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

(Respondents)

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 #13

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

AND TO: **ALL** **REGISTERED** **TEAMS**

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PART I: OVERVIEW

[1] Regulatory regimes play a key role in protecting the public interest and third-party property rights while ensuring the safe and sustainable development of Canada's natural resources. However, responsible extraction is part and parcel to the sustainability of future development. Such responsible extraction fails when a company is allowed to run roughshod over land while leaving the public and its industrial counterparts to clean up their mess.

[2] The Alberta Energy Regulator (the "Regulator) has filed enforcement orders to ensure a licensee's compliance with its public duties and the law. The licensee in question, Grant Thornton Limited (the "Trustee"), would have the courts equate general law with a monetary claim in bankruptcy to avoid the pubic obligations they inherited from the bankrupt estate of Redwater Energy Corporation ("Redwater").

[3] The Trustee would have the courts use the doctrine of paramountcy as a sword to inflate the value of a bankrupt's estate. This is entirely contrary to years of jurisprudence which has applied such a powerful doctrine with restraint. The same should be done here.

[4] The Trustee would also have the courts believe that all environmental obligations should be considered "claims" in bankruptcy. This is out of line with jurisprudence and the facts of this case. Only creditors have claims in bankruptcy and the Regulator is not a creditor. They have never professed to be one, nor do they fit the definition of one under the *Abitibi* framework.

[5] The courts should not be so eager to hamstring a regulatory regime that has seen environmental obligations fulfilled and creditors benefit for almost twenty-five years. Doing so would risk open season on Canada's resources, to the detriment of the public and landowners who should benefit from them most.

PART II. STATEMENT OF FACTS

a. The Alberta Energy Regulator and its oil and gas regulatory regime

[6] The Alberta government takes a cradle-to-grave approach to energy regulations. The Regulator has a statutory mandate[1] to oversee the oil and gas industry and safeguard the public against environmental hazards generated by the industry. The Regulator has two keystones to its regulations: the licensing regime and the end-of-life obligations imposed on all licensees. A Regulator licence allows businesses to drill wells that would otherwise be illegal, but it does not provide any interest in the oil and gas underground. Instead, these interests are gained via a mineral lease. The definition of "licensee" is expansive, and includes receivers and trustees.[2] Obligations of licensees also come with the privilege of managing the licensed assets in the oil and gas industry.

[7] The regime's end-of-life obligations refer to the licensees' duties to dismantle the wells and restore the surface back to its original state at the conclusion of the business operation. These obligations are in place to minimalize the disruption to the surface conditions and to ensure public health and safety. These surface lands usually belong to the third-party farmers, the Crown or indigenous peoples. End-of-life obligations are crucial to landowners' resumption of land use following the termination of the industrial operations in question.

[8] It is particularly noteworthy that the end-of-life obligations are a pre-condition of a Regulator licence and an inherent part of Alberta's oil and gas regulatory regime. In 1991, the *Northern Badger* decision affirmed that the end-of-life environmental obligations are general

[1] *Responsible Energy Development Act*, RSA 2012, c R-17.3, s 2(1)(a).
[2] *Oil and Gas Conservation Act*, RSA 2000, c O-6, s 1(1)(*cc*)

law, not provable claims in bankruptcy.[3] In that decision, the Alberta Court of Appeal distinguished the regulator from a creditor with a monetary claim.[4]

b. The Regulator's LLR program and its LMR calculation

[9] The Regulator has adopted a Licensee Liability Rating program ("LLR") to ensure all participants in the industry are financially capable of carrying out end-of-life environmental obligations for their wells. The LLR program is in place to protect the public from bearing the burden of these obligations.

[10] The core of the LLR program is the Liability Management Ratio ("LMR"), which is a number assigned to each licence to reflect its financial capability of carrying out end-of-life obligations for their wells. The Regulator calculates this number by considering the entire financial profile of a company, including both its good and bad assets. The good assets are divided by the bad assets plus the potential costs for the end-of-life obligations. If the ratio is above 1.0, then the licensed company has the financial capability of performing the obligations and they can continue their operations. If the ratio falls below 1.0, then the Regulator provides the licensee with options to bring their ratio back to 1.0 or above.[5] The Regulator calculates the LMR monthly and at the time of licence transfers initiated by the licensees.

c. The Orphan Well Association

[11] The Orphan Well Association ("OWA") is a not-for-profit organization with delegated authority from the Regulator. The OWA is tasked with the proper shut down of orphan wells as designated by the Regulator. Orphan wells have no financially capable licensees or any other

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[3] *Panamericana de Bienes y Servicios v Northern Badger Oil and Gas Limited*, 1991 ABCA 181 at para 21 (CanLII) Laycraft CJ [*Northern Badger*].
[4] *Ibid.*
[5] *Orphan Well Association v Grant Thornton Limited*, 2017 ABCA 124 at para 13 (CanLII) [*Orphan Wells*].

entity to perform the end-of-life obligations. The OWA is funded by a levy collected within the Alberta oil and gas industry.

