WILLMS & SHIER ENVIRONMENTAL LAW MOOT COURT COMPETITION 2019

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

IN THE SUPREME ENVIRONMENTAL MOOT COURT OF CANADA

(ON APPEAL FROM THE ALBERTA COURT OF APPEAL)

B E T W E E N:

ORPHAN WELL ASSOCIATION and ALBERTA ENERGY REGULATOR

APPELLANTS
(Appellants)

- and -

GRANT THORNTON LIMITED

RESPONDENT
(Respondent)

FACTUM OF THE APPELLANTS
ORPHAN WELL ASSOCIATION and ALBERTA ENERGY REGULATOR

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

TEAM #2019-11

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

AND TO: **ALL REGISTERED TEAMS**

TABLE OF CONTENTS

Page No. 3

PART I -- OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Appellants' Position

1 The Appellants, the Alberta Energy Regulator ("AER" or "the Regulator") and the Orphan Well Association ("OWA"), submit that when an oil and gas company becomes insolvent, its licensing obligations are not a claim provable in bankruptcy. Instead, as a precondition to obtaining a license to drill, the licensing obligations are an ongoing duty to the public that must be fulfilled prior to the distribution of a company's assets.

2 Such a conception is evident when the principle of cooperative federalism is applied to interpreting the *Bankruptcy and Insolvency Act* ("*BIA*") and Alberta's oil and gas development licensing laws. The majority decision of the Alberta Court of Appeal ("the Majority") failed to correctly apply the principle of cooperative federalism in its approach to this case. This error led to a finding that section 14.06 of the *BIA* permits oil and gas companies to sideline their obligations to remediate public lands.

3 The minority decision ("the Minority") correctly found that section 14.06 does not turn the licensing obligations into a claim provable in bankruptcy for two reasons. First, section 14.06 cannot capture licensing obligations as the section's purpose is to reduce the personal liability of trustees and to attract them to manage sites with environmental obligations. Second, section 14.06 only arises where licensing obligations and environmental remediation orders are related to real property of the debtor affected by an environmental condition or damage. In this case, the debtor did not own any real property that was affected by an environmental condition or damage.

4 The *AbitibiBowater* test should not be applied given that it concerns claims provable in bankruptcy, which the licensing obligations are not. Should the test be applied, though, the

licensing obligations still do not meet the first or third parts of the *AbitibiBowater* test. The Regulator does not act as a creditor as it does not seek any costs from the Respondent, nor does it benefit from the obligations itself. There is also no sufficient certainty that the Appellants would remediate the Respondent's licensed assets. The Regulator does not remediate wells and sites, and the OWA faces financial instability as well as a decade-long backlog in remediating the wells and sites in its current inventory.

5 Since neither section 14.06 of the *BIA* nor the *AbitibiBowater* test apply to the licensing obligations, the doctrine of paramountcy is not engaged. Even if the test for paramountcy were applied, though, the provincial regulatory regime is still able to operate alongside the federal legislation. As Justin Martin correctly held, there is no operational conflict between the provincial and federal legislations, nor does the provincial scheme frustrate the purposes of the *BIA*.

6 The Appellants submit that the Majority took an overbroad approach to both branches of the paramountcy test when it found that the *BIA* confers a right to renounce licensing obligations, and that the provincial regulations reorder priorities in bankruptcy. This finding was counter to the principle of cooperative federalism, because the *BIA* has, and can continue to, operate side-by-side with Alberta's regulatory regime. A tempered and restrained application of the doctrine of paramountcy is required to correctly interpret of the relationship between the *BIA* and the licensing obligations at issue. The Appellants respectfully submit that the Supreme Environmental Moot Court of Canada should apply such an approach in deciding this case.

B. Statement of the Facts

i. The AER regulates oil and gas development in the public interest

7 The province of Alberta is constitutionally empowered to regulate the oil and gas industry under sections 92A, 92(5) and 92(13) of the *Constitution Act.*

Constitution Act, 1867, (UK), 30 & 31 Vict, c 3 ["*Constitution Act*"].

8 Pursuant to valid provincial legislation, the Regulator regulates all aspects of Alberta's upstream oil and gas industry. The mandate of the Regulator is to provide for the safe and environmentally responsible development of energy resources in Alberta.

Responsible Energy Development Act, SA 2012, c R-17.3, s 2(1)(a).
Orphan Well Association v Grant Thornton Limited, 2017 ABCA 124 at para 11 ["Appeal Decision"].

9 The Regulator carries out this mandate through a "cradle-to-grave" approach to upstream oil and gas management. It requires that each oil and gas well or pipeline be licensed separately. For each license, the licensee is required to abide by the rules and conditions that control all aspects of the well or pipeline, being: exploration, drilling, production, and the remediation and reclamation

Appeal Decision, *supra* para 8 at paras 11, 126.

10 In Alberta, title to land is separated into mineral and surface components. Over eighty percent of mineral rights are owned by the Crown. Surface rights are generally owned by farmers and ranchers. In order to drill, a licensee must have each of: a mineral title to the underground oil and gas resources, a right to occupy the surface of the land, and the province's permission to drill via the Regulator's licensing regime.

Appeal Decision, *supra* para 8 at para 29, 30, 119.

11 A licensee must follow rules of general application laid out in validly enacted legislation and directives published by the Regulator.

Appeal Decision, *supra* para 8 at paras 11, 14—15.

12 Provincial regulation obligates a licensee to clean-up a well upon the termination of a mineral lease or surface lease in accordance with *Directive 020*. *Directive 020* orders licensees to "abandon" wells by plugging them, removing surface installations, and returning the surface land to the original condition.

Alta Reg 151/1971, ss 3.012—3.013.
Alberta Energy Regulator, *Directive 020: Well Abandonment* (6 December 2018) at parts 4—5 ["*Directive 020*"].
Appeal Decision, *supra* para 8 at paras 12, 143.

13 *Directive 006* establishes the Regulator's Licensee Liability Rating ("LLR") program. The LLR program allows the Regulator to ensure that at any point of a licensee's lifecycle, it has the financial means to fulfil its end-of-life obligations associated with its licenses. Part one of the directive expressly states that the purpose of the LLR program is to ensure that the costs of remediating wells and pipelines are not "borne by the public of Alberta should a licensee become defunct".

