15. The Court of Appeal upheld the Trial Court's decision. Applying the three-part test from *Abitibi*, the Court of Appeal held that although the AER's order for remediation costs constituted a provable claim under section 14.06(8) of the BIA, it ranked as unsecured under the distribution scheme set out in section 136.

16. Furthermore, the Court of Appeal ruled that the provincial legislation interfered with Grant Thornton Limited's right to disclaim assets under the BIA. This interference frustrated the objective of the federal legislation. Applying the doctrine of paramountcy, the Court of Appeal

held that the BIA prevailed, affirming the lower court ruling that the remediation obligations were unenforceable against Grant Thornton Limited.

PART II -- THE RESPONDENT'S POSITION WITH RESPECT TO THE ISSUES

A. Issue 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?

17. No.

B. Issue 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?

18. No.

PART III -- ARGUMENT

A. Issue 1: The AER's end-of-life obligations for licenced properties are claims provable in bankruptcy and therefore do not have super priority in bankruptcy proceedings

(i) ***Redwater's Working Interests in Oil Wells are Interests in Real Property***

19. If the interests that Redwater held in the oil wells are real property, then Grant Thornton Limited, as trustee, has the right to renounce any oil well with liabilities exceeding the value of the property. Under section 14.06(4) of the BIA, Grant Thornton Limited has the right to renounce real property of the bankrupt estate. Grant Thornton Limited attempted to exercise a clearly defined statutory right.

20. In refusing to allow Grant Thornton Limited to exercise its right to renounce real property unless security was posted, the AER was issuing a claim provable in bankruptcy. Furthermore, per section 14.06(7) of the BIA, remediation orders for real property are secured via a charge against the real property interest itself, not as a priority in the bankruptcy process.

21. With respect to the exploitation of oil and gas in Alberta, section 1 of the *Oil and Gas Conservation Act* (the "**OGCA**") describes extraction rights as a working interest: a bundle of "rights, grants, concessions, and obligations". In this case, Redwater held several working interests.

> Fenner L Stewart, "How to Deal with a Fickle Friend? Alberta's Troubles with the Doctrine of Federal Paramountcy" (2017) 6 Ann Rev Insolv 24 at 14.

22. In Alberta, working interests to exploit oil and gas can be characterized as profits à prendre (*Law of Property Act*; *Mines and Minerals Act*; *Bank of Montreal v Dynex Petroleum*; *Berkheiser v Berkheiser*). Therefore, working interests are interests in land and hence real property interests (*Orphan Well*).

> *Law of Property Act*, RSA 2000, c L-7, s 79.
> *Mines and Minerals Act*, RSA 2000, c M-17, s 80(1)(b).
> *Bank of Montreal v Dynex Petroleum*, 1999 ABCA 363, aff'd on other grounds [2002] 1 SCR 146 at para 53.
> *Berkheiser v Berkheiser*, [1957] 1 SCR 387, 7 DLR (2d) 721 at para 12.
> *Orphan Well Association v Grant Thornton Limited*, 2017 ABCA 124 at para 32 [*Orphan Well*].

23. 'Real property' is not defined in the BIA. However, 'property' is defined broadly as follows: property includes "any type of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent". In keeping with the broad definition of "property" under the BIA, 'real property' should be afforded a similarly broad definition.

> *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 2 [*BIA*].

24. Furthermore, the wording of sections 14.06(4) and 14.06(7) of the BIA describe "any interest in real property or any right in any immovable". In drafting sections 14.06(4) and 14.06(7) in this way, Parliament did not intend to narrowly define 'real property'.

> *BIA*, *supra* para 23 at ss 14.06(4), 14.06(7).

25. If Redwater's working interests cannot be characterized as interests in 'real property', they can be characterized as rights in 'immovables'. Thus, even if this Court finds that the working interests are not real property interests *per se*, sections 14.06(4) and 14.06(7) continue to bind the Appellants and Grant Thornton Limited.

> *Orphan Well*, *supra* para 22 at para 57.

26. While the AER did issue licences to Redwater for the exploitation of oil, the provincial licencing regime does not alter the fact that, in substance, the Province was issuing a remediation claim against real property, or in the alternative, an immovable. The Appellants' claim that the remediation orders were tied to the licenses does not alter the fact that the Province was ordering the remediation of real property, or in the alternative, an immovable. In both cases, an interest held by Grant Thornton Limited as trustee in bankruptcy.