[12] The OWA is designed as a safety net and a last resort, but it has been burdened with a rapidly increasing number of orphan wells in recent years. During 2013-2014, the OWA had 80 orphan wells, but the number climbed to 591 during 2014-2015. By the summer of 2017, the total number of orphaned wells and sites exceeded 1,800.[6] The OWA's financial capability is being heavily stretched to cope with the influx of orphan wells.

d. The Redwater Insolvency

[13] Redwater Energy Corporation ("Redwater") acquired its Regulator licence in 2009, and with it the end-of-life obligations for the wells. Fully aware of these end-of-life obligations, the Alberta Treasury Board ("ATB") became a creditor to Redwater in 2013.[7] ATB's internal document entitled "Industry Knowledge Guide – Oil and Gas Extraction" indicate that "[t]he costs for the borrower of abandoning a well and returning the well and land site to their predrilled condition can be significant…Abandonment liability and calculations are required in third party engineering reports."[8]

[14] In 2015, Redwater encountered financial difficulties, and Grant Thornton Limited (the "Trustee") became the receiver of Redwater's full assets. The Trustee attempted to claim only 20 profiting sites out of the total 127 licensed sites. In October 2015, Redwater received court order appointed Grant Thornton Limited as the trustee of Redwater's estate. The Regulator and OWA applied to the court to compel the Trustee to claim the non-profiting licensed sites, and to fulfill their end-of-life obligations.[9]

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[6] *Supra* note 4 at para 144.
[7] *Supra* note 4 at para 141.
[8] *Ibid.*
[9] *Redwater Energy Corporation (Re)*, 2016 ABQB 278 at para 19 (CanLII) [*Redwater*].

e. Judicial history of the Court of Queen's Bench and Court of Appeal

[15] In May 2016, the Alberta Court of Queen's Bench ruled in favor of the Trustee and ATB. Wittman CJ held there was an operational conflict between the provincial legislation and the federal *Bankruptcy and Insolvency Act* ("*BIA*").[10] He applied the federal paramountcy doctrine, and found the Regulator's orders to have met three-part *Abitibi* test for claims provable.

[16] The majority of the Court of Appeal dismissed the appeal from the Regulator and OWA, and found that the 1997 amendments to *BIA*'s section 14.06, combined with the *Abitibi* decision, overruled the previous decision in *Northern Badger* which held environmental obligations apart from claims provable in the bankruptcy process.[11]

[17] In her dissent, Martin J preferred an interpretation that would allow both levels of governments to work in harmony. She also stressed the high bar of invoking the doctrine of federal paramountcy.[12]

[18] Martin J held that *Northern Badger* had not been overruled, and that end-of-life obligations consist of public duties owed to citizens at large.[13] She found that the Regulator's licences were not real property under section 14.06 of the *BIA*.[14] She also stressed that it would be irresponsible for courts to read in extraordinary powers granting receivers and trustees the right to pick and choose assets to acclaim or renounce.[15] Such a power would require the relevant legislation to have explicit language vesting trustees with these responsibilities.[16]

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[10] *Supra* note 8 at para 183.
[11] *Supra* note 4 at para 105.
[12] *Supra* note 4 at para 201.
[13] *Supra* note 4 at para 224.
[14] *Supra* note 4 at para 220.
[15] *Supra* note 4 at para 114.
[16] *Ibid.*

[19] Martin J also found that the Regulator did not have a monetary claim as defined in *Abitibi*.[17] Further, that the LLR program is an integral part of the industry regulation, is general law and thus not monetary in nature.[18]

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

PART III: STATEMENT OF ISSUES

[21] **1.** Did the Court of Appeal err in finding that end-of-life obligations for licenced properties are claims provable in bankruptcy and therefore do not have super priority in bankruptcy proceedings?

2. Did the Court of Appeal err in holding that the licence obligations created by provincial legislation conflict with or frustrate the scheme of priorities set out in the *BIA*?

PART IV: STATEMENT OF ARGUMENT

A. THE STANDARD OF REVIEW IS CORRECTNESS

[22] At its core, this is a constitutional case. It considers whether the doctrine of paramountcy should be applied to potentially conflicting, albeit equally valid, provincial and federal legislative provisions. The appropriate interpretation of the statutory regime is correctness.[19]

B. THE ALBERTA REGULATORY REGIME AND END-OF-LIFE OBLIGATIONS

[17] *Supra* note 4 at para 224.
[18] *Supra* note 4 at para 138.
[19] *Housen v Nikolaisen*, 2002 SCC 33 at para 8, [2002] 2 SCR 235 [*Housen*].

[23] It is the appellant's position that this case is distinguishable from *Abitibi* because the Alberta regulatory regime sets out requirements that must be met before an oil producer can even begin to produce oil at all. Such a regime should not be compromised in an insolvency situation.

i) The Substance, and not the form, of the Alberta regulatory regime must be the primary consideration of whether an order constitutes a claim.

[24] At issue is whether the end-of-life obligations are provable claims in bankruptcy, or whether they are regulatory obligations set pursuant to licence terms on the extraction of natural resources within the province. The Regulator is Alberta's only regulator for all oil and gas activities in the province. The court should therefore consider how the Alberta Energy Regulator administers their licences.

[25] In *Abitibi*, the Supreme court considered whether certain environmental orders were "claims" for the purposes of the bankruptcy process. In *Nortel*, the court further clarified *Abitibi* that the substance of the environmental regulation is a key focus of the *Abitibi* analysis.[20] The SCC has been clear that it is the substance and not the form of the provincial regime that must be examined.[21] The licensee and creditors are responsible for the risks inherent in the business venture and assume the end-of-life obligations.[22] This is the substance of the regime. The licensees, in our case, are simply subject to the same ongoing obligations imposed on all licensees by law.

ii) The Regulator's licence preconditions and end-of life-obligations are anticipated.