Alberta Energy Regulator, *Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process* (17 February 2016) at parts 1, 5 ["*Directive 006*"].

14 As part of this program, the Regulator calculates a liability management ratio ("LMR") on a monthly basis and upon the sale or transfer of a license. The LMR compares a licensee's financial assets with its financial liabilities. For the purposes of the LMR, liabilities are defined as the costs of suspending, abandoning, remediating, and reclaiming a well. If the LMR is below 1.0, the Regulator requires that the licensee reduce its financial liabilities either by posting a security deposit with the Regulator or by reclaiming its properties.

Directive 006, *supra* para 13 at parts 4, 5.
Appeal Decision, *supra* para 8 at paras 135—136.

15 To transfer or sell a license, a licensee must first obtain approval from the Regulator. The Regulator can approve, deny, or impose any condition on the transfer of license. In particular,

under part 10 of *Directive 00*6, the Regulator can deny or impose a condition on a license when its transfer increases the likelihood that a spent well will not be remediated.

Oil and Gas Conservation Act, RSA 2000, c O-6, ss 24(1)—(2), (7) ["*OGCA*"].

16 For nearly twenty-five years, trustees have discharged their mandates under the *BIA* while working together with the Regulator to fulfil licensing obligations.

Bankruptcy and Insolvency Act, RSC 1985, c B-3, s 14.06(4) ["*BIA*"].
Appeal Decision, *supra* para 8 at para 234.

ii. The OWA manages the environmental risks of orphaned wells

17 The OWA is empowered by the Regulator to remediate orphaned wells. The Regulator is authorized by the *OGCA* to deem oil and gas wells as orphans. *Directive 006* stipulates that a well is eligible to be deemed an orphan when the licensee becomes insolvent or defunct.

OGCA, *supra* para 15, s 70(2)(a).
Alta Reg 45/2001, ss 2—3(2).
Directive 006, *supra* para 13 at part 7.
Appeal Decision, *supra* para 8 at para 21.

18 The OWA is a non-profit organization that operates separately from the Regulator. It is funded by an orphan fund levy imposed by the *OGCA* on industry participants. The OWA has limited resources and establishes priorities to determine which properties should receive abandonment work first.

OGCA, *supra* para 15, s 73(1).
Appeal Decision, *supra* para 8 at paras 22—23, 145.

19 As of September 2015, the OWA was faced with 695 orphan wells and 503 orphan sites to be remediated. Although the OWA aspires to have all the current orphan wells and sites remediated over the next ten to twelve years, currently, the OWA does not have the financial

resources to remediate all orphaned wells. It has also seen the number of orphan wells increase in previous years.

Appeal Decision, *supra* para 8 at para 23.

iii. The AER ordered the Respondent to fulfil its licensing obligations

20 Redwater Energy Corporation ("Redwater") was a publicly listed oil and gas company operating in Alberta. The respondent, Grant Thornton Limited ("GTL"), was appointed receiver and trustee of the company under the *BIA* on May 12, 2015 and October 28, 2015, respectively.

Appeal Decision, *supra* para 8 at paras 4, 7.

21 In May 2015, the Regulator reminded GTL that it was considered a licensee under the provincial regulatory scheme. As such, GTL was required to fulfil all regulatory requirements associated with the licenses prior to distributing any funds or finalizing any proposal to creditors. The Regulator further reminded the receiver that approval of license transfers or sales would be contingent on the ability of the transferor and transferee to fulfil regulatory obligations. When GTL was appointed receiver, the LMR rating for Redwater was 0.93.

Redwater Energy Corporation (Re), 2016 ABQB 278 at paras 19, 29 ["Application Decision"].

22 On July 3, 2015, GTL informed the Regulator that it would be disclaiming 107 of the 127 licensed assets in the estate and would not be fulfilling the associated licensing obligations. The value of those assets was less than the potential costs to remediate the wells and sites.

Appeal Decision, *supra* para 8 at para 6.

23 On July 14, 2015 and August 7, 2015 the Regulator ordered GTL to remediate the 107 licensed assets it had purported to disclaim ("the Abandonment Orders"). It explained that these licensed assets constituted a potential environmental or safety hazard to the public. In a letter dated July 15, 2015, the Regulator suggested that should GTL fail to comply, the Regulator

would use its process to have the properties abandoned and seek recovery for costs. Despite this assertion, evidence accepted by the trier of fact indicates that the Regulator rarely claims costs for remediation and that it rarely performs the abandonment work itself.

Application Decision, *supra* para 21 at paras 23, 166.

24 On November 2, 2015, GTL indicated that it would not comply with the Abandonment Orders. The Regulator and the OWA subsequently brought applications to compel GTL's compliance with licensing obligations associated with the disclaimed licensed assets and a declaration that the disclaiming of those assets was void. GTL sought dismissal of the application and filed a cross-application for approval of the sale of some assets, as well as a ruling on the constitutionality of the Regulator's position.

Appeal Decision, *supra* para 8 at paras 7—8.

iv. The Decision of the Alberta Court of Queen's Bench

25 At the Alberta Court of Queen's Bench, Chief Justice Wittmann dismissed the applications by the Regulator and the OWA. He found that subsection 14.06(4) of the *BIA* granted the trustee a right to disclaim licensed assets. He also engaged the doctrine of paramountcy, ultimately deciding that the *BIA* was paramount to Alberta's licensing obligations for two main reasons. First, he held that the ability to disclaim assets under section 14.06 conflicted with the provincial prohibition to disclaim licensed assets in the *OGCA* and the *Pipeline Act*. Second, he held that the LLR's requirement to post security and to perform the Abandonment Orders prior to transfer or sale of the license effectively reordered the priority of distribution as set out in the *BIA*.

Application Decision, *supra* para 21 at paras 155, 181.

26 Chief Justice Wittmann also held that the Abandonment Orders were claims provable in bankruptcy under the *AbitibiBowater* test. He found that the third part would not be met if it was applied narrowly to the facts as there was technically no sufficient certainty that the Appellants would remediate the site.

