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 # 2019-12

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 The federal bankruptcy regime is a carefully drafted system that considers the interests of various stakeholders. The federal *Bankruptcy and Insolvency Act* ("*BIA*") is an important part of this regime. The purposes of the *BIA* are: (1) to establish a "single proceeding" model in the orderly liquidation of the insolvent debtor, (2) to distribute the realizable assets fairly among creditors based on their legal priority, and (3) to provide the bankrupt with a "fresh start."

> *Orphan Well Association v Grant Thornton Limited,* 2017 ABCA 124 at para 42 [*Orphan Well*]. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, [*BIA*].

2 In adopting the 1992 and 1997 amendments to s.14.06 of the *BIA* ("*BIA* Amendments"), Parliament struck a precise balance between two competing interests in bankruptcy proceedings involving insolvent companies with environmental obligations. On the one hand, Parliament recognized the public's interest in enforcing environmental regulations. On the other hand, Parliament sought to ensure a fair and equitable distribution of realizable assets among creditors. Ultimately, Parliament enacted the current iteration of s.14.06 as a complete code that comprehensively deals with matters related to environmental claims. Section 14.06 shields trustees from personal liability, grants them the right to renounce properties with environmental liabilities, and instructs them to allocate the costs of remediating these properties amongst creditors and the Crown.

> *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 as amended by *An Act to Amend the Bankruptcy Act and to Amend the Income Tax Act in Consequence* thereof, SC 1992, c 27, and as amended by *An Act to Amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, SC 1997, c 12 ["*BIA Amendments*"]

3 This appeal considers whether Grant Thornton Limited ("GTL"), the trustee for the bankrupt Redwater Energy Corporation ("Redwater"), should comply with the Alberta Energy Regulator's ("AER") end-of-life abandonment and remediation obligations ("End-of-Life

Obligations") in priority to all other claims under the *BIA*. Forcing GTL to comply with the End-of-Life Obligations would disrupt the single-proceeding model of the federal bankruptcy regime and disregard Parliament's intent to fairly distribute assets among creditors. Trustees should not be compelled to disturb the careful balance Parliament has struck in the *BIA*. Rather, the role of trustees is to realize value from the bankrupt's estate in an equitable manner for the benefit of all stakeholders.

4 There are two issues in this appeal. First, whether the End-of-Life Obligations should be considered provable claims in bankruptcy. Second, whether the provincial and federal legislations conflict such that the doctrine of federal paramountcy is engaged.

5 Both the Court of Queen's Bench of Alberta ("ABQB") and the majority of the Court of Appeal of Alberta ("ABCA") correctly applied the law to this case and their decisions should be upheld. First, the courts held that the End-of-Life Obligations imposed by the AER on the trustee's renounced properties are in substance monetary claims provable in bankruptcy and thus subject to the *BIA*'s priority scheme. Second, the courts held that certain provisions of the provincial *Oil and Gas Conservation Act* ("*OGCA*"), the *Pipeline Act* ("*PLA*"), and the regulations, rules and directives issued under those acts (collectively, the "Provincial Regime") conflict with the operation of and defeat the purposes of the relevant provisions of the *BIA*.

> *Orphan Well*, *supra* para 1.
> *Redwater Energy Corporation (Re)*, 2016 ABQB 278 [*Redwater*].
> *Oil and Gas Conservation Act*, RSA 2000, c O-6 ["*OGCA*"].
> *Pipeline Act*, RSA 2000, c P-15 ["*PLA*"].

6 The End-of-Life Obligations constitute provable claims subject to the distribution scheme in the *BIA* and do not enjoy "super-priority." These obligations are provable claims in bankruptcy according to the test established by the Supreme Court of Canada ("SCC") in *AbitibiBowater*. The *BIA* Amendments and the SCC's decision in *AbitibiBowater* rendered the

ABCA's decision in *Northern Badger* inapplicable. The *AbitibiBowater* test is the correct analysis to apply in evaluating whether the End-of-Life Obligations are provable claims in bankruptcy.

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

7 The End-of-Life Obligations created by the Provincial Regime both operationally conflict with and frustrate the purposes of the *BIA*. The Provincial Regime operationally conflicts with: (1) the trustee's right to renounce property under s.14.06 and (2) the trustee's protection from personal liability under s.14.06. Moreover, the purposes of the *BIA* are frustrated in two respects. First, by restricting insolvency professionals' ability to renounce assets with environmental obligations, the Provincial Regime discourages trustees from assuming mandates for estates with environmental obligations. Second, by requiring trustees' compliance with the End-of-Life Obligations, the Provincial Regime prevents the equitable distribution of assets by removing these obligations from the single proceeding model of bankruptcy. The Provincial Regime should be rendered inoperative to the extent of its conflict with the *BIA*.

BIA, *supra* para 1 at s 14.06.

8 The AER has the right to regulate the environmental obligations of oil and gas companies in Alberta and to bring environmental claims against insolvent companies. However, the AER must exercise its environmental claims, just as other creditors, in accordance with the federal bankruptcy regime in order to preserve the equitable balance struck by Parliament.

9 The Respondent therefore requests that the appeal be dismissed.

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

10 The Respondent accepts the Appellants' statement of the facts, subject to the following additions and corrections.

(i) If GTL Complies with the End-of-Life Obligations, Redwater's Oil and Gas Assets will have No Net Value

11 GTL conducted an assessment of the economic viability of Redwater's assets and concluded that it would only take control of "approximately 20" of the 127 Redwater properties licensed by the AER. The AER responded by issuing abandonment/remediation orders ("Abandonment Orders") regarding the AER licensed assets that GTL renounced control over.

Redwater, *supra* para 5 at paras 20-24.

12 The AER has the discretion to approve or refuse transfer of licenses under s.24 of the *OCGA* and s.18 of the *PLA*. If the seller or the purchaser's post-transaction Liability Management Ratio ("LMR") is lower than 1.0, the AER will either deny the transfer application or require additional security ("LMR Deposit"). As of September 2015, Redwater's LMR was at 0.93. Collectively the "Abandonment Orders" and the "LMR Deposit" make up the End-of-Life Obligations.

OGCA, *supra* para 5 at s 24.
PLA, *supra* para 5 at s 18.
Redwater, *supra* para 5 at paras 25-31.

13 The AER will not permit the transfer of the producing wells unless GTL takes one of the following actions: (1) completes the abandonment and reclamation work, (2) sells the non-producing wells in a single package with the producing wells, or (3) posts security to cover the cost of the deemed liabilities. Any one of these three options would result in the cost of satisfying the environmental liabilities exceeding the value of the oil and gas assets by $553,000. This is because the estimated cost of the anticipated abandonment and reclamation work of all producing and non-producing wells is $7.5 million, while the deemed value of these wells is only $6.947 million. In contrast, if GTL is allowed to sell only the producing wells, it would be able

to recover $4.152 million for its creditors, even after taking into account the $2.248 million anticipated environmental liabilities of these producing wells.