[26] There is an important distinction between the orders in *Abitibi, Nortel,* and *Northstar,* with respect to the obligations in the case at bar. The Regulator licence conditions—specifically the end- of-life obligations—are expected. These obligations contrast the "orders" in *Abitibi*,

[20] *Nortel Networks Corporation (Re),* 2013 ONCA 599 at para 15 (CanLII) [*Nortel*].
[21] *Newfoundland and Labrador v AbitibiBowater Inc.*, 2012 SCC 67 at para 45, [2012] 3 SCR 443 [*Abitibi*] and *Husky Oil Operations Ltd. v Minister of National Revenue*, 1995 SCC 69 at para 40, [1995] 3 SCR 453 [*Husky Oil*].
[22] *Supra* note 4 at para 117.

Nortel, and *Northstar* which were ad hoc, unanticipated, and episodic. The undertaking to fulfill the end-of-life obligations is a pre-condition to access the resource. It is a threshold requirement in the vetting process to become a licensee. It is not remediation work in the typical sense, but rather a condition in granting a licence to an applicant.

[27] These obligations and duties are known from the outset of the issuance of a licence. Whether the well is profitable or not, all wells undergo this process.[23] In other words, unlike in *Abitibi* where environmental remediation orders were unexpected, the end-of-life obligations of Regulator licensees are anticipated and required by law. They arise "without exception" at end of the well's life.[24] This differentiates them from the orders—which were found to be provable claims—in *Abitibi*.

[28] When viewed in this light, the end-of-life obligations—albeit monetary in form—are simply an enforcement of general law. That is the substance of this regime. The enforcing authority, in this case the Regulator, is not a creditor, but rather a public body enforcing a duty and precondition to the issuance of the licence.

[29] The Regulator's licencing regime takes a "cradle to grave" approach[25] that is intended to allow for minimal disruption to third party landowners, the public, and to the future of the resource. These obligations are not remedial orders responding to an unexpected environmental hazard, but rather preventative regulatory measures known by the licensees from the beginning as general law. One premise of the provincial legislation is that all oil extraction in Alberta should be governed by a public licensing regime. The regime includes a public duty to ensure the safety and security of the permitted wells regardless of the success or failure of the business

[23] *Supra* note 4 at para 128.
[24] *Ibid*.
[25] *Supra* note 4 at para 120.

venture.[26] The expectations associated with this regime have been known and practiced by the oil and gas industry for almost twenty-five years. They should not change now.

iii) The Regulator's transfer process and LLR program is not eliminated in bankruptcy.

[30] The provincial legislation requires approval from the Regulator before a licence can be transferred to a new licensee.[27] This is a crucial element of the legislation. The transfer approval is dependant on the LLR program. Each licensee is assigned a liability management ratio; simply put, this is the deemed assets compared to the deemed liabilities.

[31] Adherence with the LLR and the transfer process is adherence with the law. It is not optional. The respondent requests the ability to transfer the licence without complying with the transfer process and this simply cannot be accepted.

[32] In corporate law, a similar principle exists. Without meeting the capital impairment and solvency tests, the directors of a corporation cannot issue dividends, or sell shares to another party.[28] Adherence to this provision in the governing statutes is unquestioned in corporate law. These tests are similar to the liability management ratio in the Regulator's transfer process: the realizable value of the corporation's assets must not be, after the payment or transfer, less than the aggregate of its liabilities.[29] When the Receiver or Trustee becomes responsible for the licence, they gain the privileges of the licence and are also required to adhere to the law that governs the conditions of the licence.

[33] This is a vital part of the regulatory scheme. It ensures that there remains an entity responsible for the fulfillment of the end-of-life obligations for the public interest and to

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[26] *Supra* note 4 at para 124.
[27] *Supra* note 4 at 134.
[28] *Canadian Business Corporations Act*, RSC 1985, c C-44, s 42.
[29] *Ibid*. s *34(2)*

safeguard farming property under the governing statutes.[30] In other words, it is not an option, it is a duty.

[34] The regulatory regime, transfer process, and the end-of-life preconditions on the trustees are simply elements of the general law that governs the extraction of resources in Alberta. As former Chief Justice McLachlin outlines in her dissent in *Abitibi*, the distinction "between regulatory obligations... and monetary claims that can be compromised in… bankruptcy is a fundamental plank of Canadian corporate law."[31] Where the form may be monetary, the substance of the regime is the enforcement of the general law of Alberta. Compliance with the end-of-life obligations—and therefore the law—does not amount to a provable claim.

iv) The *Abitibi* test for claims provable clarifies and supports the holding in *Northern Badger*.

[35] There has been a fundamental error in the Majority's interpretation of the end-of-life obligations as provable claims in bankruptcy. This stems partly from an incorrect application of the test outlined in *Abitibi*. In *Abitibi* the main issue was whether the remediation orders were claims provable in bankruptcy. When regulatory bodies perform remediation work, its "claim with respect to remediation costs is subject to the insolvency process."[32] The court in *Abitibi* set out three requirements clarifying whether an "order" is a provable claim 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**;
3. It must be possible to attach a **monetary value** to the debt, liability or obligation.[33]

[30] *Supra* note 4 at 138.
[31] *Newfoundland and Labrador v AbitibiBowater Inc.*, 2012 SCC 67 at para 74, [2012] 3 SCR 443 [*Abitibi*].
[32] *Ibid* at para 31.
[33] *Ibid.* at para 32.

