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 #14

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

AND TO: **ALL REGISTERED TEAMS**

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PART I -- OVERVIEW AND STATEMENT OF FACTS

A. Overview of the Respondent's Position

1 Under the Constitution of Canada, the regulation of bankruptcy falls under the exclusive legislative jurisdiction of the federal government. Following *Northern Badger*, in 1991 and 1997 the federal government introduced and then amended S. 14.06 of the *Bankruptcy and Insolvency Act* ("BIA") to balance the rights of creditors against the demands of environmental regulators during the bankruptcy process.

> *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA].
>
> Bill C-22, *An Act to Amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, 3rd Sess, 34th Parl 1992
>
> Bill C-5, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, 2nd Sess, 35th Parl, 1997.
>
> Constitution Act, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act*].
>
> *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd*., 1991 ABCA 181, 81 Alta. L.R. (2d) 45 [*Northern Badger*].

2 In 2013, the Alberta Energy Regulator ("AER") published *Directive 006: Licensee Liability Rating (LLR) Program and Licence* ("Directive 006") which effectively allowed licensees in the oil and gas sector to leverage their productive wells without having to post security for or remediate their defunct wells. The Directive allowed licensees to maintain a very low ratio of assets to liabilities (1:1) before being required to post security or triggering abandonment and remediation and even then, the AER did not follow this guideline strictly. The system's design made it very likely that companies would enter the bankruptcy process with a negative balance of assets to environmental liabilities. *Redwater* was inevitable.

> Alberta Energy Regulator, Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process, (2013) [Directive 006].
>
> *Redwater Energy Corporation (Re),* 2016 ABQB 278, 33 Alta LR (6th) 221 at para 32 ("waived enforcement") [*Redwater*].

3 The AER knew that it, or its delegate, the Orphan Well Association ("OWA"), would be the remediator of last resort for orphan oil and gas assets in the province. The AER had regulatory authority to require licensees to abandon and remediate a well when it stopped producing. It also had the ability to set a different ratio under Directive 006 or impose a much

heftier levy on industry to finance Alberta's oil and gas orphan well fund administered by the OWA. But it didn't. In *Redwater*, the AER waited to make its move until after Alberta Treasury Branches ("ATB"), a secured creditor, pushed the company into bankruptcy under the BIA. It was only after the trustee had been appointed and the bankruptcy process was well underway that the AER decided to get serious and issue abandonment and remediation orders against the licensee who, at this point, was no longer Redwater but Grant Thornton Limited ("GTL"), acting as trustee. GTL had to choose: comply with the AER orders in its capacity as licensee or be a trustee in bankruptcy.

> See *R. v. Ontario (Ministry of the Environment)*, [2001] O.J. No. 2581 for the notion of "remediator of last resort"

4 A trustee in bankruptcy is supposed to put order into the affairs of the bankrupt so that all creditors are treated fairly and where possible, the bankrupt can get a fresh start. Sorting out the assets and disclaiming the ones that have a negative value is part and parcel of what the receiver is tasked to do. The same goes for the regulatory orders issued by the AER after the bankruptcy had begun: it was GTL's job to examine the orders and then follow the guidance from *Abitibi* to satisfy the AER's claim as and when its rank among provable claims would have the trustee do so. This is what the BIA does; it names a trustee and lets the process unfold.

> *Newfoundland and Labrador v. AbitibiBowater Inc*., 2012 SCC 67, [2012] 3 S.C.R. 443 at para 26 [*Abitibi*].

5 GTL cannot fulfill its mandate under the BIA and at the same time be subject to and comply with orders from the AER. Under cover of bankruptcy, the estate does not answer to the AER. Federal paramountcy must operate in this case. Alberta's rules making trustees licensees (OGCA 1(1)(cc), PLA 1(1)(n)), those allowing the AER to force trustees to abandon and remediate non-valuable assets (ss 27-30 OGCA and 82 PLA), and *Directive 006*, which allows the AER to refuse asset transfers, taken together, subvert the federal bankruptcy regime *by design*: the licensee becomes insolvent and its saleable assets are magically charged with a super-priority in favour of the regulator.

> *Oil and Gas Conservation Act*, RSA 2000, c O-6 ss 1(1)(cc), 27-30 [OGCA]
>
> *Pipeline Act*, R.S.A. 2000, c. P-15, ss 1(1)(n), 82. [PLA]
>
> *Directive 006*, *supra* para 2.

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

6 The Respondent accepts the facts as laid out by the Majority decision at the Alberta Court of Appeal. For the purpose of clarifying the arguments that follow, GTL wishes to remind the Court of the following facts.

Orphan Well Association v Grant Thornton Limited, 2017 ABCA 124 [Court of Appeal Reasons].

(i) The Alberta Energy Regulator

7 The Alberta Energy Regulator ("AER") is responsible for providing for the "efficient, safe, orderly and environmentally responsible development of energy resources in Alberta through the Regulator's regulatory activities".

Responsible Energy Development Act, SA 2012, c. R-17.3, s2(1)(a). [REDA].