(ii) ***Trustee's Right to Renounce Assets***

27. Section 14.06(4) of the BIA expressly affords a trustee in bankruptcy the power to renounce unprofitable real property encumbered with environmental obligations. This includes abandonment and remediation work. This power to renounce is not limited to circumstances where a trustee might be exposed to personal liability. Had Parliament intended to restrict a trustee's power to disclaim property to situations involving personal liability, Parliament would have explicitly set out those limitations in section 14.06.

Orphan Well, supra para 22 at paras 47, 68.

28. Sections 14.06(4) and 14.06(5) of the BIA provide a trustee with an opportunity to consider more than its personal liability from litigation in effecting its right to renounce. A trustee can also consider the 'economic viability' of the bankrupt's assets (*Orphan Well*; *Abitibi*). If a trustee determines that an oil and gas well is valueless, either because it has been exhausted or because its liabilities exceed its value, the trustee is entitled to ignore the asset and return it to the bankrupt estate at the end of the insolvency process (*Orphan Well*). In this case, Grant Thornton Limited was entitled to renounce the valueless wells.

Orphan Well, supra para 22 at paras 47, 68, 70.
Abitibi Inc, Re, 2012 SCC 67 [*Abitibi*].

29. Parliament did not intend for section 14.06(4) of the BIA to shield trustees only from being sued personally. Section 14.06(2) already immunizes trustees from legal claims, unless the trustee was negligent or there was wilful misconduct. It is a principle of statutory interpretation that Parliament intends every word and does not create superfluous sections. Section 14.06(4) cannot be interpreted to repeat the protection that section 14.06(2) already provides.

Randal NM Graham, *Statutory Interpretation Theory and Practice*, (Toronto: Emond Montgomery, 2001) at 92.

30. Personal liability in section 14.06(4) of the BIA should be interpreted broadly. The modern approach of statutory interpretation requires reading section 14.06(4) "harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". Section 14 of the BIA concerns itself with protecting the trustee with any liability, and section 14.06(4) goes beyond the protection of liability from a legal action. Section 14.06(4) should be interpreted as

protecting the trustee from any liability, including liability in the form of posting security to realize assets of the bankrupt estate.

Rizzo & Rizzo Shoes Ltd, Re, [1998] 1 SCR 27 at para 21.

(iii) ***Establishment of test for provable claims in bankruptcy***

31. The remediation claims of the AER are claims provable in bankruptcy. Not allowing Grant Thornton Limited to renounce the valueless wells without paying security amounts to a claim in bankruptcy.

32. The majority in *Abitibi* created the following three-part test for determining whether a regulatory order is a claim provable in bankruptcy: "first, there must be a debt, liability or obligation to a creditor. Second, the debt, liability or obligation must be incurred before the debtor becomes bankrupt. Third, it must be possible to attach a monetary value to the debt, liability or obligation". As the AER was making an order to remediate a real property interest, the *Abitibi* test is the appropriate analysis.

Abitibi, *supra* para 28 at para 26.

33. The standard of review for whether the AER is a making a claim in bankruptcy is a standard of palpable and overriding error. Whether the AER is making a claim in bankruptcy is a mixed question of fact and law. Applying the *Abitibi* test to the facts requires a factual analysis of the nature of the AER's orders. Therefore, deference must be given to the trier of fact.

Housen v Nikolaisen, 2002 SCC 33 at para 32 [*Housen*].

34. The AER's remediation orders pass each part of the *Abitibi* test.

Abitibi, *supra* para 28 at para 26.

(iii) ***Intentionally Broad Test***

35. The test in *Abitibi* is not limited to the specific facts of the case. The central purpose of the BIA is to ensure a single proceeding for every claim against the debtor. The SCC in *Abitibi* was clear that environmental liabilities can be monetary claims under federal bankruptcy law. The SCC recognized that there is a distinction between general regulatory duties and claims in bankruptcy subject to federal law.

Abitibi, *supra* para 28 at para 3.

36. The SCC in *Abitibi* held that the courts must look to the substance of the regulatory claim and apply rules for assessment. What counts as a "claim" is defined broadly in the BIA. The SCC noted that section 2 of the BIA defines a claim provable in bankruptcy as "any claim or liability provable in proceedings under this Act by a creditor."

Abitibi, *supra* para 28 at para 21.

37. To complete the definition, the SCC relied on section 121(1) of the BIA:

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

BIA, s*upra* para 23 at ss 121(1).