[36] The end-of-life obligations inherent in the Regulator's licencing regime are not provable claims in bankruptcy because they fail the first and third branches of the *Abitibi* test. *Northern Badger* is still the leading case on the treatment of abandoned wells in the insolvency process in Alberta. *Abitibi* clarified the scope of what a provable claim is in the context of environmental remediation orders. The facts in *Northern Badger* and the case at bar are distinguishable because the duty is owed as a public duty by the licensees to the community. These preconditions, or obligations to properly close a well are simply the enforcement of general law. The enforcing authority does not become a "creditor" of the licensees via enforcement of environmental obligations.[34]

v) The Alberta Energy Regulator is a regulator, not a Creditor.

[37] The Regulator, in enforcing the end-of-life obligations, was not acting as a creditor and thus fails the first branch of the *Abitibi* provable claims test. The Regulator is a regulator, not a creditor. They have been tasked with enforcing the obligations of licensees within the Alberta oil and gas regime. The Majority decision runs the risk of overturning twenty-five years of cooperative regulation. The end-of-life obligations are preconditions to granting an applicant a licence in Alberta. These preconditions are expected by the industry and are therefore not a debt to the creditor, but rather a public duty and obligation inherent in the licensing scheme.

[38] If the Regulator is to be considered a creditor, it would render the regulation of end-of-life obligations ineffective and meaningless. The Regulator relies on the precondition of well closure procedures in the vetting process for licences. This is fundamental in the issuance of licences and the enforcement of general law to protect the public from hazardous wells at the end of their life. The Majority's decision, if maintained, would not just undermine the enforcement of the end-of-life obligations, but the entire Alberta regulatory regime.

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[34] *Supra* note 2 at para 33.

[39] Justice Martin points out that "*even if*" one could characterize the Regulator's issuance of the abandonment orders as fitting the description of creditor in the provable claims test, the LLR program and transfer process would stand alone.[35] The requirement that a licensee obtain approval in the transfer process is different from the order for a licensee to complete their obligations and properly close the abandoned wells.

[40] The province's authority to maintain control over the transfer process during bankruptcy is undisputed. The alternative would make bankruptcy an accomplice for companies looking for creative ways to break provincial transfer regulation. Bankruptcy is meant to be used as a shield, not a sword in gaining more money for the creditors.[36]

[41] The Regulator's vetting and approval of qualified licensees, and their potential requirement to post a security as part of the licence transfer, are not debts owed. Rather, they are "part of the conditions attached to the licence."[37] The Majority erred in their decision, potentially compromising a functional and necessary system for the protection of public security.

vi) No monetary claim exists, because there is no sufficient certainty the province will remediate the environmental damage.

[42] Under the third branch of the *Abitibi* test, the only orders subject to the bankruptcy and insolvency process are the ones that "are monetary in value" and "will ripen into a financial liability owed to the regulatory body that made the order."[38] In order to qualify for a monetary claim in the form of a financial liability owed to the Regulator, the order must contain sufficient

[35] *Supra* note 4 at para 187.
[36] *Royal Bank of Canada v North American Life Assurance Co. and Balvir Singh Ramgotra*, 1996 SCC 219 at para 18, [1996] CarswellSask 418 [*Ramgotra*].
[37] *Supra* note 4 at para 188.
[38] *Supra* note at para 169.

certainty that the regulatory body will ultimately perform the remediation work and be in a position to seek reimbursement by means of monetary claim.[39]

[43] There are three major distinguishing factors between the case at bar and *Abitibi*. First, the environmental clean-up orders were unexpected in *Abitibi*; second, those orders were aimed at industrial pollution; and third, it was industrial pollution on the debtor's land. The orders in *Abitibi* were aimed at the prevention and clean-up of a limited number of environmental problems that arose unexpectedly during operations.[40] In the case at bar, the licencing obligations are expected and anticipated, including the end-of-life process. The abandonment is not aimed at pollution, but rather the winding up of a business venture: the oil well. Nor does the land does belong to the debtor, but often to an innocent third party or the public.

[44] The third branch of the test requires that two questions be asked: (1) is this financial liability owed to the Regulator? And (2), is it sufficiently certain that the Regulator will perform the work and be in a position to seek reimbursement? In this case, the answer is no to both.

[45] The Regulator is, as Justice Martin puts it, not "in the business of performing abandonment work itself… it rarely, if ever, conducts abandonment work on behalf of its licensees, and when it does so it virtually never asserts a claim for reimbursement… Abandonment is the obligation of the licensee."[41] The abandonment is sometimes funded using security posted by licence-holders if they do not meet the acceptable Liability Management Ratio.

[46] Alternatively, the OWA may eventually abandon the wells, but it has no ability to seek reimbursement. The OWA is a not-for-profit funded by the private sector as a safety net when an insolvent cannot complete its obligations. In either case (with the LLR or the OWA), the

[39] *Supra* note 19 at para 20.
[40] *Supra* note 4 at para 177.
[41] *Supra* note para 179.

provincial government does not perform or fund the abandonment work. Therefore, as detailed in *Nortel*, if there is no "sufficient certainty" that the regulator will perform the end-of-life obligations and advance a claim for reimbursement, then the obligation cannot be reduced to a monetary claim.[42] To do so would "result in virtually all regulatory environmental orders being found to be provable claims."[43] This in turn would render the third branch of the test meaningless.