8 Among its many powers, the AER controls the issuance and transfer of oil and gas licenses. Its rules for doing so are published in *Directive 006: Licensee Liability Rating* ("LLR"). These rules were developed in consultation with the oil and gas industry.

Directive 006, *supra* para 2.

Kelly Bourassa, Ryan Zahara, and Chris Nyberg, "Restructuring Challenges in the Oil and Gas Sector: The Treatment of Regulatory Orders Post-Redwater," (2016) 54 Alta. L. Rev. 2 at 388.

9 The LLR program allows the AER to determine when well licenses can be transferred, depending on its assessment of the financial health of the company seeking to buy or sell. This determination is based on the calculation of a licensee's asset-to-liability ratio, or Liability Management Rating ("LMR"). If the AER determines that a license holder has more liabilities than assets, it can block the sale, or can mandate that the asset-to-liability ratio be improved. This can be achieved by selling off existing liabilities, abandoning wells, or posting security with the AER. However, licensees with an inadequate LMR often lack the money to pay the substantial security costs which would be required by the AER.

(ii) Orphan Well Association

10 The Orphan Well Association ("OWA") is a non-profit organization with the mandate to conducting remediation work for non-producing wells for which no responsible party is financially capable of doing the work. It is funded in part by a levy on industry administered by

the AER pursuant the *Oil and Gas Conservation Act* ("OGCA") (70(1)(a), 70(2)). The rest of its funding comes from the provincial government.

Oil and Gas Conservation Act, RSA 2000, c O-6, ss 70(1)(a), 70(2) [OGCA].

11 The OWA works closely with the AER, and is delegated authority from the AER to finance and carry out remediation. Its board of directors includes representatives from the Canadian Association of Petroleum Producers ("CAPP"), the Exporters and Producers Association of Canada, the AER, and Alberta's Ministry of Environment and Parks (*Redwater*). In short, it is an organization that works closely both with the AER and with industry.

Alta Reg 45/2001 (*Orphan Fund Delegated Administration Regulation*).
Redwater, supra para 2 at para 33.

(iii) Alberta's regulatory regime

12 Three elements are necessary to exploit a well within the Albertan oil and gas regulatory regime. First, one must obtain a license to drill from the AER. The conditions for obtaining and transferring a license are defined by the AER itself, in accordance with the OGCA. Directive 006 and the LLR program are an example of such conditions. Second, one must acquire an interest in the minerals themselves. This interest is generally granted through a mineral lease agreement with the Crown, as most of mineral rights in Alberta are publicly owned. Finally, one must have a right to access the surface of the land, as mineral rights are distinct from surface rights. This can be obtained through private agreements with landowners, or a right of entry order issued by the Surface Rights Board of Alberta.

Court of Appeal Reasons, *supra* para 6 at paras 129-131.
Directive 006, *supra* para 2.
Surface Rights Act, RSA 2000, c S-24, s 12.

(iv) The case of Redwater

13 Redwater fell into financial difficulty when oil prices crashed in 2014. Its main creditor, ATB, called in its loan. In May 2015, when Redwater was unable to pay the ATB, GTL was appointed receiver, and later trustee. According to its duties as receiver and trustee, GTL notified the AER that it would disclaim all but 20 of Redwater's 127 licensed wells. In July 2015, AER

issued abandonment orders ("Abandonment Orders"), which provided that unless Redwater or GTL properly remediated the wells, "the AER will, without further notice, use its process to have the properties abandoned. The AER will exercise all remedies available to it to recover costs from the liable parties."

Redwater supra para 2, at para 23.

14 In October 2015, GTL disclaimed Redwater's non-valuable wells and stated that it did not intend to comply with the Abandonment Orders.

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

15 The Respondent accepts the issues as stated in the Appellant's' factum, namely:

i. 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?

ii. 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 III -- ARGUMENT

16 For the doctrine of paramountcy to apply in this case, GTL needs to demonstrate that (A) GTL, in its capacity as Trustee, is entitled to renounce the assets for which the AER issued Abandonment Orders, and (B) that the Abandonment Orders are claims provable in bankruptcy, leading to the application of the BIA to this case. These two premises will allow GTL to demonstrate that (C) ss 1 of the *OGCA* and of the *Pipeline Act*, are inoperative to the extent that they allow the AER through *Directive 006* to frustrate the purpose of the BIA and create an operational conflict with s 136 of the BIA.

OGCA, supra para 5 ss 1(1)(cc), 27-30.

Stewart, Fenner L., "Interjurisdictional Immunity, Federal Paramountcy, Co-Operative Federalism, and the Disinterested Regulator," (2018) 33 Banking & Finance L. Rev. 227 at 230.

PLA, supra note 5 at. 1(1)(n), 82.

Directive 006, supra para 2.

A. Section 14.06 of the BIA does not prevent trustees from disclaiming assets

17 Section 14.06 is actually a *sub*-section of section 14, with many sub-paragraphs. It is well established that these provisions are "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" (Driedger). The purpose of the BIA, that of s 14.06, the grammatical and ordinary sense of s.14.06 and the scheme of s 14.06 all support a reading of the section that allows trustees to renounce property.