38. Additional guidance is set out in sections 121(2) and 135(1.1) of the BIA:

> 121(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.
>
> 135(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

BIA, s*upra* para 23 at ss 121(2), 135(1.1).

39. The broad wording of the BIA provides independent grounds for holding that environmental orders may be claims provable in bankruptcy. The test in *Abitibi* defines the boundary between a regulatory duty and a claim provable in bankruptcy.

Abitibi, *supra* para 28 at para 27.

(iv) ***Part I of Abitibi Test: the AER is a creditor***

40. Most environmental regulatory bodies can be creditors in respect of monetary and non-monetary obligations imposed by environmental statutes. The issue at this stage of the analysis is whether the AER has exercised its enforcement power against a debtor. As the OWA is a delegation of the AER and must follow the orders and directions of the AER, the OWA must be treated, in substance, as an agency of the AER.

Abitibi, *supra* para 28 at para 27.

41. The Appellants are attempting to enforce the payment of security for remediation costs on the previously repudiated wells. Clearly, therefore, the Appellants are exercising their enforcement power against a debtor.

Abitibi, *supra* para 28 at para 27.

42. As whether the AER is a creditor is a mixed question of fact and law, deference must be shown to the trier of fact. After applying the first stage of the *Abitibi* test, the trial judge held that the AER is a creditor.

Housen, *supra* para 33 at para 32.
Redwater Energy Corporation (Re) at para 164 [*Redwater*].

(v) ***Part II of Abitibi Test: the debt was incurred prior to Redwater's insolvency***

43. A claim in bankruptcy must stem from an obligation that was "incurred before the day on which a bankrupt becomes bankrupt".

Abitibi, *supra* para 28 at paras 28-29.
BIA, *supra* para 23 at s 121(1).

44. This step is clearly satisfied: the remediation obligation crystallized at the time the licence was granted to Redwater, long before its insolvency.

(vi) ***Part III of Abitibi Test: the AER is seeking to enforce a monetary claim***

45. The Appellants' claims have a monetary value.

46. Further, it is sufficiently certain that the AER will perform the remediation work. The SCC in *Abitibi* established that orders that are not expressed in monetary terms can be translated into such terms. If a claim is clearly stated in monetary terms, such as requiring a payment by a certain date, then the court need not consider this step since what is claimed is an indebtedness and clearly falls under the definition of a claim.

Abitibi, *supra* para 28 at para 30.

47. Importantly, orders can come in many forms. When considering an order that is not framed in monetary terms, the court must look at its substance and apply the rules for the assessment of claims. The substance of the regulators position should prevail over any narrow and technical interpretation.

Abitibi, *supra* para 28 at paras 31, 76.

48. If an environmental order is to be included in the insolvency process, there must be sufficient certainty that the regulatory body who triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed. When this is the case, the order is subject to the insolvency process.

Abitibi, *supra* para 28 at paras 36-38.

49. The majority in *Abitibi* defined 'certainty' as 'sufficiently certain'. By contrast, in dissent Chief Justice McLachlin found that 'certainty' should be interpreted to mean a 'likelihood approaching certainty'. Therefore, the majority of the SCC set out a lower threshold for 'certainty'. This lower threshold insures greater flexibility in the analysis, ensuring that the test can accommodate a wide-ranging set of factual scenarios.

Abitibi, *supra* para 28 at paras 36-38.

50. As a question of mixed fact and law, deference must be given to the trial judge. The trial judge properly held as a finding of fact that the AER orders meet the third part of the *Abitibi* test.

Redwater, *supra* para 42 at para 170.

Financial Obligation

51. The AER's directive constitutes a financial obligation. It imposes financial consequences on the transfer of assets. It is irrelevant whether the obligation arises directly, i.e. from costs incurred from a clean-up, or indirectly, i.e. from end of life obligations attaching to licences. In substance, the AER is stripping away value from the bankrupt estate to meet environmental obligations.

Orphan Well, *supra* para 22 at paras 76-77.

Proper use of accrued funds

52. Using the funds for anything other than for the purpose of environmental remediation violates the OGCA.

53. Section 10(1)(b) of the OGCA states the Regulator may make rules:

> "requiring licencees and approved holders to provide to the Regulator deposits or other forms of security to guarantee the proper and safe suspension, abandonment and reclamation of wells and facilities" [emphasis added]

The security collected by the AER is held on trust for the remediation of wells. A statutory obligation to use these funds to remediate wells generates sufficient certainty to meet the third part of the *Abitibi* test.