Application Decision, *supra* para 21 at para 173.

v. The Decision of the Alberta Court of Appeal

27 In a split decision, the Court of Appeal dismissed the appeal. The Majority found that subsection 14.06(4) permits a trustee to disclaim licensed assets, and that both the Abandonment Orders and licensing obligations were claims provable in bankruptcy.

Appeal Decision, *supra* para 8 at paras 68—73, 79.

28 Like the lower court, the Majority held that the licensing regime conflicted with the *BIA*, rendering the federal legislation paramount. The Majority found that the licensing obligations were in operational conflict with the following provisions of the *BIA*: those that exempt a trustee and receiver from personal liability, those that allow a trustee and receiver to disclaim assets, and those that outline the priority of distribution. The Majority also held that the purpose of the priority of distribution was frustrated by the licensing obligations.

Appeal Decision, *supra* para 8 at paras 88—90.

29 In dissent, Justice Martin characterized the case as one that should be understood in relation to the principle of cooperative federalism. She explained that this principle requires that the doctrine of paramountcy be read narrowly and applied with restraint. If both laws can operate side-by-side without conflict, she explained that they should be read and interpreted accordingly.

Appeal Decision, *supra* para 8 at paras 149—151.

30 Justice Martin held that the licensing obligations were not monetary claims under section 14.06 or the *AbitibiBowater* test, but rather, were public duties owed to citizens. In keeping with this interpretation, Justice Martin did not find a conflict between the provincial and federal legislation. She held that there was no operational conflict between the two on the basis that section 14.06 of the *BIA* did not entitle the trustee to renounce its licensing obligations. She further held that the provincial legislation did not frustrate the purpose of the *BIA*, as a "mere effect" on the bankrupt's assets does not reorder priorities in bankruptcy.

Appeal Decision, *supra* para 8 at paras 174, 156.

PART II -- QUESTIONS IN ISSUE

31 There are two questions at issue in this Appeal:

(1) Do the licensing obligations amount to a claim provable in bankruptcy?

(2) Do the licensing obligations conflict with or frustrate the purpose of the *BIA*, thereby engaging the doctrine of paramountcy?

32 The Appellants submit that the answer to each of these questions is no.

PART III -- ARGUMENT

A. The Interpretive Principles Governing the Questions at Issue

33 The two overarching interpretive principles necessary to correctly adjudicate the questions in appeal are the principle of cooperative federalism and the modern approach to statutory interpretation.

34 The principle of cooperative federalism tempers the doctrine of paramountcy. This doctrine renders a federal law paramount where a provincial and federal law conflict. However, the principle of cooperative federalism requires paramountcy to be narrowly construed. The Supreme Court of Canada requires that courts favour a harmonious reading of two laws over a conflicting one. Further, the Supreme Court obliges courts to exercise restraint in hampering provincial measures that were enacted in the public interest.

> *Husky Oil Operations Ltd. v Minister of National Revenue*, [1995] 3 SCR 453, 128 DLR (4th) 1 at para 162.
> *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56 at para 10.
> *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 37.

35 In *Lemare Logging*, the Supreme Court reinforced that provincial powers should not be constrained unless there is a clear inconsistency between the provincial and federal laws. It reemphasized the need for courts to take a "restrained approach" to the paramountcy analysis and stressed that courts should choose a harmonious interpretation where it exists.

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

36 Further, *Lemare Logging* confirmed that onus to prove a conflict fell on the party raising the constitutional challenge. In order to find the *BIA* to be paramount, the Respondent must prove that the *BIA* and Alberta's licensing obligations can only be read in a conflicting manner.

> *Lemare Logging*, *supra* para 35 at para 77.

37 The second principle which must be applied is Driedger's modern approach to statutory interpretation. The modern principle requires that: "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." Such an approach must be applied in order to correctly interpret section 14.06 of the *BIA* and to arrive at its precise meaning and to avoid an overbroad interpretation of the legislation.

Re Rizzo & Rizzo Shoes Ltd (Re), [1998] 1 SCR 27, 154 DLR (4th) 193 at para 2.

38 Furthermore, the legislative intention of Parliament is relevant to correctly interpreting a statute according to the modern approach. As such, Parliament's aims in drafting the *BIA*, as well as the relationship between the bankruptcy regime and environmental protection regulations, must be considered in interpreting the *BIA*.

Bell ExpressVu Limited Partnership v Rex, 2002 SCC 42.

B. The Licensing Obligations Are Not Claims Provable in Bankruptcy

39 Section 14.06 of the *BIA* governs how environmental obligations and orders are treated in bankruptcy proceedings. It does not state that all such obligations and orders are claims provable in bankruptcy but only those that are caught by the words of the provision understood in a grammatical and ordinary sense. Section 14.06 also captures environmental orders that are deemed monetary claims under the *AbitibiBowater* test so long as the section applies.

Appeal Decision, *supra* para 8 at paras 49, 159.

40 The Appellants submit that neither the stated language of section 14.06 nor Parliament's intentions for enacting this section justify the Majority's finding that the licensing obligations were claims provable in bankruptcy. Due to the fact that section 14.06 does not apply and because this appeal is concerned with licensing obligations, not environmental orders, the *AbitibiBowater* test should not be applied. If it were applied, though, the test is still not met. Neither the licensing obligations nor the Abandonment Orders meet the first or third branches of the test.

i. Section 14.06 does not apply to the licensing obligations

41 Subsection 14.08(8) has the power to turn a claim arising from the costs of remedying environmental damage into a claim provable in bankruptcy. With respect, subsection 14.06(8) cannot apply to licensing obligations at issue given that no property that is owned by the debtor is affected by environmental damage. Based on a grammatical and ordinary reading of the subsection, subsection 14.06(8) captures only those claims where the costs are associated with remedying environmental damage that affect real property owned by the debtor. The subsection reads:

> (8) Despite subsection 121(1), **a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor shall be a provable claim**, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy. [emphasis added]

42 The costs associated with the regulatory obligations to remediate environmental damage do not affect any of the property interests owned by the debtor: neither the *profit à prendre*, nor the surface access rights, nor the regulatory licenses. The costs associated are to remedy environmental damage to the surface of the land.