> *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53 at para 77, quoting E.A. Driedger, Construction of Statutes (2nd ed. 1983), at p. 87.
>
> BIA, *supra* para 1, s. 14.06.

(i) The purpose of the BIA and of s.14.06 support a reading of 14.06 as allowing trustees to renounce non-valuable assets

(a) The purpose of the BIA is to bring order to chaos and do so in a way that is fair

18 The *Constitution Act, 1867* grants Parliament the exclusive power to legislate with respect to bankruptcy and insolvency. Informed by the common law, the *Bankruptcy and Insolvency Act* ("BIA") establishes a complete code for bankruptcy and insolvency. Where the BIA process is lawfully triggered, "property and civil rights in the province" must be interpreted by a province and its regulators in a way that does not interfere with the BIA and the work being done by the trustee in bankruptcy.

> Constitution Act, *supra* para 1, s. 91(21).
>
> Court of Appeal Reasons, *supra* para 6 at para 57.

19 The BIA "provide[s] for the orderly liquidation and winding up of the insolvent debtor, at minimum expense". It seeks an equitable distribution of a bankrupt's assets among creditors by carefully ranking their claims. In many cases (though not here), the BIA also provides a bankrupt with a "fresh start," "free from the burden of crushing debt" (Court of Appeal Reasons)

> Court of Appeal Reasons, *supra* para 6 at para 42-43.
>
> *Alberta (Attorney General) v Moloney*, 2015 SCC [*Moloney*].
>
> Goldstein, Yoine J et al. *Bankruptcy and insolvency*, 2017 reissued (Lexis Nexis, 2017).
>
> BIA, *supra* para 1, s.136

20 While its objectives are broad, the provisions of the BIA are anything but vague. The BIA has provisions addressing the full range of questions that may arise when a debtor becomes insolvent. It is diligently amended by Parliament to maintain its relevance.

Court of Appeal Reasons, *supra* para 6 at para 43.

See, e.g., Bill C-22, *supra* para 1 and Bill C-5, *supra* para 1.

(b) Trustees in bankruptcy rely on the stability of the BIA

21 The BIA relies on trustees to breathe life into the process. Without trustees, the chaos remains. Potential trustees require the BIA to be clear regarding their powers, duties, and exposure to liability under provincial law—especially provincial law that may be at odds with the bankruptcy process. Without willing trustees to manage the "winding up" process, there is a risk of the bankruptcy regime falling apart and leaving the assets and liabilities of bankrupts with no responsible party for ongoing management.

Court of Appeal Reasons, *supra* para 6 at para 42, 84.

22 Stability during bankruptcy relies on the specific ordering of the priority of claims to ensure the transparent and equitable treatment of creditors and avoid a chaotic run on the bankrupt by its various creditors and other stakeholders. Parliament explicitly laid out the order of claims in s.136, and additional provisions in the BIA supplement this to create a comprehensive set of rules. These provisions are key to the federal bankruptcy scheme and show a clear intention of Parliament to exercise its exclusive jurisdiction to establish the order of claims and maximize global recovery of creditors and stakeholders.

Court of Appeal Reasons, *supra* para 6 at para 42.

(c) After Northern Badger*, Parliament amended the BIA to protect trustees*

23 BIA ss. 14.06 (2) and (4) are Parliament's answer to *Northern Badger*. Worried that the decision would make insolvency professionals steer clear of mandates with environmental liabilities, these provisions were intended to provide a fair warning of how provincial environmental remediation orders and the BIA are meant to interact. This intention was explained at Committee by David Tobin, Director General of the Corporate Governance Branch, Department of Industry:

> (1700, 11 June 1996): "What you have before you is very much a compromise. I would argue that some of the environmentalists would have liked to have seen a larger or wider priority or a priority on a wider range of goods or assets. The lending community might have wanted to see a narrower one or one that was in the bill as it is right now. The trustees, those who are ultimately going in, found that the provisions in the existing act didn't allow them to go in."
>
> *Northern Badger*, *supra* para 1 at para 55.
>
> Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, No 13 (11 June 1996), (Intervention of Jacques Hains at 1545); see also: *ibid*, Intervention of David Tobin at 1700.

24 At the time, Parliament also enacted BIA s.14.06(7), giving the Crown a super-priority on real property that was renounced by the trustee and remediated at the expense of the Crown. These amendments set out the circumstances in which a trustee could be held personally liable under a provincial clean-up order, and all stakeholders were put on notice regarding how far the federal government was willing to allow a province to go in giving itself a super priority for remediation costs.

> Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, No 13 (4 November 1996), Intervention of Jacques Hains at 1645.
>
> Court of Appeal Reasons, *supra* para 6 at para 210.