> *Oil and Gas Conservation Act*, RSA 2000, c O-6, ss 10.1 [*OGCA*].

(vii) *Northern Badger is Superseded by Abitibi on these facts*

54. The SCC in *Abitibi* did not explicitly overturn *Northern Badger*. However, it is clear that *Abitibi* supersedes *Northern Badger* on these facts.

55. *Abitibi* applies more aptly to these facts for two reasons: (i) *Northern Badger* would fail the test set out in *Abitibi*, and (ii) the 1997 amendments to the BIA are inconsistent *Northern Badger*.

(viii) *Northern Badger Fails the Abitibi Test*

56. The *Abitibi* test has determined that regulatory boards can have environmental claims provable in bankruptcy. This directly undermines *Northern Badger*.

> *Panamericana de Bienes y Servicios v Northern Badger Oil & Gas Limited*, 1991 ABCA 181 at para 36 [*Northern Badger*].

57. N*orthern Badger* also held that a public authority enforcing public law is not a creditor of the person owing the public duty. This conflicts with the first step of the *Abitibi* test: a public authority can be a creditor.

> *Abitibi*, *supra* para 28 at para 33.

58. The SCC in *Abitibi* rightly discarded the public purpose distinction in *Northern Badger*. Almost any activity done by the government is done, in a broad sense, for the public purpose. Placing governmental claims against debtors outside of federal bankruptcy law threatens the coherence of insolvency law by creating a separate proceeding for public bodies. The public

purpose distinction from *Northern Badger* is much too broad. The test from *Abitibi* reflects the fact that governmental orders can be claims in bankruptcy and therefore bound by federal law.

(ix) *Amendments to the BIA post-Northern Badger*

59. The SCC in *Northern Badger* held that "a receiver was personally liable for work under a remediation order and that the order was not a claim in insolvency proceedings". Subsequently, the BIA was amended to include sections specifically dealing with environmental claims.

Northern Badger, *supra* para 56 at para 44.

60. In 1992, Parliament enacted legislation protecting trustees from the very form of liability that was imposed in *Northern Badger*. This was followed by a 1997 amendment which increased the protection for trustees and monitors. A further amendment in 2007 made it clear that courts could determine that a regulatory order may be a claim. The amendment also provided criteria for staying regulatory orders.

Abitibi, *supra* para 28 at para 47.

61. The purpose of these amendments was to balance the creditors' need for fairness and the debtors' need to make a fresh start. Under the amended BIA, the environmental liabilities rest on the bankrupt estate. This demonstrates that Parliament explicitly considered the priority of environmental liabilities when enacting the 1997 and 2007 amendments.

Abitibi, *supra* para 28 at para 47.

62. Section 14.06(6) of the BIA provides that remediation costs of abandoned properties do not rank as costs of administration. Therefore, if the trustee incurs costs in remediating abandoned properties, those costs cannot be paid prior to the other listed preferred claims or the claims of secured creditors.

BIA, *supra* para 23 at s 14.06(6).

B. Issue 2: The AER licence obligations frustrate the scheme of priorities set out in the BIA

(i) *Operability Analysis*

63. Enforcing the AER licensing obligations in bankruptcy conflicts with federal law. Parliament considered the appropriate priority for environmental remediation orders when enacting and amending the BIA. The paramountcy of federal law ensures that the AER obligations, as they relate to the insolvency process, are inoperable.

Canadian Western Bank v Alberta, 2007 SCC 22 at para 75 [*Canadian Western Bank*].

(ii) ***Frustration of Federal Purpose***

64. The AER regulatory scheme frustrates the purpose of the BIA. A provincial statute may be inoperable even when there is no direct operational conflict. A provincial law that is incompatible with the purpose of a federal law is inoperable to the extent of the incompatibility.

Canadian Western Bank, *supra* para 63 at para 73.

(iii) ***Re-Organization of Claims***

65. While a federal statute should be interpreted in a manner that does not interfere with provincial law, it is in this case impossible to interpret the AER licensing requirements in a manner that is consistent with the central purpose of the BIA.

Canadian Western Bank, *supra* para 63 at para 73.