Orphan Well, *supra* para 1 at paras 16, 18.

(ii) The Provincial Regime Exposes Licensees to Personal Liability

14 The Provincial Regime imposes many obligations on licensees, including the duty to abandon oil wells and pipelines, pay remediation costs, and comply with any order of the AER. A licensee who contravenes the Provincial Regime or fails to comply with an AER order is liable for a fine of up to $50,000. The Provincial Regime defines "licensee" to include trustees.

OGCA, *supra* para 5 at ss 1(1)(cc), 27(1), 29, 106(1), 110.
PLA, *supra* para 5 at ss 1(1)(n), 24-25, 52(2), 54.
Redwater, *supra* para 5 at para 70.
Orphan Well, *supra* para 1 at 89.

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

15 In response to the Appellants' statement of questions in issue, the Respondent submits:

(a) The End-of-Life Obligations are claims provable in bankruptcy.

(b) The End-of-Life Obligations created by the Provincial Regime both operationally conflict with and frustrate the purposes of the *BIA*.

PART III -- ARGUMENT

A. The End-Of-Life Obligations are Provable Claims in Bankruptcy Under the *AbitibiBowater* Test

(i) The *AbitibiBowater* Test Should be Used to Evaluate Whether the End-Of-Life Obligations are Provable Claims in Bankruptcy

16 The majority of the ABCA correctly applied the test established by the SCC in *AbitibiBowater*. In *AbitibiBowater*, the SCC created a new analytical framework to determine

what constitutes a provable claim in bankruptcy. The Court held that remediation orders from a Newfoundland and Labrador environmental regulator constituted provable claims and were therefore subject to insolvency proceedings. The SCC confirmed in *Moloney* that the *AbitibiBowater* test applies to both major bankruptcy statutes, the *BIA* and the *Companies' Creditors Arrangement Act*.

> *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at para 55 [*Moloney*].
> *AbitibiBowater*, *supra* para 6 at para 27.

17 The majority of the ABCA correctly rejected any attempt to distinguish the End-of-Life Obligations from the type of claims considered under the *AbitibiBowater* test. The fact that these obligations could be "anticipated in advance" or are "inherent in the nature of the properties" does not make them a unique form of regulation exempt from the *AbitibiBowater* test (*Orphan Well*). In *AbitibiBowater*, although the claims could have been anticipated in advance and were inherent in the nature of the properties, the SCC nonetheless held that they were provable claims in bankruptcy. The possibility of environmental issues arising, forcing the debtor company's mill to be closed and remediated, could have been anticipated before its construction. In addition, the risk of environmental remediation for the debtor's industrial projects could be considered "inherent" in the nature and use of that property.

> *Orphan Well*, *supra* para 1 at para 64.

18 Even if one could distinguish between the End-of-Life Obligations in this case and the environmental regulations in *AbitibiBowater*, this would not render the *AbitibiBowater* test inapplicable. The key question under the *AbitibiBowater* test is not whether remediation obligations are pre-existing or inherent to the property, but instead whether these obligations can be monetized and therefore be treated as provable claims for the purposes of bankruptcy.

Therefore, differences in the type or form of an environmental order does not require a separate analysis.

Orphan Well, *supra* para 1 at para 78.

(ii) Outlining the *AbitibiBowater* Test

19 The SCC laid out a three-part test in *AbitibiBowater* to determine if a contingent liability (in this case a regulatory order) is in substance monetary and therefore a provable claim in bankruptcy. First, there must be "a debt, liability or obligation [owed] to a *creditor.*" Second, "the debt, liability or obligation… [must have been] incurred *before the debtor becomes bankrupt*." Finally, it must be "possible to attach a monetary value to the debt, liability or obligation."

AbitibiBowater, *supra* para 6 at para 26.

(iii) *Northern Badger* is no Longer Determinative as to Whether Environmental Claims are Provable

20 The Appellants are incorrect to rely on the ABCA's decision in *Northern Badger* as the relevant precedent to determine whether the claims are provable in bankruptcy. Subsequent statutory and jurisprudential developments render the holding in *Northern Badger* inapplicable to this case.

Factum of the Appellants (Team No 2019-11) at para 54 [Appellants' Factum].

21 In *AbitibiBowater,* the SCC rejected the holding from *Northern Badger* that environmental orders should not be interpreted as claims provable in bankruptcy when the relevant regulatory body has not yet monetized its order. The SCC contextualized *Northern Badger* as occurring before significant changes in insolvency legislation took place. These legislative reforms included the addition of s.14.06 of the *BIA*, which specifically addresses the

priority of regulatory environmental orders in the context of provable claims in bankruptcy. The SCC even suggested that these legislative reforms occurred "seemingly in response to" the decision in *Northern Badger*.

AbitibiBowater, *supra* para 6 at paras 44, 47.

22 As a result of these legislative changes, it is no longer the case that environmental regulatory orders should automatically be classified as "non-monetary" and therefore not provable claims in bankruptcy. Instead, the SCC held that such orders are "subject to scrutiny in insolvency proceedings" using the *AbitibiBowater* test. This ensures that the evaluation of a potential provable claim examines the specific details of the claim rather than its classification, putting "substance ahead of form." The *AbitibiBowater* test determines if orders are in substance monetary and therefore constitute a claim provable in bankruptcy even if they are not yet quantified.

AbitibiBowater, *supra* para 6 at para 48.

(iv) The AER Constitutes a Creditor under the First Stage of the *AbitibiBowater* Test

23 In order to satisfy the first stage of the *AbitibiBowater* test there must be a "debt, liability or obligation [owed] to a creditor." The Appellants initially conceded at the court of first instance that this part of the test was satisfied (*Redwater*). However, the Appellants have now reversed their position, arguing that Madam Justice Martin of the ABCA was correct in her dissenting opinion that the AER was acting as a regulator and not a creditor when it issued its End-of-Life Obligations. Justice Martin's view that the AER did not constitute a creditor was rooted in her analysis of the substance of the order. Justin Martin characterized an order that creates an "obligation to abandon a well and reclaim the well site" as a claim not commonly associated with the traditional conception of a creditor (*Orphan Well*).

AbitibiBowater, *supra* para 6 at para 26.

Redwater, *supra* para 5 at para 164.
Appellants' Factum, *supra* para 20 at paras 59-60.
Orphan Well, *supra* para 1 at para 185.

24 Justice Martin erred in her analysis of the first step of the *AbitibiBowater* test. In *AbitibiBowater,* the SCC clearly stated that determining whether a regulatory obligation can be translated into monetary terms is not relevant at the first stage of the test. Rather, this determination is made at the third step. The only relevant inquiry at the first stage is "whether the regulatory body has exercised its enforcement power against a debtor." Under a proper application of the first stage, a regulatory agency exercising enforcement power is acting equivalently to any other creditor who could enforce its rights by obtaining a judgment and/or an enforcement order.