(d) The trustee's power to disclaim assets is required to do the job

25 Where an estate has assets with a positive value and others that with a negative value (liabilities) then the trustee in bankruptcy must be able to set aside the "bad" assets in order to fulfill its mandate. If the trustee were required to make the good assets pay the bad assets first, then what would be the purpose of the bankruptcy process? Allowing trustees to disclaim assets is a choice that was made with both environmental protection and resource development in mind. At common law, trustees have long been allowed to renounce assets that are essentially liabilities. The 1997 amendments to the BIA did not revoke this power. All they did was clarify the effect of a renunciation on the ability of a province to hold a trustee personally liable under a clean-up order.

> Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, No 13 (11 June 1996), Intervention of David Tobin at 1700.
>
> Court of Appeal Reasons, *supra* para 6 at paras 47, 53, 68.

26 To underscore the centrality within the bankruptcy process of a trustee's power to renounce assets, Parliament made sections 14.06(2) and 14.06(4) operable "[n]otwithstanding

anything in any federal or provincial law." In doing so, Parliament situated sections 14.06(2) and 14.06(4) within the broader scheme of the unified bankruptcy process. The purpose of this process, as mentioned above, is to ensure the equitable treatment of all creditors. To interpret s.14.06 as somehow limiting a trustee's power to renounce assets would not only hamper the ability of trustees to do their job, it would likely turn creditors off the BIA process, inviting a return to chaos and undermining Parliament's role as the maker of rules for bankruptcy.

BIA *supra* para 1, s 14.06(2), 14.06(4).
Bourassa et al. "Restructuring," *supra* para 8 at 408.
Redwater, *supra* para 2 at para 84.

(e) The property in question is real property

27 The Trustee's power to disclaim assets applies specifically where there is an "interest in real property" (s. 14.06(4)(c)). This interest exists for the disclaimed wells in question. For a company like Redwater to operate an oil well, it must hold a bundle of rights and interests, comprising a license to drill, surface occupancy rights, and a right to the sub-surface minerals generally owned by the Crown. The mineral rights can be characterized as *profits-à-prendre*, a category of real property.

BIA, *supra* para 1, 14.06(4)(c).
Court of Appeal Reasons, *supra* para 6 at para 30.
Alberta Energy Co v Goodwell Petroleum Corp, 2003 ABCA 277 (CanLII), [2003] AJ No 1207 at para 63.

28 By putting restrictions on the transfer of wells, the LLR effectively bundles all the property interests attached to a single well. For the purposes of the case at bar, the multiple separate licenses for oil and gas exploration and extraction must be treated together with the underlying right to the minerals (the *profits-à-prendre*); an impact on one is an impact on all the licenses and underlying rights. As such, there is a clear interest in real property on the part of the Trustee in this case.

(ii) <u>Renunciation power is supported by internal logic and grammar of 14.06</u>

29 Both the grammatical and ordinary sense of s.14.06 and the overall context of the BIA support a reading of s 14.06 allowing trustees to renounce non-valuable property.

30 S 14.06(2) and (4) do not create an explicit right to disclaim non-valuable property, because they assume the independent existence of this right from the start. The right of trustees

to renounce non-valuable assets is clear in the grammatical structure of sections 14.06(4)(a)(ii) and 14.06(4)(c). In both sections, the right of trustees to renounce the assets is assumed to be the starting point: s.14.06(4)(a)(ii) protects the trustee from personal liability if it decides to exercise its right to renounce, and s.14.06(4)(c) protects the trustee from personal liability in cases where it disclaimed the bad assets before an order was made.

Court of Appeal Reasons, *supra* para 6 at para 68.

BIA, *supra* para 1, s 14.06.

31 Section 14.06 does not translate into a "broad right to avoid compliance costs and increase the estate's value," as the Appellants argue. S. 14.06 is a complete code, but it is not a stand-alone code. While s.14.06 confirms that trustees may renounce assets affected by environmental orders, it does not put an end to the environmental obligations themselves. S.14.06 exists within the broader context of an insolvency regime which grants this power to receivers so that they can see to the equitable treatment of creditors. The estate of the bankrupt retains the obligation to comply with such orders, either within the bankruptcy process if they are provable in bankruptcy per the *AbitibiBowater* test, or outside of it if they are non-monetary regulatory orders.

Willms & Shier Moot Team 7, Appellant Factum (2019) at para 53.

Court of Appeal Reasons, *supra* para 6 at para 57.

Abitibi, *supra* para 4 at para 40.

32 Finally, the right of trustees to renounce non-valuable assets is also apparent in the broader structure of s.14.06. Section 14.06(4)(b) allows receivers to petition for a stay to assess the economic impacts of keeping the assets. This provision would be meaningless if the receiver, at the outcome of this assessment, could not make the decision to renounce.

Court of Appeal Reasons, *supra* para 6 at para 129.

33 In conclusion, an ordinary and grammatical reading of s.14.06 of the BIA supports the existence of a power in officers of the court to renounce non-valuable assets if they deem it necessary in order to fulfill their statutory mandate, which is to maximize recovery by creditors in accordance with an order of priorities determined by law.