43 Environmental damage from oil and gas extraction do not affect the *profit à prendre* held by the debtor. The *profit à prendre* is the right to the oil and gas deposits. Environmental damage affects the land, not oil and gas deposits, nor the right to the oil and gas deposits. Likewise, the costs in question are to remedy environmental damage affecting the land, not to remedy environmental damage affecting oil and gas deposits.

> Appeal Decision, *supra* para 8 at para 33, 57(c).

44 The surface access rights are also not affected by the environmental damage. The costs in question are to remedy environmental damage to the land itself. The right of the debtor to access

the surface of the land will not change based on whether the land is remediated or not. Even if the estate involves a surface lease, Justice Martin notes that the "surface of the land remains the property of the Crown or third-party landowner." As such, it is the landowner that is affected by the environmental damage caused the surface construction and drilling associated with oil well development.

> Appeal Decision, *supra* para 8 at para 130.

45 Finally, on this point, regulatory licenses are not real property. Even if they were, permission to drill and operate a well cannot be affected by environmental damage.

> Appeal Decision, *supra* para 8 at para 41.

46 Subsection 14.06(8) must also be interpreted holistically with the rest of the provisions of this section, in keeping with the modern rule of statutory interpretation. Subsection 14.06(8) was drafted in conjunction with subsection 14.06(4) during the 1997 amendments to the *BIA*. As such, they must be read together, and with respect to section 14.06 as a whole.

> Appeal Decision, *supra* para 8 at para 208.

47 Section 14.06, particularly paragraph 14.06(4)(c) does not clearly state that the trustee can disclaim licensing obligations, contrary to what the Majority held. The Majority's finding is not in accordance with the modern rule, nor the principle of cooperative federalism which demands a narrow reading of provincial legislation if a broader reading would render it inoperative. As Justice Martin correctly notes:

> To allow trustees in bankruptcy to pick and choose when they will comply with valid and generally applicable provincial law would be a power so extraordinary that it would require clear and express articulation. There is no such clear and express conferral of this power in the *BIA*. Nor should this power be inferred when to do so contravenes principles of statutory interpretation, cooperative federalism and the rule of law.

> Appeal Decision, *supra* para 8 at para 114.

48 Chief Justice Wittmann and Justice Martin both agree that the purposes of subsection 14.06(4) are: to protect receivers and trustees from personal liability, and to encourage them to accept mandates that involve ongoing environmental obligations.

> Appeal Decision, *supra* para 8 at para 197.
> Application Decision, *supra* para 21 at paras 128—129.

49 These purposes were clarified during the bankruptcy regime's evolution in 1992 and 1997. The 1992 amendments to the *BIA* limited the personal liability of trustees for environmental damage that occurred before and after their appointment. These amendments were motivated by concerns about the personal protection of receivers after the Alberta Court of Appeal ruled that a receiver would be held personally liable for the debtor's environmental obligations in *Northern Badger*.

> Appeal Decision, *supra* para 8 at paras 193—194.
> *PanAmericana de Bienes y Servicios v Northern Badger Oil and Gas Limited*, 1991 ABCA 181 at para 56 ["*Northern Badger*"].

50 In 1997, the *BIA* was amended further to address environmental claims in detail by adding subsections 14.06(4)-(8). The relevant Hansard debates show that the continued aim of section 14.06 was to limit liability of insolvent professionals in order to encourage them to accept mandates where environmental obligations were involved. Mr. Jacques Hains, Director at the Department of Industry Canada, was involved in drafting both the 1992 and 1997 amendments. During Senate debate on the 1997 amendments to section 14.06, Mr. Hains stated:

> The aim is to provide a better definition of the liability of insolvency professionals and practitioners in order to encourage them to accept mandates where there may be problems related to the environment. It is hoped that this will reduce the number of abandoned sites both for the benefit of the environment and the safeguard of businesses and jobs.

> Appeal Decision, *supra* para 8 at para 197.
> Senate of Canada, Standing Senate Committee on Banking, Trade and Commerce, *Evidence*, 13 (4 November 1996).

51 These purpose of section 14.06 to protect trustees from personal liability is also evident from a plain reading of section 14.06. Subsection 14.06(2) provides that, in continuing the bankrupt's business, "a trustee is not personally liable in that position for any environmental condition that arose or environmental damage…". Subsection 14.06(4) states that where a trustee is faced with an environmental order, "the trustee is not personally liable for failure to comply with the other and is not personally liable for any costs…".

52 The effect of the Majority's overbroad interpretation of section 14.06 is that creditors would unduly benefit at the expense of the financial stability, health, and safety of the Alberta public. Justice Martin describes these implications at paragraph 220,

> Importantly, the end-of-life obligations the trustee seeks to avoid primarily affect land that belongs not to the debtor, but to a third party – either the Crown or a private third party who owns the surface of the land on which the well and other facilities were placed. The creditor, who granted credit with full knowledge of the nature of the collateral available and the end-of-life obligations inherent in it, will take the benefit of more profitable portions of the debtor's estate, while leaving the surface owner's land in unsafe and less valuable condition. This sort of undesirable and unintended consequence should not happen unless there is no other available statutory interpretation.

53 Neither third party surface owners, nor the public, should be asked to bear the burden of spent wells to protect the bankrupt's estate. All parties involved, including lenders, were aware that the end-of-life obligations were a precondition of obtaining a license. These licensing obligations, which are predicated on the notion that the polluter is responsible for environmental remediation costs, have lived together with the federal bankruptcy regime for twenty-five years. This demonstrates that the Alberta's natural resource development regulations and the federal bankruptcy regimes can, and do cooperate with one another, and as such, they should be interpreted harmoniously.

ii. The *AbitibiBowater* test does not apply to the licensing obligations

54 It is not necessary to apply the *AbitibiBowater* test to the licensing obligations. The *AbitibiBowater* test sheds light on when an environmental order amounts to a monetary claim for the purposes of bankruptcy proceedings. Once it is considered a monetary claim, if the conditions of subsection 14.06(8) are met, then the claim is considered a claim provable in bankruptcy. Given that the conditions of subsection 14.06(8) are not met, application of the *AbitibiBowater* test becomes unhelpful. Additionally, this decision focused specifically on environmental orders issued by regulators, which are different in substance and form from the licensing obligations that are at the heart of this appeal.