AbitibiBowater, *supra* para 6 at para 27.

25 Enforcement powers are distinguishable from other non-enforcement regulatory actions which do not establish the regulator as a creditor imposing a liability or obligation on a debtor. In both *Terrace Bay* and *Sino-Forest Corps*, Justice Morawetz of the Ontario Superior Court held that investigatory actions which resulted in compliance orders and potentially eventual financial consequences did not constitute the use of enforcement powers by regulatory agencies. This is because during an investigation there has not yet been a final determination upon which the agency can seek enforcement. Thus, these agencies were not considered creditors and their orders were not provable claims in bankruptcy.

Terrace Bay Pulp Inc (Re), 2013 ONSC 5111 at paras 36-38 [*Terrace Bay*].
The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corporation (Re), 2016 ONSC 1156 at para 58 [*Sino-Forest Corps*].

26 The first stage of the *AbitibiBowater* test is not designed to be a significant hurdle. Even Justice Martin's dissent acknowledged that the SCC in *AbitibiBowater* "cast the creditor net widely." The standard is easily met on the facts of this case. The AER issued Abandonment

Orders and required LMR Deposits from Redwater. In contrast to the facts in *Terrace Bay* and *Sino-Forest Corps*, the AER is far past the point of investigation and has issued final orders. These orders are a mechanism of enforcing provincial statutory requirements under the *OGCA* and *PLA*. In utilizing these orders, the AER exercised its enforcement powers as a regulatory body and therefore qualifies as a creditor.

> *Orphan Well*, *supra* para 1 at para 186.
> *AbitibiBowater*, *supra* para 6 at para 27.

27 The Appellants suggest that the first stage of the *AbitibiBowater* test would only be satisfied if the Orphan Well Association ("OWA") itself is a creditor. They argue that since the OWA has no standing to make a claim for compensation in Redwater's bankruptcy, it cannot constitute a creditor. However, s.29 of the *OGCA* explicitly makes the licensee liable for *any* abandonment costs regardless of who conducts the remediation; whether the AER or a person or organization authorized by the AER conducts the remediation is irrelevant. Either way, these remediation and abandonment costs under s.30(5) of the *OGCA* constitute a debt payable to the AER. Therefore, the AER could file a claim for the OWA's costs of remediation including on a contingent basis. This means that even if the OWA conducts the remediation, the AER will serve as creditor of Redwater for the debt, collecting on the OWA's behalf.

> Appellants' Factum, *supra* para 20 at para 62.
> *OGCA*, *supra* para 5 at ss 29, 30(5).

(v) <u>Redwater's Debt, Liability, or Obligation was Incurred before the Bankruptcy</u>

28 The Appellants do not dispute that the second stage of the *AbitibiBowater* test is satisfied. To satisfy this stage, the debt, liability, or obligation must be incurred "before the debtor became bankrupt." In this case, the renounced wells were shut in prior to GTL's appointment. The environmental issues that led to the End-of-Life Obligations also pre-existed the appointment.

> Appellants' Factum, *supra* para 20 at para 58, 67.

AbitibiBowater, *supra* para 6 at para 26.
Orphan Well, *supra* para 1 at para 60.
Redwater, *supra* para 5 at para 164.

(vi) The Debt, Liability, or Obligation either Constitutes a Monetary Debt or it is Possible to Attach a Monetary Value to it

29 The third and final stage of the *AbitibiBowater* test asks whether the debt, liability, or obligation constitutes a monetary debt or whether it is "possible to attach a monetary value to the debt, liability or obligation." The majority of the ABCA correctly recognized that the LMR Deposit is in substance monetary. The fact that the AER is demanding a specific amount of "cash on the table" diverted from the estate to ensure remediation is completed constitutes a much higher level of certainty that the order is monetary than the orders in *AbitibiBowater*, which did not have a specific monetary value attached to them.

Orphan Wells, *supra* para 1 at para 80.
AbitibiBowater, *supra* para 6 at para 26.

30 In addition, it is possible to attach a monetary value to the Abandonment Orders. In *AbitibiBowater*, the SCC held that the determination of whether a monetary value can be assigned to a contingent claim, such as the Abandonment Orders in this case, depends on whether the potential event creating the claim is "too remote and speculative" to be considered monetary. In the context of an environmental order, there must be "sufficient certainty" that the regulatory body (in this case the AER or the OWA acting as a designated authority) will ultimately perform the remediation work and assert a monetary claim on the bankrupt to be reimbursed. If this "sufficient certainty" exists, a court will conclude that the order is in fact monetary and therefore constitutes a provable claim subject to the relevant bankruptcy regime.

AbitibiBowater, *supra* para 6 at para 36.

31 The presence of the following factors indicates that there is "sufficient certainty" that the regulatory body will perform the remediation work and assert a monetary claim in the bankruptcy (*AbitibiBowater*):

i. A lack of ongoing activities on the land,

ii. The debtor no longer controls the property,

iii. The debtor does not have the means to comply with the order, and

iv. Requiring the debtor to comply with the order would have a negative effect on the insolvency process.

AbitibiBowater, *supra* para 6 at para 38.

32 In this case, the application of all four of these factors strongly indicates that there is "sufficient certainty" that the AER or OWA will undertake the remediation and subsequently demand compensation from the estate. GTL, on behalf of Redwater, renounced the assets subject to the Abandonment Orders under s.14.06(4) of the *BIA*. The renounced licenses applied to shut-in wells, which are not currently producing and therefore have no ongoing activities. Therefore, there are no "ongoing activities on the land."

33 Similarly, GTL, acting in the place of Redwater, never took possession of these disclaimed assets and therefore does not have control of them. The fact that GTL (and therefore Redwater) no longer controls the property supports the inference that the government entity will be conducting the remediation and seeking compensation.

Orphan Well, *supra* para 1 at para 6.

34 There is no potential for Redwater to become solvent because Redwater is being liquidated under the *BIA* and is not taking part in a restructuring process. As a result of its liquidation, Redwater's estate does not have, and almost certainly will never have, "the means to comply with the order." This further contributes to the "sufficient certainty" that the government,

which has significantly more resources than the insolvent Redwater, will actually be conducting the remediation.

Orphan Well, *supra* para 1 at paras 7, 60.

35 Finally, requiring the debtor to conduct the remediation itself would do more than merely negatively affect the insolvency process; it would entirely disrupt the insolvency process. This requirement would delay the ability of the trustee to facilitate the sale of the valuable assets and complete an orderly liquidation process. In addition, requiring GTL to use Redwater's limited assets to conduct remediation before the completion of the bankruptcy process would result in an inequitable treatment of its creditors. Currently, if GTL is allowed to sell Redwater's approximately 20 producing wells, there will be estimated $4.152 million to distribute among its creditors, including the AER. If GTL is forced to carry out the End-of-Life Obligations of all 127 wells before any sale is completed, there will be a deficiency in Redwater's estate of over $553,000. Creating such a deficiency would prevent the distribution of any assets to Redwater's other creditors. These negative effects to the bankruptcy process are the type of consequences identified in *AbitibiBowater* that support the finding that there is sufficient certainty that the regulator will be conducting the remediation and seeking subsequent compensation.