(iii) The applicability of a s14.06(7) remedy is not a condition precedent to the Trustee's power to disclaim assets

34 Martin J. in her dissent at the Alberta Court of Appeal argues that a harmonious reading of s.14.06 suggests that the power to renounce must be based on the possibility to activate a s.14.06(7) remedy. The diffuse ownership structure of oil wells in Alberta, combined with the fact that they no longer have value once they are remediated, makes any s.14.06(7) remedy inefficient in these circumstances. Parliament was aware that s 14.06.(7) only applied to real property owned by companies when it designed this balance. The majority in *Abitibi* made clear that "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 assets". Parliament could have made environmental claims a clear, unambiguous super-priority in the bankruptcy regime. It did not. It chose instead to limit the application of the super-priority to a regulator's claim for remediation costs incurred at real property owned by insolvent companies.

Abitibi, *supra* para 4 at para 33.

Court of Appeal Reasons, *supra* para 6 at para 223.

Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, No 13 (18 Sept 1996), Intervention of Mr Lebel at 1645.

35 Moreover, contrary to the view advanced by Martin J., there is nothing in the wording of s 14.06(7) to suggest that the availability of s.14.06(7) is a condition precedent to the exercise by the trustee of the power to renounce recognized by s.14.06(4). Section 14.06 is part of federal legislation, and as such it applies uniformly in every province. The particularities of the property rights involved in oil and gas development and regulation in Alberta do not modify the provisions of the BIA.

Court of Appeal Reasons, *supra* para 6 at para 223.

36 Interpreting the BIA otherwise would amount to an intrusion by the judiciary into the exclusive legislative authority of Parliament, something the Supreme Court has consistently cautioned against. It is not the role of the court to create exceptions to the express intent of Parliament. If Parliament wishes to strike a different balance between environmental remediation and the security of creditors within bankruptcy, it can do so through the legislative process. Frustrating Parliament's clear intent in enacting s.14.06(7) by ignoring the provision's plain meaning stretches the scope of s.14.06 beyond the limits of what a court may read in.

See e.g. *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 CC 40 at para 32 (on separation of powers).

37 In conclusion, the purpose of the BIA, that of s.14.06, the grammatical and ordinary sense of s.14.06 and the scheme of s 14.06 all support a reading of the section that allows trustees to renounce property. GTL is entitled under the BIA to renounce the assets that it deems non-valuable as necessary to fulfill its role as a trustee.

B. Per the test in *Abitibi*, the Abandonment Orders and the obligation to post security are provable claims in bankruptcy

38 In *Redwater*, the AER: (i) issued the Abandonment Orders, directing GTL to carry out abandonment and remediation of the non-producing wells in accordance with the AER requirements; and (ii) refused to assent to the transfer of the licenses for the producing wells unless the non-producing wells were sold as well or security was posted. The requirement to post security indirectly aims for the same result as the Order by preventing GTL from selling non-valuable assets. Since neither is aimed at leaving the trustee out of pocket personally, it becomes clear that both effectively give the AER a super-priority on the proceeds of sale of the producing wells. The question for this court to answer is whether these two scenarios can be addressed per the test established in *Abitibi*. The answer is yes.

39 In *Northern Badger*, the Alberta Court of Appeal characterized regulatory obligations like the ones faced by Redwater not as debts to be paid to the regulator but as obligations under the general law of the province. In *Abitibi*, the Supreme Court re-examined *Northern Badger* and separated regulatory obligations at bankruptcy into two categories. Some are monetary in nature. They take their place alongside other monetary claims inside the insolvency process. Others are non-monetary; they are obligations under the general law of the province. They remain intact, following the estate beyond the bankruptcy process.

Northern Badger, *supra* para 1.

Abitibi, *supra* para 4 at para 26.

40 To distinguish between the two, the Court established the following three-pronged test:

(a) First, there must be a debt, a liability or an obligation to a creditor.

(b) Second, the debt, liability or obligation must be incurred before the debtor becomes bankrupt.

(c) Third, it must be possible to attach a monetary value to the debt, liability or obligation

Abitibi, *supra* para 4 at para 26.

41 Both the requirement to post security and the Abandonment Orders are debts. These debts were incurred before Redwater entered bankruptcy and this fact is not contested. It is possible to attach a monetary value to these debts.

(i) The AER is a creditor

(a) In accordance with Abitibi*, the Abandonment Orders are a debt owed by the estate to the AER, a creditor*

42 Per Martin J., *Abitibi* "cast the creditor's net widely" when it identified the provincial government as a creditor "as soon as it had exercised its enforcement powers against the debtor." *Abitibi* made clear that a government body enforcing a statutory obligation through a regulatory order is a creditor. The AER became a creditor when it ordered GTL to abandon the defunct wells in Redwater's estate. The text of the order itself is clear: "Should Redwater […] fail to abandon their respective properties […], the AER will, without further notice, use its process to have the properties abandoned. The AER will exercise all remedies available to it to recover costs from the liable parties."