Appeal Decision, *supra* para 8 at paras 57(d), 220.

55 Further, the test was articulated by the Supreme Court in *AbitibiBowater*, which is not binding on the Supreme Environmental Moot Court of Canada.

Newfoundland and Labrador v AbitibiBowater Inc., 2012 SCC 67 at para 5 ["*AbitibiBowater*"].

56 The facts in *AbitibiBowater* were drastically different than the one in this case. In *AbitibiBowater*, AbitibiBowater Inc. announced that it would close its last site after operating in Newfoundland and Labrador for over 100 years. Two weeks after the company's announcement, the province passed the *Abitibi Act* which expropriated three of out of five of the corporation's privately-owned land and gave it no legal recourse.

AbitibiBowater, *supra* para 55 at paras 5—6.
Abitibi-Consolidated Rights and Assets Act, SNL 2008, c A-1.01 ["*Abitibi Act*"].

57 The government then ordered AbitibiBowater to remediate all five of the industrial sites, including the three that had been expropriated through the *Abitibi Act*. On the same day it issued this order, the Province brought a motion to declare that the environmental remediation orders would not be affected by the federal reorganization statute.

AbitibiBowater, *supra* para 55 at paras 9—10.

58 The Court was asked to determine whether the remediation orders were monetary in nature and thus subject to a stay under the federal reorganization statute. The Court articulated a three-part test to determine whether an environmental order was a claim provable in bankruptcy:

> (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. The Court went onto explain that if it cannot be expressed in monetary terms, there must be sufficient certainty that the regulatory body would ultimately perform the remediation work and pursue a claim against the debtor.

Appeal Decision, *supra* para 8 at paras 60, 166—167.
AbitibiBowater, *supra* para 55 at paras 26, 36.

59 Justice Martin correctly held that the Abandonment Orders did not meet the first or third branches of the test.

Appeal Decision, *supra* para 8 at para 188.

60 In relation to the first part of the test, the Regulator cannot act as a creditor given that no cost is owed to it or to the province. The Majority relied on the security posted for the LLR program as proof that the Regulator acted as a creditor.

61 With respect, the Abandonment Orders at issue are separate from the LLR program, which is an ongoing obligation. Justice Martin explains this stating that:

> The requirement that a licensee obtain AER approval for licence transfers is fundamentally different from the clean-up orders at issue in *Abitibi*. The province has to be able to maintain control over the transfer of well and pipeline licences during a bankruptcy and there is no reason why that regulatory requirement cannot co-exist with the distribution of a debtor's estate.
>
> Appeal Decision, *supra* para 8 at para 187.

62 It is also incorrect to conceptualize the OWA as a creditor. The OWA stands as a distinct entity from the Regulator, with a separate mandate and a separate board. Although it has been delegated remediation work for orphaned wells by the Regulator, the OWA cannot seek compensation for the remedial work done and thus cannot be owed any cost from the debtor.

63 In terms of the third part of the test, there is no sufficient certainty that the wells will be remediated. The Court made it clear in paragraph 36 of *AbitibiBowater* that in order for the third part of the test to be met, "there must be sufficient indications that the regulatory body enforcing the order will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed." In the present case, it is not clear that the Regulator will perform the remediation work, nor is it clear that Regulator will seek a monetary claim to have its costs reimbursed.

64 As the trier of fact, Chief Justice Wittmann agreed with the Appellants that it is not sufficiently certain that the remediation work will be completed, stating at paragraph 173:

> Does this situation meet the sufficient certainty criterion as described in *AbitibiBowater*? The answer is no in a narrow and technical sense, since it is unclear whether the AER will perform the work itself or if it will deem the properties subject to the orders, orphans. If so, the OWA will probably perform the work, although not necessarily within a definite timeframe.

65 Furthermore, it is unclear to what extent the OWA will be able to remediate the Respondent's orphaned wells in the future. As set out in paragraph 19 above, the OWA predicted that it would take between ten to twelve years to complete remediation on the wells that have

already been orphaned in the years prior and the number of orphaned wells had been consistently increasing.

66 It is also uncertain whether the Regulator will seek compensation from the Respondent. The evidence demonstrates that it is not in the Regulator's practice to enforce costs.

> Application Decision, supra para 21 at para 166.

67 The Appellants submit that even though the Abandonment Orders do not fulfil the first or third parts of the test, the Supreme Environmental Moot Court of Canada should clarify the *AbitibiBowater* test. As the Supreme Court does not bind this Honourable Court, there is an opportunity to articulate a test that reflects the variation in regulatory orders across Canada. The Appellants submit that this Honourable Court should narrow the first and third parts of the test accordingly. Specifically, the test should be amended to better differentiate between both regulatory bodies and creditors. Furthermore, the test should be clarified to be able to distinguish between ongoing obligations and claims provable in bankruptcy.

C. The Licensing Obligations Do Not Engage the Doctrine of Paramountcy

68 For federal legislation to be rendered paramount to provincial legislation, the existence of both laws must produce either a mutually exclusive or inconsistent result. Consistent with this description of the paramountcy rule from M*ultiple Access* and *Moloney*, the Supreme Court outlined two bases under which the paramountcy doctrine might be engaged, being: where there is an operational conflict between the two, or where the provincial legislation frustrates the purpose of the federal.

> *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at para 163, 138 DLR (3d) 1 ["*Multiple Access*"].
> *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at para 18 ["*Moloney*"].

69 The Appellants submit that the licensing obligations do not engage the doctrine of paramountcy on either branch of the paramountcy test. The licensing obligations do not operationally conflict with the *BIA*, as the *BIA* does not confer the right to disclaim licensed assets. Nor do the licensing obligations frustrate the purpose of the *BIA* as they do not have the effect of reordering priorities in bankruptcy. A narrow interpretation of the federal and provincial schemes as such is correctly in accordance with the principle of cooperative federalism.

i. <u>The licensing obligations do not operationally conflict with the provisions of the *BIA*</u>

70 The first branch of the paramountcy test requires an "actual conflict," meaning an inability to comply with both federal and provincial laws concurrently. If both laws can operate side-by-side without conflict, or if both laws can apply concurrently, and can be complied with simultaneously without violating one or the other, then no operational conflict exists.