Orphan Well, supra para 1 at para 16-18.

36 Overall, applying these factors to this case demonstrates the "sufficient certainty" that neither Redwater nor GTL will be the parties conducting the remediation of the renounced properties subject to the Abandonment Orders. Instead, all four of the *AbitibiBowater* factors indicate that the AER or OWA will be conducting the remediation and that the cost of carrying out the Abandonment Orders will form the basis of a compensation claim. Therefore, both the LMR Deposit and the Abandonment Orders are monetary in substance. As a result, the third and final stage of the *AbitibiBowater* test is satisfied.

37 Since all three stages of the *AbitibiBowater* test are satisfied, the AER's claims are provable in bankruptcy.

(vii) The End-Of-Life Obligations do not have Priority under the *BIA* Distribution Regime

38 Environmental claims must be considered within the distribution scheme of s.136 of the *BIA*, which sets out the priority of all provable claims against the bankrupt. The SCC in *AbitibiBowater* made clear that "environmental claims do not have a higher priority" than other claims but are instead subject to the distribution scheme of the relevant insolvency statute.

> *AbitibiBowater*, *supra* para 6 at para 19.
> *BIA*, *supra* para 1 at s 136.

39 Under s.136(1) of the *BIA*, secured creditors have the highest priority for distribution as all other payments are "subject to the rights of secured creditors." Section 14.06(7) of the *BIA* establishes a limited secured claim for environmental orders. Specifically, under s.14.06(7) a governmental entity that remediates an "environmental condition or environmental damage" affecting a specific property is granted a secured interest on that property to the extent of its costs. In addition, the government entity can also be granted a secured charge, to the extent of its costs, on specific contiguous property that is related to the activity that caused the environmental condition or damage requiring remediation. This secured charge under s.14.06(7) "ranks above any other claim…against the property." This charge is consistent with the "restitutionary principle" that any sale of remediated land should first compensate the government body whose remediation made the sale possible.

> *Orphan Well*, *supra* para 1 at paras 42, 55, 155.
> *BIA*, *supra* para 1 at ss 14.06(7), 136(1).

40 However, s.14.06(7) does not create a super-priority on the bankrupt's entire estate for all existing or contingent environmental liabilities. Section 14.06(7) creates a limited super-priority where the government has already remediated the contaminated property and only applies to that

specific piece of property (or the contiguous property that is the cause of the environmental damage) rather than the entire bankrupt's estate. Therefore, the AER could only assert a secured claim against the abandoned property itself and not against the entire estate for any remaining costs of remediation.

BIA, *supra* para 1 at s 14.06(7).

41 Following secured creditors, administrative costs are the next applicable category to be distributed under s.136(1)(b) of the *BIA*. However, s.14.06(6) of the *BIA* explicitly states that if a trustee has abandoned or renounced their interest in the property, any claim for remediation costs for that property "shall not rank as costs of administration." Therefore, the AER and OWA are not entitled to claim remediation expenses as costs of administration.

BIA, supra para 1 at ss 14.06(6), 136(1)(b).

42 After the administrative costs of the bankrupt's estate are fully paid, there are a variety of enumerated "preferred creditors" under s.136 whose claims are fully paid out prior to any other claims, including certain unpaid employee wages, pension costs, and unpaid municipal taxes. Parliament did not include environmental orders or remediation claims as one of these types of "preferred creditors." The ABCA held in *Alternative Fuel Systems* that only payments of "enumerated claims" are entitled to be given preferred creditor status under s.136 of the *BIA*. The SCC went even further in *Century Services Inc*., holding that Crown claims are only given priority status when Parliament has "legislated so explicitly and elaborately." Since environmental claims cannot be reasonably interpreted to fit under any of the enumerated "preferred creditors" of s.136, the End-of-Life Obligations are not entitled to preferred status.

BIA, supra para 1 at s 136.
Alternative Fuel Systems Inc v Remington Development Corp, 2004 ABCA 31 at para 57 [*Alternative Fuel Systems*].
Century Services Inc. v Canada (Attorney General), 2010 SCC 60 at para 45 [*Century Services Inc*].

43 Any remediation costs that are not recovered under the s.14.06(7) limited super-priority exception rank as ordinary unsecured claims. The claims of unsecured creditors are paid out after all of the higher priority claims discussed above. If the estate has insufficient funds remaining to fully cover the claims of all the unsecured creditors, the unsecured creditors are paid as a class on a proportionate basis. Therefore, the remaining remediation costs not covered by s.14.06(7) are treated equally with all other unsecured claims. As the SCC observed in *AbitibiBowater*, "[if] Parliament had intended that the debtor always satisfy all remediation costs, it would have granted the Crown a priority with respect to the totality of the debtor's asset." Parliament chose not to give this super-priority.

BIA, supra para 1 at s 14.06(7).
AbitibiBowater, *supra* para 6 at para 33.

44 Parliament's decision to create a limited super-priority for environmental claims is consistent with important public policy considerations. If remediation costs were given an absolute super-priority status, in many cases, including this one, little to no funds would remain to be recovered by any other creditors. This would mean that in cases involving estates with significant non-remediated environmental obligations, secured creditors would have no incentive to seek the appointment of a trustee. Similarly, the lack of remaining funds following environmental remediation would eliminate any incentive for trustees to act in bankruptcies in resource sectors because their fees, which fall under costs of administration, would rank below this super-priority. Consequently, bankruptcy would not be facilitated in an orderly manner.

Orphan Well, *supra* para 1 at paras 19-20.

45 In addition, an absolute super-priority for environmental remediation would mean that many non-sophisticated unsecured creditors such as small suppliers, employees, or small lenders would be highly unlikely to receive any compensation in bankruptcy for their claims.

46 Finally, if sophisticated lenders know that they are unlikely to receive significant repayment upon bankruptcy because of an environmental super-priority, they will be strongly disincentivized to lend to resource companies. The result would be that the price of financing, even with security attached, would likely become prohibitively expensive and business development would correspondingly stall.

> *BIA, supra* para 1 at s 136.
> *Orphan Well*, *supra* para 1 at paras 19-20.

47 Parliament chose not to grant an absolute super-priority on environmental remediation claims due to the negative consequences associated with such a super-priority. Instead, Parliament implemented the current system, which balances the restitutionary obligation for remediated land with the need to not privilege environmental claimants disproportionately in comparison to all other creditors.