Court of Appeal Reasons, *supra* para 6 at paras 186-187.

Abitibi, *supra* para 4 at para 27.

Redwater, *supra* para 2 at para 23.

(b) In accordance with Abitibi*, the order to post security is a debt owed by the estate to the AER, a creditor*

43 The requirement to post security within the LLR program also qualifies as a debt. In dissent, Martin J. found that when the AER insisted that the trustee post security in accordance with LLR requirements, it was acting more like a regulator than a creditor. Martin J. stated that the LLR program "does not fit comfortably" with the definition of creditor to the extent that it is

an ongoing obligation that is taken on by the licensee with full knowledge of the remediation obligations concurrent to the licence.

> Court of Appeal reasons, *supra* note 6 at para 187.

44 Respectfully, this distinction is artificial. The Abandonment Orders and the LLR are two means to the same end: remediation of the defunct wells using the revenue from the sale of the operating wells. It is telling that while both obligations exist independently of the bankruptcy process (general law of the province), the AER only activated them once the bankruptcy process had begun.

(c) The AER is not a "detached regulator"

45 When the AER, with full knowledge that the licensee's estate is under bankruptcy protection, makes license transfer conditional upon security being posted for the remediation of the defunct wells *as a corollary* to ordering the abandonment of those wells, it is not acting as "the detached regulator" or public enforcer issuing orders for the public good. On these facts, the AER seems to know that unless it intervenes, it will be left with a substantial debt.

> See *AbitibiBowater Inc. (Arrangement relatif à)*, 2010 QCCS 1261 at para 175 [*Abitibi* Trial Decision] for a distinction of a "detached regulator" from a creditor.

46 The AER manages all environmental protection and resource development in Alberta. The LLR is the mechanism available to the AER for giving resource companies sufficient financial flexibility while monitoring their environmental liabilities. Under the LLR, solvent companies don't need to post security. As a company's financial situation starts moving in the direction of insolvency, its asset-to-liability ratio deteriorates and it must then hand over liquidity to the AER, to re-establish the balance. Through this, it is clear that the LLR program is suboptimal as a means of guaranteeing that environmental remediation gets done or paid for by the licensee. As a framework for sustainable oil and gas development, the LLR is weak in comparison to systems in place elsewhere in Canada and around the world. Because the system is open-ended, allowing companies to avoid doing or financing clean-up unless and until they go bankrupt, it no surprise more and more un-reclaimed well sites are ending up as orphans under the care of the OWA.

> Alta. Reg. 45/2001, *supra* para 11.
>
> Benjamin Dachis, Blake Schaffer, et al, "All's Well that Ends Well: Addressing End-of-Life; Liabilities for Oil and Gas Wells," C.D. Howe Institute, Commentary No. 492 (2017), at 9.

Lucija Muehlenbachs, "80,000 Inactive Oil Wells: A Blessing or a Curse" online: (2017) 10:3 University of Calgary School of Public Policy SPP Briefing Paper, <https://journalhosting.ucalgary.ca/index.php/sppp/article/view/42617> at 3.

REDA, *supra* para 7.

47 The AER is Alberta's remediator of last resort. It follows that the AER has a very real interest in finding funds to cover end-of-life clean-up obligations at defunct oil and gas wells in the province. In the context of Redwater's bankruptcy, the AER is far from a disinterested regulator. It's a creditor with a clear reason for wanting a super-priority.

R. v. Ontario (Ministry of the Environment), *supra* para 3 at paras 184-185.

48 In sum, the clean-up orders and the obligation to post security are debts provable in bankruptcy per *Abitibi*.

(ii) The Abandonment Orders and the obligation to post security are monetary obligations

49 The third prong of the *Abitibi* test distinguishes whether the obligation is expressed in monetary terms or if it isn't, whether it meets the definition of a contingent liability.

Court of Appeal reasons, *supra* para 6 at para 74.

(a) Both the Abandonment Orders and the obligation to post a security deposit are monetary in nature

50 The requirement to post security can be expressed in monetary terms. In fact, nothing less than money is acceptable as security under Directive 006.

Directive 006, *supra* para 2.

51 The Abandonment Orders, although not orders to pay money, are "intrinsically financial." As explained earlier, the Abandonment Orders are just another means to the same end. To get the money to do the abandonment work the trustee has to sell the producing wells. In the words of the majority, "it is irrelevant whether Redwater's obligation to remediate the wells arises directly from a clean-up order, or indirectly from a directive which imposes financial consequences to the transfer of assets."

Redwater, *supra* para 2 at para 173.

Abitibi, *supra* para 4 at para 50.

Court of Appeal Reasons, *supra* para 6 at para 77.

(b) The third prong of the Abitibi *test is satisfied because the AER will remediate the defunct wells*

It is certain that the AER (or the OWA, on its behalf) will remediate the wells

52 Abandonment orders not expressed in monetary terms can nevertheless be treated as monetary claims if it is sufficiently certain that the regulator will ultimately undertake the remediation. The AER is expressly asking for money as a security to ensure that wells will be remediated and as a result has clearly stated its intention to remediate the wells subject to the orders.