Multiple Access, *supra* para 68 at para 170.

71 Furthermore, there is a presumption of constitutionality when determining whether provincial and federal laws are in operational conflict. As such, there is a high bar for conflict that must be met, requiring a restrained approach.

Moloney, *supra* para 68 at para 27.

72 In order to determine whether an operational conflict exists, a review of both the language used in section 14.06 and the context in which it was enacted are important to understanding the intention of Parliament in drafting the *BIA*. The language and context of section 14.06 demonstrates that it does not encompass every provincial regulation that touches on environmental matters.

Appeal Decision, *supra* para 8 at para 169, 192.

73 Subsection 14.06(2) and (4) both expressly speak of the personal liability of the trustee; both provisions specify situations in which a trustee will not be "personally liable" for environmental conditions on land belonging to a debtor that pre-exist the trustee's mandate. As submitted, this section was added to the *BIA* following the decision in *Northern Badger*, where the receivers in bankruptcy were held personally liable for environmental obligations.

> Appeal Decision, *supra* para 8 at para 191.

74 As shown, the *BIA* does not confer a positive right to abandon oil and well licenses. The Respondent relies heavily on subsection 14.06(4) as proof that it can abandon wells, however this positive right does not exist. Subsection 14.06(4) does not impute rights for trustees to disclaim licensing obligations, and nor does it affect all potential environmental claims against the estate. As such, the *BIA* does not absolve a trustee from fulfilling their environmental obligations that are a precondition to obtaining a license to develop natural resources.

75 This understanding flows from a holistic reading of subsections 14.06(4) and (8). As submitted, the ability to disclaim assets is restricted to real property by subsection 14.06(8). In this way, the amendments were enacted together to provide a compromise between protecting the bankrupt and the environment, and they must be interpreted inclusively to achieve these important ends.

76 For these reasons, section 14.06 should not be understood to confer the right to disclaim unprofitable assets to trustees. Instead, interpreting section 14.06 as limiting the personal liability of the trustee means that licensing obligations are still enforceable against the estate. This allows for a harmonious interpretation, and a finding that there is no operational conflict between the federal and provincial legislation.

77 Furthermore, the notion that the polluter must be responsible for environmental obligations is not a novel concept. The polluter-pays principle is entrenched in environmental law in Canada. As such, the provincial oil and gas regulatory regime requires that fulfilling licensing obligations are a condition of obtaining a license to drill. This scheme thereby implements the polluter pays principle.

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

78 By finding that these legislative regimes, which have operated side-by-side for years, are in conflict, the Majority decision disrupts a functioning relationship between two schemes that were designed to operate, and were in fact operating, in concert. The *BIA* and environmental regulations must be able to operate concurrently in order to ensure that there is a compromise between the protection of the bankrupt and that of the environment.

ii. <u>The licensing obligations do not frustrate the purpose of the *BIA*</u>

79 As submitted below, the purposes of the *BIA* are not frustrated by the provincial licensing obligations. Even where there is no operational conflict between provincial and federal legislation, provincial legislation can be rendered unconstitutional if it frustrates the purpose of federal law.

80 The Supreme Court identified two purposes furthered by the *BIA* being: the equitable distribution of assets, and the financial rehabilitation of the debtor.

Moloney, *supra* para 68 at para 32.

81 The Supreme Court has held that the purpose of the federal bankruptcy scheme is frustrated if provincial legislation has the effect of altering the priorities established by the *BIA*, giving priority to one provable claim over others. In *Lemare Logging*, the Supreme Court found

that the provincial legislation at issue did not frustrate the purpose of the *BIA*. The Court decided to read section 243 of the *BIA* in a "simple and narrow" way according to the provision's purpose.

Lemare Logging, *supra* para 35 at para 45.

82 As expressed in *Northern Badger*, a mere effect on the bankrupt's assets does not meet the high constitutional law bar for the frustration of purpose. As such, 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.

Northern Badger, *supra* para 49 at para 63.

83 In this case, there was no reordering of bankruptcy priorities by the provincial legislation, but rather, an effect on the value of the bankrupt's estate. As held by Justice Martin, the costs associated with compliance with regulatory obligations do not reorder creditor priorities. Rather, the regulatory costs are internalized within the license, because, as demonstrated, the end-of-life obligations are a pre-condition to obtaining a license to extract resources in Alberta.

Appeal Decision, *supra* para 8 at para 156.

84 With respect, the Majority did not demonstrate that the high constitutional law threshold for frustration of the federal purpose was met by the licensing obligations. The Majority held only that the provincial legislation had a general effect on the *BIA*, stating that "to the extent that the interpretation of the provincial legislation leads to a different result, the paramountcy doctrine is engaged." By setting the standard for frustration of purpose as that which creates a "different result," the Majority created an overbroad and unspecific standard. The correct test for determining if the purpose of the bankruptcy regime has been frustrated asks whether the

provincial legislation has disrupted the order of priority of claims. The test is not whether the provincial scheme has a mere impact on the federal legislation's effect.

Appeal Decision, *supra* para 8 at para 91.

85 The provincial legislation may have an impact on the value of the estate, but that does not mean the province is seeking an unauthorized priority in bankruptcy. The provincial regulatory provisions, which make trustees liable for remediation, do not frustrate the purpose of section 14.06, because although this provision allows trustees to disclaim certain assets, it does not reorder the scheme of the *BIA* such that it causes a conflict.

86 The regulatory provisions allow the province to enforce laws and licensing conditions designed to protect the public interest, the environment, and the rights of farmers and ranchers affected directly by the extraction of oil and gas and its regulatory regime. The insolvency regime is not meant to undercut these important goals. As stated, the *BIA*'s purpose is to provide the bankrupt with relief, and to ensure the orderly distribution of assets. In this way, the purpose of the *BIA* is to provide a fresh start to the bankrupt - not a free pass to polluters.