66. The central purpose of the federal bankruptcy regime is to ensure a single proceeding model. All parties who have claims against the bankrupt estate can, in an organized fashion, seek repayment (*Abitibi*). The BIA creates a series of priorities to ensure that the bankrupt estate is parsed out in a predictable and equitable manner. The priorities created by Parliament are crucial to ensure fairness to all interested parties.

Abitibi, *supra* para 28 at para 21.
BIA, *supra* para 23 at s 136.

67. The SCC has stated that federal purpose should be interpreted narrowly (*Lemare Lake*). Additionally, clear proof of a federal law's purpose is necessary to demonstrate that the federal law is frustrated.

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

68. The SCC has repeatedly found that the purpose of the BIA is to ensure a single proceeding throughout Canada and all its provinces. The single proceeding model ensures an organized distribution of assets (*Abitibi*; *Lemare Lake*). The BIA's organization of priorities is not permissive. Rather, it defines the distribution of priorities which must be followed.

Abitibi, *supra* para 28 at para 21.
Lemare Lake, *supra* para 67 at paras 23, 45.

69. Ranking remediation orders ahead of the claims of secured creditors is poor public policy and contrary to the central purpose of the BIA. The oil and gas industry is a highly leveraged industry that relies significantly on the availability of credit. By reducing the likelihood that secured creditors will see the value of their loans returned after a bankruptcy, the provincial regulatory regime threatens the supply of credit to the energy industry. Such a decision would involve profound consequences for the industry's wellbeing and growth.

70. Furthermore, the provincial regime merely encourages secured creditors to walk away from bankrupt estates when it is likely that the costs of remediation exceed the value of remaining assets. Secured creditors are incentivized to abandon claims on bankrupt industries, leaving the wells in those companies truly orphaned. The provincial regulatory regime encourages more orphaned wells, rather than imposing an effective system to ensure remediation. Provincial attempts to circumvent the federal scheme would not only breach the overarching purpose of the BIA, such attempts would also produce precisely the negative public-policy consequences Parliament intended to avoid.

Canadian Western Bank, *supra* para 63 at para 73.
BIA, *supra* para 23 at s 136.

71. Parliament recognized that enforcing remediation orders above the interests of secured creditors is poor public policy. In section 14.06(7) of the BIA, Parliament secured remediation costs as a charge against real property or immovables, rather than as a super priority in bankruptcy proceedings. Combined with section 14.06(6) of the BIA, which states that remediation is not a cost of administration, Parliament clearly established that remediation orders are to be enforced through a charge against property. Parliament thus created a means for provinces to claim funds for remediation without frustrating the scheme of the bankruptcy process and encouraging secured creditors to walk away.

BIA, *supra* para 23 at ss 14.06(6), 14.06(7), 72.1.

72. Parliament declined to establish a super priority for environmental remediation. Instead, Parliament balanced the competing interests of environmental regulators, creditors, and the bankrupt by setting out a clear-priority ranking scheme and slotting remediation orders in as a charge against real property.

BIA, *supra* para 23 at ss 14.06(7), 72.1.

73. Neither this honourable Court nor the Province has the authority to alter the priorities established by Parliament in the BIA. Where the Province, even as part of a legitimate regulatory regime, circumvents federal bankruptcy law by enforcing obligations that apply to insolvency proceedings, the provincial law is inoperable.

74. The SCC has unequivocally recognized that provincial attempts to force bankruptcy claims through a regulatory practice or legislation are inoperable.

75. The remediation orders established by the AER, as discussed above, are claims in bankruptcy. Under section 136 of the BIA, secured creditors have priority over the bankrupt estate's assets to the exclusion of all others. The AER scheme forces a bankruptcy claim above the interest of secured creditors, reorganizing the priorities established by the BIA.

Abitibi, *supra* para 28 at para 58.
Alberta (Attorney General) v Moloney, 2015 SCC 51 at para 75.
407 ETR Concession Co v Canada, 2015 SCC 52 at para 25.
Ontario (Minister of Finance) v Clarke, 2013 ONSC 1920 at para 52.
BIA, *supra* para 23 at s 136.

76. The AER is attempting to enforce outstanding obligations through a proceeding separate from the BIA. This contravenes the central purpose of the BIA, to ensure a single proceeding model for bankruptcies.

77. The BIA already contemplates the priority a remediation order can enjoy in a bankruptcy proceeding in section 14.06(7). Oil extraction interests held by Grant Thornton Limited are real property interests. Remediation orders are claims under section 14.06(7). As such, remediation orders are secured by a charge against real property. It would be absurd if remediation orders were to have a super-priority for oil profit à prendres, while remediation orders on any other property are secured by a charge against the property.