B. The Provincial Regime Engages the Doctrine of Federal Paramountcy

48 The doctrine of federal paramountcy states that where validly enacted federal and provincial law conflict, the provincial legislation is rendered inoperative to the extent of the conflict. The paramountcy doctrine has two branches: (1) operational conflict and (2) frustration of federal purpose (*Moloney*). If either branch is satisfied, the doctrine of federal paramountcy is engaged. Operational conflict occurs when "compliance with one law involves breach of the other" (*Smith*, *Multiple Access*). Frustration of federal purpose occurs where the provincial law defeats the purpose of the federal law (*Hall*, *Moloney*). Both branches are satisfied in this case.

> *Smith v the Queen,* [1960] SCR 776 at 800, 25 DLR (2d) [*Smith*].
> *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at 191, 138 DLR (3d) [*Multiple Access*].
> *Bank of Montreal v Hall*, [1990] 1 SCR 121 at 155, 65 DLR (4th) 361 [*Hall*].
> *Moloney*, *supra* para 16 at para 18.

49 The Appellants argue that the principle of cooperative federalism should be invoked to read the provincial and federal legislation harmoniously such that doctrine of federal

paramountcy is not engaged. The principle of cooperative federalism requires that the courts exercise restraint and favour harmonious interpretations of federal and provincial legislation, where such interpretations are reasonably open to the court, over interpretations that result in conflict (*Lemare Lake*). However, cooperative federalism cannot be used to interpret federal legislation in a manner that is "repugnant to the text and context of the federal legislation" (*Mangat*).

> Appellants' Factum, *supra* para 20 at paras 33-34.
> *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd,* 2015 SCC 53 at para 21 [*Lemare Lake*].
> *Law Society of British Columbia v Mangat,* [2001] 3 SCR 113 at para 66, 205 DLR (4th) 507 [*Mangat*].

(i) Section 14.06 of the *BIA* can be Applied to Renounce the End-of-Life Obligations

50 The Appellants argue that there is no operational conflict because s.14.06 cannot be applied to renounce the End-of-Life Obligations. They premise this argument on two grounds: (1) that s.14.06 is preconditioned on personal liability and (2) that there is no real property interest owned by the debtor that is associated with the environmental condition. The Appellants are incorrect on both grounds and their argument should be dismissed.

> Appellants' Factum, *supra* para 20 at paras 3, 41, 78.

(a) *Section 14.06(4) of the BIA Provides a Broader Right of Renunciation which is Not Restricted to Personal Liability*

51 The Appellants narrowly characterize s.14.06 as solely concerning the protection of trustees from personal liability and state that s.14.06 should not be interpreted as conferring a broad right to disclaim environmental obligations beyond limiting personal liability. The lower courts correctly rejected this characterization.

> Appellants' Factum, *supra* para 20 at para 76.

52 A holistic reading of s.14.06 indicates a broad right of renunciation that does not depend on the existence of personal liability. The Court's interpretation of s.14.06(4) should be guided by Driedger's modern principle of statutory interpretation which requires the words of the provision "to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

> *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193, quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p 87.

53 An interpretation of s.14.06(4) which is dependent on personal liability is incoherent when read in context with the other subsections of s.14.06. If s.14.06(4) was restricted to a disclaimer of the trustee's personal liability it would be redundant given the existence of s.14.06(2). Section 14.06(2) already provides for the protection of trustees from personal liability for environmental damage, absent gross negligence or wilful misconduct. If s.14.06(4) is interpreted as solely protecting trustees from personal liability, it would provide no additional protection beyond that offered by s.14.06(2). Instead, it would only offer a more complicated means to the same end. Parliament surely cannot have intended to enact a redundant provision. As held by the SCC in *JTI-Macdonald*, "the rule that the legislator does not speak in vain suggests that [a redundant] interpretation should be rejected."

> *BIA, supra* para 1 at ss 14.06(2), 14.06(4).
> *Canada (Attorney General) v JTI-Macdonald Corp.*, 2007 SCC 30 at paras 87, 110. [*JTI-Macdonald*].

54 In addition, if trustees can only renounce property with environmental obligations when they face personal liability, then s.14.06(4)(c) cannot be an operative provision. Section 14.06(4)(c) allows trustees to renounce such property before remediation orders have been issued when personal liability is not implicated. If trustees can only renounce when they face personal liability, then they are unable to exercise their rights under s.14.06(4)(c).

55 There is a presumption that the provisions of a statute "fit together logically to form a rational, internally consistent framework… [and each contribute] something toward accomplishing the intended goal" (*R v LTH*). Thus, an interpretation of s.14.06 that only acknowledges renunciation rights where trustees are at risk of personal liability is inconsistent with s.14.06(4)(c) and cannot be supported.

BIA, *supra* para 1 at s 14.06(4)(c).
R v LTH, 2008 SCC 49 at para 47.

(b) *The End-of-Life Obligations are Attached to a Real Property Interest*

56 The Appellants argue that the environmental damage is not connected to real property owned by the debtor and therefore the environmental obligations cannot be disclaimed under s.14.06(4). This argument is incorrect because it is premised on an inaccurate definition of "any real property interest" within s.14.06. The Appellants restrict "any real property interest" to only mean fee simple ownership. This definition wrongly excludes *profits à prendre*.

Appellants' Factum, *supra* para 20 at paras 41-45.

57 A *profit à prendre*, a property interest which "enables the holder to enter onto the land of another to extract some part of the natural produce" (*Saulnier*), necessarily constitutes "any real property interest" within s.14.06 for two reasons. First, if Parliament had intended to exclude *profits à prendre* from the scope of "any real property interest," it would have expressly done so. Instead, Parliament enacted s.14.06(4) using the expansive language "any interest in any real property." Second, if *profits à prendre* were excluded from the definition of "real property interests," the resource sector, including the oil and gas industry, would be outside the purview of s.14.06. Many resource industries with large environmental liabilities, such as mining and forestry, operate using *profit à prendre* rights. Excluding these rights from the definition of "real property interests" would bar these industries from the use of a provision that was specifically

enacted to deal with environmental obligations in the bankruptcy context. This result cannot be Parliament's intention because the "golden rule" of statutory interpretation presumes "that the legislation does not intended to produce absurd consequences" (*Driedger*).

> *Saulnier v Royal Bank of Canada*, 2008 SCC 53 at para 28 [*Saulnier*].
> *BIA, supra* para 1 at s 14.06(4).
> Driedger on the Construction of Statutes, Second Edition, by Ruth Sullivan (Butterworths, Toronto, 2002) at p 236 [*Driedger*]

58 The Appellants wrongly contend that GTL cannot disclaim the environmental obligations because Redwater does not own the land where the wells operate. They fail to recognize that the environmental obligations are also attached to the physical wells which necessarily connect to Redwater's oil and gas leases, a form of *profits à prendre* (*Dynex*). Thus, s.14.06(4) can be applied to renounce oil and gas leases, and with them their attendant environmental obligations.

> Appellants' Factum*, supra* para 20 at paras 41-45.
> *Orphan Well*, *supra* para 1 at para 34.
> *Bank of Montreal v Dynex Petroleum Ltd,* 2002 SCC 7 at para 9 [*Dynex*].