87 Although the *BIA* is meant to provide the bankrupt with a fresh start, this can only occur once all duties owed to the public are fulfilled. The *BIA* is not meant to protect the bankrupt at the expense of the public good. The bankruptcy regime has clear limits placed on it for this reason; for example, the *BIA* does not absolve student loans, and personal income tax debt will only be wiped away subject to certain conditions. The fulfilment of end-of-life obligations for spent wells is a duty owed to the public for the protection of both surface rights owners and the environment as a whole.

BIA, *supra* para 16, ss 178(g), 172.1.

88 For each of these reasons, a restrained approach to paramountcy is necessary to arrive at a correct interpretation of the *BIA*. Expansively interpreting the purpose of the *BIA* runs counter to

both the purposes of the *BIA* and the goal of environmental protection. As such, the Appellants submit that the Supreme Environmental Moot Court of Canada should construe the *BIA* narrowly according to its purposes. Arriving at a harmonious conception of the provincial and federal regimes at issue in this case promotes the protection of both the bankrupt and the environment.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

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

PART V -- ORDER SOUGHT

90 The Appellants respectfully request that this appeal be allowed, and that the following relief be granted:

(a) An Order/Declaration that the disclaimer by GTL of a portion of the licensed assets of Redwater Energy Corp. is void and unenforceable and contrary to section 2 of the initial order appointing GTL as Receiver;

(b) An Order compelling GTL to comply with the closure and abandonment orders issued by the Alberta Energy Regulator in relation to a portion of the assets of Redwater Energy Corp. licensed properties; and

(c) An Order compelling GTL to fulfil its statutory obligations as a licensee in relation to the abandonment, reclamation and remediation of all the Redwater Energy Corp. licensed properties.

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

Sarah Levy

Maha Mansoor

Counsel for the Appellants
Orphan Well Association and Alberta Energy Regulator

PART VI -- TABLE OF AUTHORITIES

Paragraph No. 91

Authority	Paragraph numbers where authority is cited
Legislation	
Bankruptcy and Insolvency Act, RSC 1985, c B-3	16, 25, 41, 51, 87
Constitution Act, 1867, (UK), 30 & 31 Vict, c 3	7
Oil and Gas Conservation Act, RSA 2000, c O-6	15, 17—18,
Responsible Energy Development Act, SA 2012, c R-17.3	8
Regulations	
Alta Reg 151/1971	12
Alta Reg 45/2001	17
Alberta Energy Regulator, *Directive 020: Well Abandonment* (6 December 2018)	12
Alberta Energy Regulator, *Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process* (17 February 2016)	13—15, 17
Jurisprudence	
Alberta (Attorney General) v Moloney, 2015 SCC 51	68, 71, 80
Bell ExpressVu Limited Partnership v Rex, 2002 SCC 42	38
Canadian Western Bank v Alberta, 2007 SCC 22	34
Husky Oil Operations Ltd. v Minister of National Revenue, [1995] 3 SCR 453, 128 DLR (4th) 1	34
Imperial Oil v Quebec (Minister of the Environment), 2003 SCC 58	77
Multiple Access Ltd v McCutcheon, [1982] 2 SCR 161, 138 DLR (3d) 1	68, 70
Newfoundland and Labrador v AbitibiBowater Inc., 2012 SCC 67	55—58, 63
Orphan Well Association v Grant Thornton Limited, 2017 ABCA 124	8—12, 14, 16—20, 22, 24, 27—30, 36, 39, 43—50, 52, 54—55, 58—59, 61, 72—73, 83—84
PanAmericana de Bienes y Servicios v Northern Badger Oil and Gas Limited, 1991 ABCA 181	49, 82
Redwater Energy Corporation (Re), 2016 ABQB 278	21, 23, 25—26, 48, 64, 66
Reference re Employment Insurance Act (Can.), ss. 22 and 23, 2005 SCC 56	34
Re Rizzo & Rizzo Shoes Ltd (Re), [1998] 1 SCR 27, 154 DLR (4th) 193	37
Saskatchewan (Attorney General) v Lemare Lake Logging Ltd., 2015 SCC 53	35, 81
Alberta (Attorney General) v Moloney, 2015 SCC 51	68, 71, 80
Bell ExpressVu Limited Partnership v Rex, 2002 SCC 42	38
Canadian Western Bank v Alberta, 2007 SCC 22	34

PART VII -- LEGISLATION AT ISSUE

ALTA REG 45/2001

Establishment of delegated authority

2 The Alberta Oil and Gas Orphan Abandonment and Reclamation Association incorporated under the Societies Act is hereby designated as a delegated authority for the purposes of Part 11 of the Act.

Delegation

3(1) The following powers, duties and functions of the Regulator are delegated to the Association:

(a) all of the powers, duties and functions of the Regulator for the purpose of administering the payment of money for the purposes set out in section 70(1) of the Act;

(b) the powers, duties and functions of the Regulator under sections 28(b), 102 and 104(1)(b) and (2)(b) of the Act, subject to the following terms and conditions:

[…]

(2) In exercising and carrying out the powers, duties and functions delegated to it under subsection (1), the Association shall act in accordance with

(a) the Act and regulations and any other applicable law,

(b) applicable requirements, guidelines, directions and orders of the Regulator, and

(c) generally accepted engineering and operating practices.

ALTA REG 151/1971

Abandoned Wells

3.012 A licensee shall abandon a well or facility

(a) on the termination of the mineral lease, surface lease or right of entry,

(b) where the licensee fails to obtain the necessary approval for the intended purpose of the well, if the licensee does not hold the right to drill for and produce oil or gas from the well,

(c) if the licensee has contravened an Act, a rule, a regulation or an order or direction of the Regulator and the Regulator has suspended or cancelled the licence,

(d) if the Regulator notifies the licensee that in the opinion of the Regulator the well or facility may constitute an environmental or a safety hazard,

(e) if the licensee is not or ceases to be a working interest participant in the well or facility,

(e.1) if the licensee

(i) is not or ceases to be resident in Alberta,

(ii) has not appointed an agent in accordance with section 91 of the Act, and

(iii) does not hold a subsisting exemption under section 1.030 from the requirement to appoint an agent,

(f) if the licensee is

(i) a corporation registered, incorporated or continued under the Business Corporations Act whose status is not active or has been dissolved or if the corporate registry status of the corporation is struck or rendered liable to be struck under any legislation governing corporations, or

(ii) an individual who is deceased,

(g) if the licensee has suspended the well in contravention of the requirements established by the Regulator under section 3.020, or
(h) where otherwise ordered to do so by the Regulator.