[47] In our case, we are dealing with public duties and regulatory obligations that survive bankruptcy.[44] These are not debts provable in bankruptcy, but *a priori* elements of the licence that must be assumed before an entity may profit from resource extraction. These are the costs to comply with "generally applicable laws."[45] These duties do not amount to monetary claims in bankruptcy just because they are monetary in form.

C. THE REGULATORY REGIME AND THE *BIA*

i) The end-of-life obligations attached to the licences fall outside of s. 14.06 of the *BIA*.

[48] Section 14.06 of the *BIA* was created after the decision in *Northern Badger* to address some of the confusion present in this very case. The respondents and the lower courts hold that s. 14.06 constitutes a complete code governing the treatment of all environmental liabilities in bankruptcy. We hold that both lower courts erred in their expansive interpretation of s.14.06. A closer look at the language in the provision and the context further support our position that s.14.06 does not capture the provincial licencing regime.

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[42] *Supra* note 19 at para 31.
[43] *Supra* note 19 at para 32.
[44] *Supra* note 4 at para 184.
[45] *Ibid.*

[49] The primary purpose of s.14.06 is to protect insolvency practitioners from personal liability. The secondary purpose is to strike a balance between the public's interest in enforcing environmental remediation and the interest of creditors being treated equitably.[46] The respondents and lower courts inappropriately expand on the language for the first priority. Also, the second priority does not apply to the facts of our case because the balance struck for remediation applies only to those orders that are claims provable in bankruptcy according to the *Abitibi* test.[47]

[50] The Majority Decision has accepted an interpretation that gives trustees an "extraordinary power… to pick and choose when they will comply with validly enacted and generally applicable provincial law."[48] As outlined in *Abitibi*, a review of the language and context of s 14.06 shows that it does not include every provincial regulation on environmental matters.[49]

ii) The Respondents conflate the protection of trustees with the protection of the estate's value – Ss. 14.06 (2) and (4)

[51] Section 14.06(2) and (4) consider personal liability. The error of the Majority decision is that they are conflating the protection of the Trustee with the protection of the value of the estate. Protecting the value of the estate is not apparent in the language and was not the intention of Parliament. The amendments made to 14.06 in response to *Northern Badger* was to avoid trustees being personally liable for the obligations or debts the estate could not cover.[50]

iii) Not all environmental claims are claims provable in bankruptcy – S. 14.06(4)

[52] The Majority erred in adopting the interpretation of the word "orders" to mean all regulation that touches environmental matters. This, as previously discussed, is inconsistent with

[46] *Supra* note 4 at para 214.
[47] *Supra* note 4 at para 214.
[48] *Supra* note 4 at para 189.
[49] *Supra* note 4 at para 190.
[50] *Supra* note 4 at para 202.

the decision in *Abitibi* and *Nortel*. Both cases have made it clear that not every regulatory obligation, or "order," is a provable claim in bankruptcy.[51] In fact, *Abitibi* simply creates the test that allows parties to rebut the presumption that an order is not a claim in bankruptcy. Adopting the Respondent's interpretation would make s.14.06 a complete code and would occupy "the entire field of environmental regulation after a bankruptcy has occurred."[52] As previously outlined in this factum, that approach was rejected by the Supreme Court in *Abitibi*, and the Ontario Court of Appeal in *Nortel*.

iv) The meaning of "released an interest in real property" – Ss. 14.06(4) to (8)

[53] The Majority erred in holding that 14.06(4) grants to trustees a broad right to renounce all assets that are affected by any environmental orders. This practically allows the trustee to avoid compliance costs and to increase the estate's value.[53] This interpretation is entirely contrary to Canadian jurisprudence and should not be so readily adopted by the courts.[54]

[54] First, sub-section 14.06(4) must be read within the entire context of section 14.06.[55] The Trustee's ability to renounce real property is restricted to real property, subject to an order that amounts to a monetary claim provable in bankruptcy.[56] The ability to renounce real property is accompanied by the subsequent balancing in subsections (4) to (8). They ensure that the remediator does not bear the whole burden of remediation and that creditors do not unduly benefit from remediation work performed by the province.[57] This balance applies only to those regulatory orders that are provable in bankruptcy pursuant to the test set out in *Abitibi*.[58] This balances fairness for the remediator and the creditor, but only works if the order is

[51] *Supra* note 4 at para 204.
[52] *Supra* note 4 at para 205.
[53] *Supra* note 4 at para 200.
[54] *Supra* note 35.
[55] *Supra* note 4 at para 206.
[56] *Supra* note 4 at para 210.
[57] *Ibid.*
[58] *Supra* note 4 at para 214.

unanticipated.[59] This is not the case here. The balancing of interests in 14.06 does not apply to inherent regulatory obligations as compliance with general law and public duties.

[55] Subsections (4), (7), and (8) refer to the renunciation of "real property". In subsection (4) it highlights that it is only "real property affected by the condition." These three subsections concern the "real property of the debtor" which would allow the debtors to transfer their interest in the property without the consent of any regulator. That is wholly distinguishable from the case at bar.