BIA, *supra* para 23 at s 14.06(7).

(iv) *Trustee Liability*

78. The OGCA defines licencee as including both trustees and receivers. As a licencee, trustees are responsible for the duty to abandon oil wells under section 27.1 of the OGCA. Trustees are also responsible for the costs of remediation performed by other persons under section 29 of the OGCA. Section 14.06(4) of the BIA immunizes trustees from personal liability arising from environmental remediation orders. The liability imposed on trustees as licencees by the OGCA frustrates the clear intent of the BIA to shield trustees from personal liability.

BIA, *supra* para 23 at s 14.06(4).
OGCA, *supra* para 53 at ss 27.1, 29.

(v) ***Trustee's Right of Renunciation***

79. The trustee has a duty to ensure that secured creditors receive as much return as possible from the bankrupt estate. Renouncing assets is integral for a trustee to ensure that creditors receive as much as possible from the bankrupt estate.

Re Coffey, 2004 NLSCTD 22 at para 40 [*Coffey*].

80. By forcing trustees to accept the contents of a particular estate, the provincial regulatory regime frustrates Parliament's intention to grant trustees the power to arrange an estate's affairs. The provincial licensing scheme does not permit a transfer of licences without the posted assets tied to all the licences of the entity exceeding the estimated cost of remediation for all of licences of the entity. Under this scheme, a corporation could not exchange any of their licences without the total value of the assets exceeding the estimated remediation liability.

81. The provincial licensing regime frustrates the purposes of the BIA by re-organizing the priorities governing the insolvency process set by Parliament. The provincial licensing regime cannot be read in harmony with the BIA. The conflict cannot be resolved under the auspices of cooperative federalism. The provincial licences re-organize the priorities of creditors as defined in the BIA, imposing personal liability on trustees that is explicitly contemplated and ruled out under the BIA.

(vi) ***Direct Operational Conflict***

82. Grant Thornton Limited cannot comply with both the BIA and the AER licensing regime. The test for an operational conflict is whether there is an actual conflict in the operation of laws, i.e. where one statute compels an action that another statute prohibits (*Canadian Western Bank*; *Multiple Access Ltd v McCutcheon*). A direct operational conflict occurs where it is impossible to comply with both federal and provincial legislation. Importantly, section 72.1 of the BIA explicitly states that where provincial laws conflict with the BIA, the BIA prevails.

Canadian Western Bank, *supra* para 63 at para 71.
Multiple Access Ltd v McCutcheon, [1982] 2 SCR 1611 at para 91.
BIA, *supra* para 23 at s 72.1.

83. Section 14.06(6) of the BIA states that claims for the cost of remediating abandoned interests in real property do not count as costs of administration. Administrative costs are the

necessary costs that are paid for the benefit of the whole estate (*Re Canada 3000 Inc*). These include costs that are not incorporated in the other priorities set out in section 136 of the BIA. Costs of administration thus include regulatory compliance. If the Appellant is correct that remediation orders are not a claim in bankruptcy, but are instead a duty imposed by regulation, then the costs for remediation constitute administrative costs which likewise do not take priority over the interests of secured creditors.

Re Canada 3000 Inc, 36 CBR (4th) 17 at para 2.
BIA, *supra* para 23 at s 14.06(6).

84. The provincial regime forces the trustee into an impossible position, by requiring payment of what are normally costs of administration first, while at the same time being barred under federal law from paying those costs ahead of the interests of secured creditors.

85. The AER, by requiring licencees to comply with the remediation orders, is requiring Grant Thornton Limited to pay an expense covered under section 136(b)(ii) of the BIA. Grant Thornton Limited has as duty under law to discharge the estate as per section 136. The Province is therefore forcing the trustee into a position to pay a cost contrary to the scheme of priorities in section 136.

86. The costs of remediation must fall somewhere in section 136 of the BIA. Furthermore, under section 14.06(7), remediation orders are secured by a charge against real property, not as a super-priority. Therefore, there is a direct operational conflict between the AER regulatory scheme and the BIA. It is impossible for Grant Thornton Limited to comply with both federal and provincial law.

BIA, *supra* para 23 at ss 14.06(7), 136.