(ii) <u>The Provincial Regime Operationally Conflicts with s.14.06 of the *BIA*</u>

59 The definition of licensee under the Provincial Regime, by including trustees as licensees, makes it impossible for GTL to comply with both the Provincial Regime and the *BIA*. Compliance with both regimes, or "dual compliance," is impossible for two reasons. First, the Provincial Regime conflicts with the trustee's right to renounce property under s.14.06. Second, the Provincial Regime exposes the trustee to personal liability.

> *OGCA*, *supra* para 5 at s 1(1)(cc).
> *PLA*, *supra* para 5 at s 1(1)(n).

(a) *The Provincial Regime Operationally Conflicts with s.14.06(4) of the BIA by Not Recognizing the Trustee's Renunciation Power*

60 The definition of licensee under the *OGCA* and *PLA* conflicts with the trustee's right to renounce property under the *BIA.* Section 14.06(4) of the *BIA* provides trustees with the right to

renounce assets. However, the right to renunciation is not recognized under s.29 of the *OGCA*, s.25 of the *PLA*, or anywhere else in these acts. If the Provincial Regime were to remain operative, a trustee would still be liable for the remediation costs of the disclaimed property despite renunciation under the *BIA*. In *Moloney* and *407 ETR*, the SCC held that there was an operational conflict when the *BIA* cleared the debtors of their obligations but provincial legislation enforced those very same obligations through license restrictions. Similarly, in this case, operational conflict results because the *BIA* specifically seeks to release debtors from environmental remediation obligations while the Provincial Regime reinstates this liability.

OGCA, supra para 5, s 29.
PLA, supra para 5, s 25.
Moloney, supra para 16 at para 63.
407 ETR Concession Co v Canada, 2015 SCC 52 at para 24 [*407 ETR*].

(b) *The Provincial Regime Operationally Conflicts with the Protection of Trustees from Personal Liability Under s.14.06 of the BIA*

61 The definition of licensee in the Provincial Regime further conflicts with s.14.06 of the *BIA* by exposing trustees to personal liability. Section 14.06 seeks to protect trustees from personal liability by providing that a trustee is not personally liable for environmental obligations attached to assets upon renunciation of those assets. However, under the Provincial Regime, a trustee may be held personally liable for these obligations. This personal liability may occur in two ways. First, contravening the Provincial Regime could result in the trustee being fined under s.110 of the *OGCA* and s.54 of the *PLA*. Second, the Provincial Regime does not explicitly limit the licensee's liability to the value of the estate's property and assets. Consequently, a trustee, as a licensee, may be personally liable for any obligations in excess of the value of the estate's assets.

OGCA, *supra* para 5 at s 110.
PLA, *supra* para 5 at s 54.

(iii) The Provincial Regime Frustrates the Purposes of the *BIA*

(a) *The Provincial Regime Frustrates the BIA's Objective of Limiting Trustee Liability for Remediation Costs*

62 The Provincial Regime frustrates the purpose of s.14.06 by not recognizing the renunciation of assets with environmental liabilities. Section 14.06 limits the liability of trustees so they will accept mandates, notwithstanding environmental obligations associated with the estates of bankrupts. If trustees' renunciation of assets is not respected by provincial legislation, they will remain liable for the environmental obligations of disclaimed properties. This will make acting as a trustee unprofitable in certain situations, creating a disincentive to assume this role. GTL will resign as trustee if this Court holds that GTL must comply with the environmental obligations of the renounced properties.

Redwater, *supra* para 5 at para 128.

(b) *The Provincial Regime Frustrates the BIA's Objective of an Equitable Distribution of Assets among Creditors*

63 The equitable distribution of assets is one of the core purposes of the *BIA* (*Moloney*). Equitable distribution of assets is realized through the single proceeding model, which requires all creditors to assert their provable claims under one collective proceeding. Creditors cannot enforce their claims individually outside of this model. Claims are paid out according to their assigned priority under the *BIA*. In bringing together creditors under one proceeding with a defined priority scheme, the system avoids the inefficiencies and chaos of a self-help model in which creditors assert claims individually in order to maximize global recovery for all creditors.

Moloney, supra para 16 at paras 32-35.

64 The *BIA* reflects Parliament's careful consideration and balancing of competing policy interests. Because bankruptcy occurs when a company's liabilities exceed their assets, not all creditors can expect full repayment. Parliament chose to prioritize certain creditors and claims in its distribution scheme to ensure the fair distribution of assets. This distribution scheme should be respected. Provincial legislation that has the effect of reordering the priority of claims under the *BIA* will be declared inapplicable in the context of bankruptcy proceedings (*Husky Oil*).

Husky Oil Ltd v MNR, [1995] 3 SCR 453 at para 36, 128 DLR (4th) 1 [*Husky Oil*].

65 As demonstrated by the *AbitibiBowater* analysis above, the End-of-Life Obligations are claims provable in bankruptcy. These obligations should be treated as unsecured claims and paid in accordance with ss.141 and 136 of the *BIA*. In this priority of distribution, the claims would be paid on a proportionate basis with other unsecured creditors, only after allocating the estate's assets to secured creditors, administrative costs, and various preferred creditors.

BIA, *supra* para 1 at ss 136, 141.

66 By requiring compliance with the End-of-Life Obligations for renounced assets, these claims are removed from the single bankruptcy proceeding model and given super-priority over the claims of other creditors, disrupting the distribution scheme set out in the *BIA*. If Parliament intended to give priority to these types of environmental claims it would have done so explicitly within the *BIA*. However, the *BIA* does not create such an absolute super-priority. The Provincial Regime effectively creates a super-priority for environmental remediation claims by elevating these unsecured claims to ones that are paid out before all other claims. In doing so, the Provincial Regime shifts the burden of environmental obligations onto the bankrupt's other creditors. Funds that should have be paid to these creditors in accordance with the *BIA's* priority scheme are instead subverted to pay for the End-of-Life Obligations. By removing

environmental claims from the single proceeding model, the Provincial Regime frustrates a core purpose of the *BIA* and therefore engages the doctrine of paramountcy.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

67 The Respondent does not seek costs and asks that costs not be ordered against it. This case is of national importance and furthers the development of bankruptcy and environmental law. Asking either party to bear the costs of this development, beyond what they have already expended, would be unfair.

PART V -- ORDER SOUGHT

68 The Respondent respectfully requests the Court affirm the judgements of the ABQB and ABCA, such that s.(1)(1)(cc) of the *OGCA*, s.1(1)(n) of the *PLA* are declared inoperative to the extent of their conflict with the *BIA*.

> *Orphan Well*, *supra* para 1 at para 106.
> *Redwater*, *supra* para 5 at para 183.