[56] The Regulator's licences do not amount to an interest in real property. The drilled wells are chattels owned largely by a third party, or the public. This is one of the many reasons why licensees require consent from the Regulator to transfer their licence--something that has been undisputed in the industry until the case at bar. Subsection (7) grants a super priority to the Crown for remediating the debtor's real property.[60] The licence is not real property, and the abandoned minerals often belong to the Crown. This combination does not generate a super-priority under this provision.[61] The unique nature of Alberta's oil and gas industry could suffer catastrophic repercussions if the Regulator's regulations are shoehorned into s. 14.06. It could incentivize oil and gas developers to declare bankruptcy in order to avoid their environmental obligations owed to the public.

[57] Respectfully, the lower courts, and the respondents have failed to contemplate the gravity of such a stretch in the interpretation of the statute. The well licences signify inherent conditions to being granted the privilege to drill. These end-of-life obligations under the licence are ongoing public duties to safely abandon and reclaim wells. They are not ad hoc "orders" subject to the balancing provisions in s. 14.06.

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[59] *Ibid.*
[60] *Supra* note 4 at para 218.
[61] *Ibid.*

[58] The end-of-life obligations that the Trustee seeks to avoid adversely affects land belonging to a third party; land in which the Trustee has no real property interest.[62] A broad interpretation of 14.06 would generate injustice effectively allowing creditors to benefit from the more profitable portions of the debtor's estate while leaving the real land owners with unsafe property of a lower value. This is even more unjust because the creditors had full knowledge of the risk and end-of-life obligations before beginning their resource development operations. The courts should favour the appellant's interpretation to ensure third party owners and the public at large need not bear the burden of Redwater's unfulfilled obligations.[63]

[59] Furthermore, s.14.06(8) states: "a claim against a debtor for environmental clean-up costs is a provable claim." Pursuant to the provable claims test in *Abitibi* there is no monetary claim by the Crown. As previously discussed, the licence conditions are elements of general law and are assumed by the licensee. These public duties are different from environmental remediation claims. The respondents are contravening a fundamental principle in bankruptcy law by using s 14.06 as a sword to allow "greater access to their debtors' assets than they possessed prior to bankruptcy."[64]

[60] As discussed in Justice Martin's dissent, the Supreme Court in *Husky Oil* has cautioned that the conflict between provincial and federal legislation should not be found lightly.[65] This is to allow each level of government to "act freely as possible within its respective sphere of authority."[66] In conclusion, Alberta's regulatory licencing obligations are separate from s. 14.06 of the *BIA* and remain outside of the bankruptcy process.

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[62] *Supra* note 4 at para 220.
[63] *Supra* note 4 at para 222.
[64] *Supra* note 4 at para 241.
[65] *Husky Oil Operations Ltd. v Minister of National Revenue*, 1995 SCC 69 at para 162, [1995] 3 SCR 453 [*Husky Oil*].
[66] *Supra* note 4 at para 228

D. FEDERALISM ARGUMENTS WITHIN THE *BIA*

i) The Trustee is using the doctrine of paramountcy as a sword to inflate the value of a bankrupt's estate.

[61] To use this doctrine as a sword is entirely contrary to years of paramountcy jurisprudence. Under the lens of cooperative federalism, the doctrine of federal paramountcy must be applied with restraint.[67] The threshold to apply federal paramountcy is high, and only an "actual conflict in operation" warrants an application of paramountcy.[68]

[62] The provincial provisions are operative for two reasons: (1) Because the provincial legislation does not frustrate the relevant purpose of the *BIA*: equitable distribution of assets; and (2) Because there is no operational conflict between the provincial regulatory scheme and the *BIA*, particularly section 14.06.

ii) The provincial legislation clarifies the value of the estate available for creditors under the *BIA* claims process.

[63] The Supreme Court identified both of the *BIA*'s legislative purposes in *Moloney:* the first is the equitable distribution of assets and the second is financial rehabilitation of the bankrupt.[69] The facts in *Moloney* required a consideration of the *BIA*'s second purpose. Our case requires consideration of the first: the equitable distribution of assets.

[64] A mere 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* of the equitable distribution of assets. In the context of bankruptcy proceedings, "equitable" means ensuring a fair and transparent process for creditor access to a bankrupt's estate. It does not

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[67] *Saskatchewan (Attorney General) v Lemare Logging Ltd.*, 2015 SCC 53 at para 21, [2015] 3 SCR 419 [*Lemare Logging*] and *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at para 27, [2015] 3 SCR 327 [*Moloney*].
[68] *Multiple Access Ltd v McCutcheon*, 1982 SCC 55 at para 19, [1982] 2 SCR 161 [*Multiple Access*].
[69] *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at para 10, [2015] 3 SCR 327 [*Moloney*].

capture the value of the estate available for distribution prior to a bankruptcy proceeding. The equitable distribution of assets must happen after the insolvency test, where the trustees would deduct liabilities from the total value of the estate. This is standard business practice.

[65] The fulfilment of the environmental obligations is distinct from the effect of reordering bankruptcy priorities. Justice Martin states that the provincial law must have the much narrower effect of reordering bankruptcy priorities before it is declared in conflict with the *BIA*.[70] This is not the effect of regulatory regime. Instead, the regime ensures abandonment obligations are upheld for the purpose of public security. In so doing, it has the effect of modifying the size of the estate available to creditors. It does not reorder bankruptcy priorities. To do so would require the Regulator to have a claim in the insolvency process. The Regulator has no such claim as the provincial order enforcing the Trustee's public obligation does not qualify as one.