Abandonment Operations
3.013(1) Abandonment operations, including well abandonment, casing removal, zone abandonments and plug backs, shall be conducted in accordance with the current edition of Directive 020.
(2) A licensee must comply with all of the requirements of Directive 079, including requirements for locating and testing wells which are considered abandonment operations for the purposes of sections 27, 28, 29, 30, 101 and Part 11 of the Act.

***BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C B-3**

No trustee is bound to act
14.06 (1) No trustee is bound to assume the duties of trustee in matters relating to assignments, bankruptcy orders or proposals, but having accepted an appointment in relation to those matters the trustee shall, until discharged or another trustee is appointed in the trustee's stead, perform the duties required of a trustee under this Act.

Application
(1.1) In subsections (1.2) to (6), a reference to a trustee means a trustee in a bankruptcy or proposal and includes

(a) an interim receiver;

(b) a receiver within the meaning of subsection 243(2); and

(c) any other person who has been lawfully appointed to take, or has lawfully taken, possession or control of any property of an insolvent person or a bankrupt that was acquired for, or is used in relation to, a business carried on by the insolvent person or bankrupt.

No personal liability in respect of matters before appointment
(1.2) Despite anything in federal or provincial law, if a trustee, in that position, carries on the business of a debtor or continues the employment of a debtor's employees, the trustee is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,
(a) that is in respect of the employees or former employees of the debtor or a predecessor of the debtor or in respect of a pension plan for the benefit of those employees; and
(b) that exists before the trustee is appointed or that is calculated by reference to a period before the appointment.

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

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

Liability in respect of environmental matters

(2) Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

(a) before the trustee's appointment; or

(b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct or, in the Province of Quebec, the trustee's gross or intentional fault.

Reports, etc., still required

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

Non-liability re certain orders

(4) Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of requiring a trustee to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, or during the period of the stay referred to in paragraph (b), the trustee

(i) complies with the order, or

(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property, or any right in any immovable, affected by the condition or damage;

(b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a), within ten days after the order is made or within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the trustee to contest the order, or

(ii) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(c) if the trustee had, before the order was made, abandoned or renounced or been divested of any interest in any real property, or any right in any immovable, affected by the condition or damage.

Stay may be granted

(5) The court may grant a stay of the order referred to in subsection (4) on such notice and for such period as the court deems necessary for the purpose of enabling the trustee to assess the economic viability of complying with the order.

Costs for remedying not costs of administration

(6) If the trustee has abandoned or renounced any interest in any real property, or any right in any immovable, affected by the environmental condition or environmental damage, claims for costs of remedying the condition or damage shall not rank as costs of administration.

Priority of claims
(7) Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security

> **(a)** is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and
> **(b)** ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

Claim for clean-up costs
(8) Despite subsection 121(1), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.

CONSTITUTION ACT, 1867, (UK), 30 & 31 VICT, C 3

Exclusive Powers of Provincial Legislatures
Subjects of exclusive Provincial Legislation
92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

> […]
> 5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
> […]
> 9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
> […]
> 13. Property and Civil Rights in the Province.
> […]
> 16. Generally all Matters of a merely local or private Nature in the Province.

Non-Renewable Natural Resources, Forestry Resources and Electrical Energy
Laws respecting non-renewable natural resources, forestry resources and electrical energy
92A. (1) In each province, the legislature may exclusively make laws in relation to

> (a) exploration for non-renewable natural resources in the province;
> (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and
> (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

OIL AND GAS CONSERVATION ACT, RSA 2000, C 0-6

Transfer of licence

24(1) A licence shall not be transferred without the consent in writing of the Regulator.

(2) The Regulator may consent to the transfer of a licence subject to any conditions, restrictions and stipulations that the Regulator may prescribe, or the Regulator may refuse to consent to the transfer of a licence.

[…]

(7) A transfer of a licence has no effect until the Regulator has consented to, or directed, a transfer of the licence under this section.

Purpose of Fund

70(1) The purposes of the orphan fund are

(a) to pay for suspension costs, abandonment costs and related reclamation costs in respect of orphan wells, facilities, facility sites and well sites where the work is carried out

(i) by the Regulator,

(ii) by a person authorized by the Regulator, or

(iii) by a Director or a person authorized by a Director in accordance with the Environmental Protection and Enhancement Act;

(2) The Regulator may,

(a) designate wells, facilities, facility sites and well sites to be orphan wells, facilities, facility sites or well sites for the purposes of this Part;

Orphan fund levy

73(1) The Regulator may, in respect of each fiscal year of the Regulator, by rules prescribe

(a) classes of wells, facilities (other than pipelines) and unreclaimed sites and the rates of the orphan fund levy applicable to each class,

(b) the date as of which the licensees of the wells, facilities and unreclaimed sites are to be determined, and

(c) the date by which the levy prescribed under clause (a) and penalties payable under section 74(2) must be paid to the Regulator to the account of the orphan fund.

RESPONSIBLE ENERGY DEVELOPMENT ACT, SA 2012, C R-17.3

Mandate of Regulator

2(1) The mandate of the Regulator is

(a) to provide for the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta through the Regulator's regulatory activities, and

(b) in respect of energy resource activities, to regulate

(i) the disposition and management of public lands,

(ii) the protection of the environment, and

(iii) the conservation and management of water, including the wise allocation and use of water,

in accordance with energy resource enactments and, pursuant to this Act and the regulations, in accordance with specified enactments.

ORPHAN WELL ASSOCIATION and ALBERTA ENERGY REGULATOR
APPELLANTS
(Appellants)

and-

GRANT THORNTON LIMITED
RESPONDENT
(Respondent)

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

SUPREME
ENVIRONMENTAL MOOT
COURT OF CANADA

FACTUM OF THE APPELLANTS ORPHAN WELL ASSOCIATION and ALBERTA ENERGY REGULATOR

TEAM #2019-11

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