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

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PART VI -- TABLE OF AUTHORITIES

JURISPRUDENCE	**Paragraph No.**
407 ETR Concession Co v Canada, 2015 SCC 52.	60
Alberta (Attorney General) v Moloney, 2015 SCC 51.	16, 48, 60, 63
Alternative Fuel Systems Inc v Remington Development Corp, 2004 ABCA 31.	42
Bank of Montreal v Dynex Petroleum Ltd, 2002 SCC 7.	58
Bank of Montreal v Hall, [1990] 1 SCR 121, 65 DLR (4th) 361.	48
Canada (Attorney General) v JTI-Macdonald Corp., 2007 SCC 30.	53
Century Services Inc. v. Canada (Attorney General), 2010 SCC 60.	42
Husky Oil Ltd v MNR, [1995] 3 SCR 453, 128 DLR (4th) 1.	64
Law Society of British Columbia v Mangat, [2001] 3 SCR 113, 205 DLR (4th) 507.	49
Multiple Access Ltd v McCutcheon, [1982] 2 SCR 161, 138 DLR (3d).	48
Newfoundland and Labrador v AbitibiBowater Inc, 2012 SCC 67.	6, 16, 19, 21, 22, 23, 24, 26, 28, 29, 30, 31, 38, 43
Orphan Well Association v Grant Thornton Limited, 2017 ABCA 124.	1, 5, 13, 14, 17, 18, 23, 26, 28, 29, 33, 34, 35, 39, 44, 46, 58, 68
Redwater Energy Corporation (Re), 2016 ABQB 278.	5, 11, 12, 14, 23, 28, 62, 68

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 SCR 27, 154 DLR (4th) 193.	52
R v LTH, 2008 SCC 49.	55
Saskatchewan (Attorney General) v Lemare Lake Logging Ltd, 2015 SCC 53.	49
Saulnier v Royal Bank of Canada, 2008 SCC 53.	57
Smith v the Queen, [1960] SCR 776, 25 DLR (2d).	48
Terrace Bay Pulp Inc (Re), 2013 ONSC 5111.	25
The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corporation (Re), 2016 ONSC 1156.	25

LEGISLATION **Paragraph No.**

SECONDARY MATERIALS **Page No.**

OTHER SOURCES **Paragraph No.**

PART VII -- LEGISLATION AT ISSUE

***Bankruptcy and Insolvency Act*, R.S.C. 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

14.06(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

14.06(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

14.06(1.3) A liability referred to in subsection (1.2) is not to rank as costs of administration.

Liability of other successor employers

14.06(1.4) Subsection (1.2) does not affect the liability of a successor employer other than the trustee.

Liability in respect of environmental matters

14.06(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

14.06(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

14.06(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

14.06(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

14.06(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

14.06(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

14.06(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.

Priority of claims

136 (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

(a) in the case of a deceased bankrupt, the reasonable funeral and testamentary expenses incurred by the legal representative or, in the Province of Quebec, the successors or heirs of the deceased bankrupt;

(b) the costs of administration, in the following order,

(i) the expenses and fees of any person acting under a direction made under paragraph 14.03(1)(a),

(ii) the expenses and fees of the trustee, and

(iii) legal costs;

(c) the levy payable under section 147;

(d) the amount of any wages, salaries, commissions, compensation or disbursements referred to in sections 81.3 and 81.4 that was not paid;

(d.01) the amount equal to the difference a secured creditor would have received but for the operation of sections 81.3 and 81.4 and the amount actually received by the secured creditor;

(d.02) the amount equal to the difference a secured creditor would have received but for the operation of sections 81.5 and 81.6 and the amount actually received by the secured creditor;

(d.1) claims in respect of debts or liabilities referred to in paragraph 178(1)(b) or (c), if provable by virtue of subsection 121(4), for periodic amounts accrued in the year before the date of the bankruptcy that are payable, plus any lump sum amount that is payable;

(e) municipal taxes assessed or levied against the bankrupt, within the two years immediately preceding the bankruptcy, that do not constitute a secured claim against the real property or immovables of the bankrupt, but not exceeding the value of the interest or, in the Province of Quebec, the value of the right of the bankrupt in the property in respect of which the taxes were imposed as declared by the trustee;
(f) the lessor for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled to accelerated rent under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;
(g) the fees and costs referred to in subsection 70(2) but only to the extent of the realization from the property exigible thereunder;
(h) in the case of a bankrupt who became bankrupt before the prescribed date, all indebtedness of the bankrupt under any Act respecting workers' compensation, under any Act respecting unemployment insurance or under any provision of the Income Tax Act creating an obligation to pay to Her Majesty amounts that have been deducted or withheld, rateably;
(i) claims resulting from injuries to employees of the bankrupt in respect of which the provisions of any Act respecting workers' compensation do not apply, but only to the extent of moneys received from persons guaranteeing the bankrupt against damages resulting from those injuries; and
(j) in the case of a bankrupt who became bankrupt before the prescribed date, claims of the Crown not mentioned in paragraphs (a) to (i), in right of Canada or any province, rateably notwithstanding any statutory preference to the contrary.

Payment as funds available

136(2) Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, payment in accordance with subsection (1) shall be made as soon as funds are available for the purpose.

Balance of claim

136(3) A creditor whose rights are restricted by this section is entitled to rank as an unsecured creditor for any balance of claim due him.

Claims generally payable rateably

141 Subject to this Act, all claims proved in a bankruptcy shall be paid rateably.

***Oil and Gas Conservation Act*, RSA 2000, c 0-6.**

Interpretation

1(1) In this Act,

…

(cc) "licensee" means the holder of a licence according to the records of the Regulator and includes a trustee or receiver-manager of property of a licensee;

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.
(3) The transfer shall be in the form prescribed and shall have endorsed on or attached to it proof of execution satisfactory to the Regulator.
(4) The applicant shall submit the transfer to the Regulator together with the prescribed fee.
(5) The Regulator shall keep a record of every transfer to which it has given consent.
(6) The Regulator may direct that a licence be transferred to a person who agrees to accept it and who, in the opinion of the Regulator, has the right to receive it, and the direction of the Regulator has the same effect as a transfer consented to under this section.
(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.

Suspension and abandonment

27(1) Subject to subsection (2), a licensee or approval holder shall suspend or abandon a well or facility when directed by the Regulator or required by the regulations or rules.
(2) Notwithstanding subsection (1),

(a) if the Regulator so directs, a well or facility must be suspended or abandoned by a working interest participant other than the licensee or approval holder, and
(b) with the consent of the Regulator, a well or facility may be suspended by a working interest participant other than the licensee or approval holder.

(3) The Regulator may order that a well or facility be suspended or abandoned where the Regulator considers that it is necessary to do so in order to protect the public or the environment.
(4) A suspension or abandonment must be carried out in accordance with the regulations or rules.

Continuing liability

29 Abandonment of a well or facility does not relieve the licensee, approval holder or working interest participant from responsibility for the control or further abandonment of the well or facility or from the responsibility for the costs of doing that work.

Suspension, abandonment and reclamation costs

30(1) Subject to subsection (2), the well or facility suspension costs, abandonment costs and reclamation costs must be paid by the working interest participants in accordance with their proportionate share in the well or facility.