Court of Appeal Reasons at para 80.

Abitibi, *supra* para 4 at para 50.

53 The AER and OWA are, for all intents and purposes, the same actor. The AER has delegated its responsibility to abandon orphan wells to the OWA. The OWA is partially funded by the AER, and is the only actor other than the licensees themselves that has a duty to remediate wells. The OWA's board includes representatives of the AER and Alberta Environment and Parks. The fact that the AER may not necessarily do the remediation itself is thus not an additional factor of uncertainty. The OWA is merely an entity to which the AER has delegated certain abandonment and reclamation responsibilities, and the OWA and AER collectively should be considered a single regulator for the purpose of remediation and the eventual claim of remediation costs. Regardless of whether the AER or the OWA perform the remediation, the AER would claim the debt.

Alta. Reg. 45/2001, *supra* para 11.

Court of Appeal Reasons, *supra* para 6 at para 22, 142.

The timing of the remediation is not a cause for uncertainty

54 The passing of time between a bankruptcy and site remediation by the OWA is not cause for uncertainty. Redwater is bankrupt and does not have the funds to do the abandonment. The OWA is the only actor with a mandate to clean up a well once the licensee goes bankrupt. The wells must be dealt with for the sake of the public. The situation is analogous to *Nortel* and *Northstar*, where some claims were found provable in bankruptcy because the regulator was the only actor left to repair the environmental damage. The money derived from the bankruptcy will necessarily serve this purpose. In the absence of another potential remediator, AER will have to

declare the wells orphans under s. 70(2) of the OFCA, resulting automatically in a debt owned by the Redwater estate to the AER under s 30(5) of the OGCA.

Redwater, *supra* para 2 at para 172.
OGCA, *supra* para 5, ss 30(5) and 70(2).
Nortel Networks Corporation (Re), 2012 ONSC 1213.
Northstar Aerospace Inc (Re), 2013 ONCA 600.

Certainty is a question of fact; this Court should defer to the trial judge

55 Certainty is a question of fact. Judge Wittmann evaluated the facts in the *Redwater* case with full knowledge of the *Abitibi* decision and concluded that, as a matter of fact, remediation was certain to happen. On this point, no one is better situated than Judge Wittmann. The court should defer to his finding.

Redwater, *supra* para 2 at para 168-173.

(c) The SCC has in the past recognized similar regulatory obligations as claims provable in bankruptcy

56 Finally, to understand how the obligation to post security for well remediation is viewed in light of the BIA, it helps to look at past decisions of this court. For example, in *Moloney* and its sister case, *ETR 407*, the Supreme Court characterized an order for payment of a traffic violation as provable in bankruptcy. The Court found that the regulator was attempting to bypass the bankruptcy process by collecting on a fine that was, in pith and substance, a monetary claim. The fact that the fine was part of a regulatory system that seeks to curb dangerous driving does not change the fact that the fine was a claim provable in the driver's bankruptcy.

Moloney, *supra* para 19 at paras 54-55.
407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy), 2015 SCC 52.

57 In sum, the three parts of the Abitibi test are met. Both the LLR obligations and the Abandonment Orders are debts owed to the AER or will translate into a monetary claim against the estate once the AER remediates the wells. Both the LLR obligations and the Abandonment Orders are provable claims in bankruptcy.

C. The Abandonment Orders and the obligation to pay a deposit per the LLR frustrate the purpose of the BIA and create an express conflict

58 Under the federal paramountcy doctrine, where there is a conflict between validly enacted provincial and federal statutes, the federal statute will prevail, and the provincial law will be rendered inoperative to the extent of the inconsistency. Two types of conflicts can engage the paramountcy doctrine: a) where the provincial law frustrates the purpose of the federal law (frustration of purpose), or b) where it is impossible to comply with both at once (operational conflict). Applying this doctrine, Alberta's requirements for site remediation and posting security must be rendered inoperative for reasons both of frustration of purpose of the BIA and for impossibility of dual compliance.

> *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2005 SCC 13 (CanLII), [2005] 1 SCR 188 at para 11.
> *Canadian Western Bank v Alberta*, 2007 SCC 22 (CanLII) at para 69.
> *Quebec v Canadian Owners and Pilots Assn*, 2010 SCC 39, 2 SCR 536 62-66.
> *Multiple Access Ltd v McCutcheon*, 1982 CanLII 55 (SCC), [1982] 2 SCR 161, 138 DLR (3d) 1.

(i) Alberta's legislation frustrates the purpose of the BIA, both in general and specifically for s.14.06

59 This Court has held that in a paramountcy analysis, Parliament's intended purpose in enacting a piece of legislation must not be "overbroad." The purpose of the BIA is to carry out the responsibility assigned to Parliament by the Constitution, to legislate on the topic of bankruptcy and insolvency.

> *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd* 2015 SCC 53 (CanLII) at para 23.