[66] A finding that the Regulator's abandonment order is a public duty is in line with Canadian jurisprudence. Not every provincial order regarding environmental issues is a provable claim or has the effect of reordering bankruptcy priorities, according to *Abitibi*.[71] Deschamps J stated in "[a]s a matter of principle, reorganization does not amount to a licence to disregard rules."[72] The Ontario Court of Appeal in *Nortel* also cautioned against a broad approach that would see all environmental obligations treated as provable claims.[73] The court should maintain the approach outlined in *Nortel*. To hold otherwise would do away with the purpose of the *Abitibi* test, which presumes environmental orders are public duties until proven otherwise.

[67] The Regulator's regulatory scheme is a statute of general application with incidental effects in the bankruptcy proceeding. It is general law not a monetary claim. The legal effect of

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[70] *Supra* note 4 at para 156.
[71] *Supra* note 4 at para 158.
[72] *Supra* note 30 at para 2.
[73] *Supra* note 19 at para 32.

the environmental obligations is merely less money for the estate before the bankruptcy process begin. It does not reorder claims in the process itself.[74]

iii) The end-of-life obligations are a precondition to issuing the licence, and an integral part of the regulatory regime.

[68] The Regulator will only issue licences to developers pending their agreement to perform end-of-life obligations on the impacted land. This is a crucial condition. By accepting the terms of the licence, Redwater accepted the binding end-of-life environmental obligations attached to the licence. These obligations come with the licence and travel with the licence, meaning they are also binding on subsequent licensees including the Trustee, Grant Thornton Limited. Since the licence was transferred from the bankrupt Redwater to the Trustee, the Trustee steps into the shoes of the bankrupt and assumes its end-of-life obligations. Further, the ATB, was well aware of the regulation, and factored in the costs of the end-of-life obligations when making the decision to lend money to Redwater.[75] Consideration of the risks involved with oil and gas development are not unique to this case and Trustees have assumed licensee obligations in the past without conflict.

[69] The Regulator, and the general public by proxy, relied on the representation of the entire profile of Redwater's assets in making the decision to issue the licence. This is the core of the LLR program. The LLR program takes a holistic approach in evaluating a company's ability to perform end-of-life obligations by considering the company's total assets and liabilities, including both the profiting and non-profiting wells. It was Redwater's entire asset profile as a bundle that Regulator relied on when issuing the licence. The respondent's current attempt to separate the good assets from the bad goes in contradiction to the LLR program and the licensing

[74] *Supra* note 2 at para 63 and *Supra* note 4 at para 237.
[75] *Supra* note 4 at para 141.

regime. It is an attempt to inflate the value of the estate for creditors and it breaches the fundamental principle of bankruptcy law that prevents such a gain.[76]

[70] When obtaining a licence from the Regulator, Redwater essentially obtained a legal opportunity to conduct their business. All businesses come with risks and rewards. The non-profiting wells are the risks, and the profiting wells, rewards. Without the licence, Redwater could not have acquired their profiting wells, which came together with the non-profiting wells, as an integral part of the same business operation. The Trustee is no different. Their legal ability to sell both profiting and non-profiting wells are attached to the licence.

[71] The Respondents are attempting to separate bad assets from good ones to maximize their profits. They are attempting to avoid the business risks inherent to their industry while leaving landowners and the general public with their environmental liabilities. The Trustee is using the paramountcy doctrine as a sword to avoid the very risks the bankrupt foresaw when it obtained the licence to begin its business operations. The courts cannot allow this behaviour to stand as it places liabilities foreseen by a private actor on landowners and the general public.

iv) The Regulator's enforcement of foreseen obligations distinguishes this case from *Abitibi*.

[72] The end-of-life obligations in this case were not only subjectively foreseeable to the parties involved, they were certain. Oil wells, whether profitable or not, must always be abandoned within regulatory compliance. These obligations have been an integral part of the licensing regime for almost twenty-five years. No company can legally escape or avoid these obligations if they hold a licence from the Regulator. This is a crucial difference from *Abitibi* where the environmental damage was accidental and unexpected. Accordingly, the remediation work involved was not captured by the existing regulatory arrangement between the Government

[76] *Supra* note 35.

of Newfoundland and AbitibiBowater. The environmental orders and targeted legislative provisions in *Abitibi* were ad-hoc actions from the provincial government. This is entirely different from Alberta's foreseeable end-of-life obligations which form a known and integral part of the licencing regime.

[73] The compliance cost for the end-of-life obligations should be deducted from the estate as liabilities before the bankruptcy proceeding begins. Compliance with the Regulator's regulations certainly affect the value of the bankrupt's assets, but it does not reorder the priorities among creditors in the bankruptcy. Instead it modifies the value of the estate before the bankruptcy proceeding even begins.

E. THE PROVINCIAL LEGISLATION WORKS IN HARMONY WITH THE BIA PROCEEDINGS

i) The court should apply the doctrine of federal paramountcy with restraint.