87. The provincial licensing and remediation scheme is not a standard regulatory regime. An operational conflict in this case far from ensures that provincial regulations will never apply to bankrupt entities. On the contrary, unlike simply enforcing provincial law and regulations, the Province in this case has created a monetary claim that applies to the corporation regardless of whether the trustee actually retains the regulated assets.

88. The Appellants are not seeking to enforce a run-of-the-mill regulation. Rather, the Appellants seek the *de facto* enforcement of an asset transfer in insolvency (*Abitibi*). Section 14.06(6) of the BIA clearly requires orders for environmental remediation to fall outside of the

normal costs of provincial regulation. Parliament carved out an explicit role for remediation orders in insolvency proceedings which the Appellants are seeking to circumvent.

BIA, *supra* para 23 at s 14.06(6).
Abitibi, *supra* para 28 at para 58.

89. Bankruptcy does not release the bankrupt or its estate from having to comply with its environmental obligations (*Abitibi*; *Orphan Well*). Instead, the bankrupt's estate continues to be liable to meet these environmental obligations. Forcing the trustee to carry out remediation work prior to paying out secured creditors would force costs of remediation onto the secured lenders. This is contrary to the "Polluter Pay" principle (*Environmental Protection and Enhancement Act*; *McColl-Frontenac Inc., Re*). The Appellants' position subjects Redwater's creditors to a "third-party-pay" principle, contrary to decades of environmental legal precedent and the clear intentions of Parliament in establishing the priority-ranking scheme set out in section 136 of the BIA (*Redwater*).

Abitibi, *supra* para 28 at paras 40-41.
Orphan Well, *supra* para 22 at para 62.
Redwater, *supra* para 42 at para 173.
Environmental Protection and Enhancement Act, RSA 2000, c E-12 at s 2(i).
McColl-Frontenac Inc, *Re*, [2001] AEABD No 68 at para 3.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

90. The Respondent does not seek costs.

PART V -- ORDER SOUGHT

91. The Respondent asks this honourable Court to dismiss the appeal.

92. The Respondent further asks this honourable Court for any order that the court may find just.

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

_____
Emerson Wargel

_____
Derek Sheppard

_____

Jessica Fung

Counsel for the Respondent
Grant Thornton Limited

PART VI -- TABLE OF AUTHORITIES

A. Jurisprudence	**Paragraph No.**
407 ETR Concession Co v Canada, 2015 SCC 52	73
Abitibi Inc, Re, 2012 SCC 67	28, 32, 34, 35, 36, 39, 40, 41, 43, 46, 47, 47, 49, 57, 60, 61, 66, 68, 75, 88, 89
Alberta (Attorney General) v Moloney, 2015 SCC 51	75
Bank of Montreal v Dynex Petroleum, 1999 ABCA 363, aff'd on other grounds [2002] 1 SCR 146	22
Berkheiser v Berkheiser, [1957] 1 SCR 387, 7 DLR (2d) 721	22
Canadian Western Bank v Alberta, 2007 SCC 22	63, 64, 65, 70, 82
Housen v Nikolaisen, 2002 SCC 33	33, 42
McColl-Frontenac Inc, Re, [2001] AEABD No 68	89
Multiple Access Ltd v McCutcheon, [1982] 2 SCR 1611	82
Ontario (Minister of Finance) v Clarke, 2013 ONSC 1920	75
Orphan Well Association v Grant Thornton Limited, 2017 ABCA 124	22, 25, 27, 28, 51, 89
Panamericana de Bienes y Servicios SA v Northern Badger Oil & Gas Ltd, 1991 ABCA 181	56, 59
Re Canada 3000 Inc, 36 CBR (4th) 17	83
Re Coffey, 2004 NLSCTD 22	79, 86
Redwater Energy Corporation (Re), 2016 ABQB 278	42, 50, 89
Rizzo & Rizzo Shoes Ltd, Re, [1998] 1 SCR 27	30

ORPHAN WELL ASSOCIATION and ALBERTA ENERGY REGULATOR
APPELLANTS
(Appellants)

-and-

GRANT THORNTON LIMITED
RESPONDENT
(Respondent)

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

SUPREME ENVIRONMENTAL MOOT
COURT OF CANADA

FACTUM OF THE RESPONDENT GRANT THORNTON LIMITED

TEAM #2019-10

Emerson Wargel
Derek Sheppard
Jessica Fung

Counsel for the Respondent,
Grant Thornton Limited

Document #: 1488331