(2) The Regulator may determine the suspension costs, abandonment costs and reclamation costs

(a) on the application of the person who conducted the suspension, abandonment or reclamation, in the case of a well or facility that was suspended, abandoned or reclaimed by a licensee, approval holder, working interest participant or agent, or

(b) on the Regulator's own motion, in the case of a well or facility suspended or abandoned by the Regulator or by a person authorized by the Regulator, and the Regulator shall allocate those costs to each working interest participant in accordance with its proportionate share in the well or facility and shall prescribe a time for payment.

(3) A working interest participant that fails to pay its share of costs as determined under subsection (2) within the period of time prescribed by the Regulator must pay, unless the Regulator directs otherwise, a penalty equal to 25% of its share of the costs.

(4) Where a well or facility is suspended, abandoned or reclaimed by a licensee, approval holder, working interest participant or agent, the costs as determined under subsection (2), together with any penalty prescribed by the Regulator under subsection (3), constitute a debt payable to the licensee, approval holder, working interest participant or agent who carried out the suspension, abandonment or reclamation.

(5) Where a well or facility is suspended or abandoned by the Regulator or by a person authorized by the Regulator, the costs as determined under subsection (2), together with any penalty prescribed by the Regulator under subsection (3), constitute a debt payable to the Regulator.

(6) A certified copy of the order of the Regulator determining the costs and penalty under this section and the allocation of those costs to each working interest participant in the well or facility may be filed in the office of the clerk of the Court of Queen's Bench and, on being filed and on payment of any fees prescribed by law, the order may be entered as a judgment of the Court and may be enforced according to the ordinary procedure for enforcement of judgments of the Court.

Actions re principals

106(1) Where a licensee, approval holder or working interest participant

(a) contravenes or fails to comply with an order of the Regulator, or

(b) has an outstanding debt to the Regulator, or to the Regulator to the account of the orphan fund, in respect of suspension, abandonment or reclamation costs, and where the Regulator considers it in the public interest to do so, the Regulator may make a declaration setting out the nature of the contravention, failure to comply or debt and naming one or more directors, officers, agents or other persons who, in the Regulator's opinion, were directly or indirectly in control of the licensee, approval holder or working interest participant at the time of the contravention, failure to comply or failure to pay.

(2) The Regulator may not make a declaration under subsection (1) unless it first gives written notice of its intention to do so to the affected directors, officers, agents or other persons and gives them at least 10 days to show cause as to why the declaration should not be made.

(3) Where the Regulator makes a declaration under subsection (1), the Regulator may, subject to any terms and conditions it considers appropriate,

(a) suspend any operations of a licensee or approval holder under this Act or a licensee under the Pipeline Act,

(b) refuse to consider an application for an identification code, licence or approval from an applicant under this Act or the Pipeline Act,

(c) refuse to consider an application to transfer a licence or approval under this Act or a licence under the Pipeline Act,

(d) require the submission of abandonment and reclamation deposits in an amount determined by the Regulator prior to granting any licence, approval or transfer to an applicant, transferor or transferee under this Act, or

(e) require the submission of abandonment and reclamation deposits in an amount determined by the Regulator for any wells or facilities of any licensee or approval holder, where the person named in the declaration is the licensee, approval holder, applicant, transferor or transferee referred to in clauses (a) to (e) or is a director, officer, agent or other person who, in the Regulator's opinion, is directly or indirectly in control of the licensee, approval holder, applicant, transferor or transferee referred to in clauses (a) to (e).

(4) This section applies in respect of a contravention, failure to comply or debt whether the contravention, failure to comply or debt arose before or after the coming into force of this section.

Penalties

110(1) A person who is guilty of an offence under this Act is Liable

(a) in the case of a corporation, to a fine of not more than $500 000, and

(b) in the case of an individual, to a fine of not more than $50 000.

(2) No person shall be convicted of an offence under this Act if that person establishes on a balance of probabilities that the person took all reasonable steps to prevent its commission.

(3) A person who is guilty of an offence under this Act is liable on conviction for each day or part of a day on which the offence occurs or continues.

***Pipeline Act*, RSA 2000, c P-15.**

Interpretation
1(1) In this Act

….

(n) "licensee" means the holder of a licence for a pipeline according to the records of the Regulator or the holder of a licence for purposes of a gas utility pipeline according to the records of the Alberta Utilities Commission and includes a trustee or receiver-manager of the property of a licensee;

Transfer of licence

18(1) A licence may not be transferred without the consent in writing of the Regulator.
(2) When the licensee of a pipeline or proposed pipeline sells or otherwise disposes of the licensee's interest in the pipeline or proposed pipeline, a proposed transfer reflecting that transaction must be filed with the Regulator.
(3) The Regulator may consent to the transfer of a licence subject to any conditions, restrictions or stipulations that the Regulator may prescribe, or the Regulator may refuse to consent to the transfer.
(4) A proposed transfer must be in a form prescribed or approved by the Regulator and must have endorsed on it or attached to it proof of execution satisfactory to the Regulator.
(5) The applicant shall submit the proposed transfer to the Regulator together with the prescribed fee.
(6) The Regulator shall keep a record of every transfer to which it has given consent.
(7) The Regulator may direct that a licence be transferred to a person who agrees to accept it and who, in the opinion of the Regulator, has the right to receive it, and the direction of the Regulator has the same effect as a transfer consented to under this section.
(8) A transfer of a licence has no effect until the Regulator has
consented to or directed the transfer under this section.

Discontinuation, abandonment by Regulator

24 If, in the opinion of the Regulator, a pipeline is not discontinued or abandoned in accordance with the direction of the Regulator or the rules, the Regulator may
(a) authorize any person to discontinue or abandon the pipeline,
or
(b) discontinue or abandon the pipeline on the Regulator's own motion.

Continuing liability

25 Abandonment of a pipeline does not relieve the licensee from the responsibility for further abandonment or other work with respect to the same pipeline or part of a pipeline that may become necessary, or from the responsibility for the costs of the further abandonment or other work.

Offences

52(2) A person who

(a) whether as a principal or otherwise, contravenes any provision of this Act or of the rules or of any order, direction or licence under this Act,

(b) either alone or in conjunction or participation with others causes any holder of a licence to contravene any of those provisions, or

(c) instructs, orders, directs or causes any officer, agent or employee of any holder of an approval or licence to contravene any of those provisions, is guilty of an offence.

Penalties

54(1) A person who is guilty of an offence under this Act is liable

(a) in the case of a corporation, to a fine of not more than $500 000, or

(b) in the case of an individual, to a fine of not more than $50 000.

(2) No person shall be convicted of an offence under this Act if that person establishes on a balance of probabilities that the person took all reasonable steps to prevent its commission.

(3) A person who is guilty of an offence under this Act is liable on conviction for each day or part of a day on which the offence occurs or continue.

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 # 2019-12

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