60 In a bankruptcy context, the OGCA and PLA work against the objectives of the BIA. S. 1 of the OGCA and s.1 of the PLA render the treatment of creditors in bankruptcy inequitable.

> OGCA, *supra* para 5, ss1(1)(cc), 27-30.
> PLA, *supra* para 5, ss 1(1)(n), 82.

61 By including trustees in the definition of "licensee," Alberta's regime reorders the priority of claims set forth in s.136 of the BIA. Provinces have no such authority, and this case is no exception. Provinces are not permitted to do indirectly what they cannot do directly. This means that Alberta cannot make up for the absence of the desired super-priority by falling back on its "regulator" role and letting its own statutes take the money out of the estate.

BIA, *supra* para 1, s.136.

Husky Oil Operations Ltd v Minister of National Revenue, 1995 CanLII 69 (SCC), [1995] 3 SCR 453, 107 WAC 81 at para 40 [*Husky Oil*].

Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd., 2007 ONCA 600 (CanLII).

Moloney, *supra* para 19, quoting *Husky Oil* at para 39.

(ii) Alberta's regime is inoperative to the extent that it creates an express conflict

62 The obligation to post security or remediate wells during bankruptcy puts Alberta's statutes in an operational conflict with the BIA. To this extent, the Alberta's regulatory regime is inoperative. The Supreme Court has found that an operational conflict does not need to be limited to the text of the statutes; it hinges instead on "proper meaning of the provision that remains central to the analysis, not really its literal sense" (*Moloney*).

Moloney, *supra* para 19 at para 23.

63 The conflict here comes from the reordering of the priorities for paying claims in bankruptcy. The effect of Alberta's regime, taken together from regulations and legislation and enforced by the AER, is to create a super-priority for environmental claims in bankruptcy. The BIA states the order of priority of claims (s136), in which secured claims benefit from a priority rank and all other claims provable in bankruptcy, including environmental obligations, are classified as unsecured claims. The narrow exception to this priority order set in s.14.06(7) of the BIA, which for the reasons mentioned above, does not apply here.

BIA *supra* para 1, ss14.06(7), 136.

64 Alberta law would have GTL, as licensee, comply with Redwater's outstanding environmental orders first. S.136 tells GTL as trustee to pay ATB, a secured creditor, first. This conundrum meets the threshold established by the Court in *Moloney* for finding an operational conflict and supports the application of federal paramountcy in this matter.

(iii) The doctrine of cooperative federalism does not impact this appeal

65 The Appellants remind the Court that there is a high threshold for the application of the paramountcy doctrine that warrants caution. The Respondent agrees. This is in line with Supreme Court jurisprudence that emphasizes the need for restraint. To apply the paramountcy

doctrine in cases of minor conflict between valid statutes would fundamentally undermine the healthy and balanced operation of the Canadian federation.

Willms & Shier Moot Team 13 Appellant Factum (2019) at para 61.

Lemare Logging, *supra* para 59 at para 21.

66 A "presumption of constitutionality" has been developed as a first stage before applying paramountcy. A "harmonious" approach to interpretation is preferred, in line with cooperative federalism. Where it is possible to allow valid laws to co-exist, this should be the result. However, this presumption is rebutted where there is an actual conflict between validly enacted statutes based on their proper interpretation. The conflict must be severe enough to justify the serious result of rendering a valid provincial law inoperative.

Hogg, Peter W. *Constitutional law of Canada*, 5th ed. supplemented ed. (Scarborough, Ont: Thomson/Carswell, 2007), s16.3(a).

Quebec (Attorney General) v. Lacombe, 2010 SCC 38, [2010] 2 S.C.R. 453 at para 118.

Moloney, *supra* para 19 at para 27.

67 The conflict between the BIA and the OGCA meets this threshold. The OGCA and PLA, read together, give rise to an impermissible interference with the operation of the BIA, which frustrates the attainment of its legislative purpose. While it would be preferable to read the provisions of these acts in a manner that finds harmonious co-operation, it is not possible. Allowing the continued operation of Alberta's licensing provisions that conflict with BIA s.136 would take certainty and fairness out of bankruptcy.

BIA, *supra* para 1, s.136.

D. Conclusion

68 The Respondent submits that both questions at issue in this case, namely whether the Court of Appeal erred in finding the end-of-life claims provable in bankruptcy and whether they frustrate the BIA, should be answered in the negative.

PART IV -- SUBMISSIONS IN SUPPORT OF COSTS

69 GTL requests its costs of this appeal.

PART V -- ORDER SOUGHT

70 GTL respectfully requests that the appeal be dismissed with costs.

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

_____
Lucas Mathieu

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Julia Redmond

Counsel for the Respondent
Grant Thornton Limited

PART VI -- TABLE OF AUTHORITIES

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ORPHAN WELL ASSOCIATION and ALBERTA ENERGY REGULATOR
APPELLANTS
(Appellants)

-and-

GRANT THORNTON LIMITED

RESPONDENT
(Respondent)

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

SUPREME ENVIRONMENTAL MOOT
COURT OF CANADA

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