[74] Since the threshold of federal paramountcy is high, the court should prefer a harmonious interpretation of the *Oil and Gas Conservation Act* ("OGCA"), the *Pipeline Act* ("PA") and the *BIA* to avoid an overly broad application of the doctrine. This is a novel issue. The Regulator's regime has been working in harmony with the *BIA* for almost twenty-five years. The substance of the Regulator's licensing regime is distinct from the ad-hoc environmental orders in *Abitibi*, and comes before the bankruptcy proceeding before it even begins. Reading the provisions of the *OGCA*, the PA and the *BIA* harmoniously is both a possible and preferred approach for the purposes of ensuring consistent business expectations and public security.

[75] The case at bar can also be distinguished from *Moloney*. Mr. Moloney was driven into bankruptcy by fines owed to the Alberta government.[77] Following bankruptcy proceedings, the

[77] *Supra* note 68 at para 4.

government attempted to compel Mr. Moloney's payment of his remaining fines. By attempting to collect on debts deceased in bankruptcy, the government's action was in direct contradiction with the *BIA*. The court found an actual conflict between what the enabling government legislation allowed and a purpose of the *BIA*: rehabilitation of the bankrupt.

[76] No such conflict exists here. A licensee's environmental obligations come before and outside of bankruptcy proceedings. The Regulator's enforcement orders are not provable claims, they are a means to ensure public obligations are fulfilled. The court should opt towards a holding of harmonious interpretation that will encourage and uphold reliance and trust in the regulatory regime. In so doing, courts will protect public interest and landowner's rights.

ii) Section 14.06 of the *BIA* can work harmoniously with the regulatory regime.

[77] The Regulator's licencing regime works in harmony with section 14.06 of the *BIA* because it is outside the scope of this particular section. Section 14.06 only governs ad hoc environmental orders similar to those in *Abitibi*. Again, these are different from the foreseen obligations preconditional to the granting of a Regulator licence.

[78] The Trustee would have you equate the estate's liability with its own. This is an improper interpretation of the facts. Section 14.06 limits its application to personal liability, but the Regulator is not imposing any personal liability onto trustees. The Regulator is only aiming at the duties of the estate under the management of the Trustee. No Trustee funds would be used to uphold the estate's end-of-life obligations and the estate falls outside the protection of s. 14.06.

[79] Furthermore, the *BIA* lacks the language required to grant trustees the right to pick and choose assets to renounce. Such an extraordinary power requires explicit language no such language exists in section 14.06 or elsewhere. The Respondent would have the court read powers into the *BIA* allowing trustees to inflate the value of a bankrupt estate. These powers were not

contemplated by Parliament and have been rejected by courts in the past.[78] Instead, courts should favour the safer, more equitable interpretation of the appellant to uphold industry standards and public security.

PART V: ORDER SOUGHT

[80] Both lower courts erred in their interpretation of environmental orders in the bankruptcy process. Their interpretation risks disabling a regulatory regime that has seen both environmental and creditor obligations fulfilled for almost twenty-five years. This court has the opportunity to remedy the error committed, uphold the stability of entrenched business practices and protect landowners for generations to come. The appellant respectfully requests the court adopt Justice Martin's dissent, allow this appeal and enforce the Regulator's abandonment order.

PART VI: TABLE OF AUTHORITIES

[78] *Supra* note 35.

The following authorities are listed in order of appearance:

Cases	**Paragraph(s) Referenced**
Panamericana de Bienes y Servicios v Northern Badger Oil and Gas Limited, 1991 ABCA 181 (CanLII)	21, 33, 63
Orphan Well Association v Grant Thornton Limited, 2017 ABCA 124 (CanLII)	13, 105, 114, 117, 120, 124 128, 134,138,141, 144, 156, 158, 169, 177, 179, 184, 187, 188, 189, 190, 200, 201, 202, 204, 205, 206, 210, 214, 218, 220, 222, 224, 228, 237, 241
Redwater Energy Corporation (Re), 2016 ABQB 278 (CanLII)	19, 183
Housen v Nikolaisen, 2002 SCC 33, [2002] 2 SCR 235	8
Nortel Networks Corporation (Re), 2013 ONCA 599 (CanLII)	15, 20, 31, 32
Newfoundland and Labrador v AbitibiBowater Inc., 2012 SCC 67, [2012] 3 SCR 443	2, 31, 32, 45, 74
Husky Oil Operations Ltd. v Minister of National Revenue, 1995 SCC 69, [1995] 3 SCR 453	40, 162
Royal Bank of Canada v North American Life Assurance Co. and Balvir Singh Ramgotra, 1996 SCC 219, [1996] CarswellSask 418	18
Saskatchewan (Attorney General) v Lemare Logging Ltd., 2015 SCC 53, [2015] 3 SCR 419	21
Alberta (Attorney General) v Moloney, 2015 SCC 51 [2015] 3 SCR 327	4, 10, 27
Multiple Access Ltd v McCutcheon, 1982 SCC 55, [1982] 2 SCR 161	19

Enactments	**Section(s) Referenced**
Responsible Energy Development Act, RSA 2012, c R-17.3	2(1)(a)
Oil and Gas Conservation Act, RSA 2000, c O-6	1(1)(*cc*)
Canadian Business Corporation Act, RSC 1985, c C-44	34(2), 42
Bankruptcy and Insolvency Act, RSC 1985 c B-3	14.06(1), 14.06(2), 14.06(3), 14.06(4), 14.06(5), 14.06(6), 14.06(7), 14.06(8)
Pipeline Act, RSA 2000, c P-15	1(1)(*n*)