

# THE PROBLEM

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The competition case is an appeal to the Supreme Environmental Moot Court of Canada of the Alberta Court of Appeal's decision in *Orphan Well Association v Grant Thornton Limited*, 2017 ABCA 124. The Supreme Environmental Moot Court of Canada is a Canadian appellate court of last resort. The doctrines of precedent and *stare decisis* apply as if it were the Supreme Court of Canada.

## INSTRUCTIONS:

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Redwater Energy Corporation ("Redwater") was a publically traded oil and gas company in Alberta. Redwater held 127 licences issued by the Alberta Energy Regulator ("AER"), including 84 well licences, 7 facility licences, and 36 pipeline licences.

The Alberta Treasury Branches, Redwater's principal secured lender, demanded repayment of Redwater's debts and sought a bankruptcy order against Redwater. Grant Thornton Limited ("the Trustee") was appointed as receiver and trustee for enforcement proceedings under the federal *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("BIA").

Alberta legislation mandates that licencees and trustees perform "end-of-life obligations" for licenced properties, including closure and environmental remediation. Where no licencee or trustee is financially capable of performing the prescribed end-of-life obligations, wells are designated as "orphan wells" under Alberta's *Oil and Gas Conservation Act*, RSA 2000, c O-6, s 70 ("OGCA").

The remediation costs for a number of Redwater's properties exceeded the value of those properties. Because these assets were unprofitable, the Trustee disclaimed 107 licenced properties with onerous environmental abandonment costs. The Trustee took possession of the remaining licenced properties that had positive net values.

The AER ordered the Trustee to decommission the disclaimed wells prior to distributing funds to Redwater's creditors. The Trustee indicated that it did not intend to comply. The AER and the Orphan Well Association ("OWA") brought applications to the Court. The AER and OWA sought an order requiring the Trustee to: (1) comply with the AER orders, and (2) invalidate the Trustee's disclaimer of the wells. The Trustee brought a cross application seeking approval to exclude the disclaimed licenced properties from the sale of Redwater's assets.

Upon hearing the joint application brought by the AER and the OWA, and the cross-application by the Trustee, the Court applied the doctrine of paramountcy

and held that certain sections of the OGCA and the Alberta *Pipeline Act*, RSA 2000, c P-15 (“PA”) operationally conflicted with the BIA, s 14.06. The Court found that the OGCA and PA frustrated the purpose of the BIA.

On appeal, the Alberta Court of Appeal upheld the decision of the Applications Judge (2-1). The Court of Appeal found that the AER’s orders were subject to bankruptcy proceedings and did not have a super priority. Further, the Court of Appeal agreed that the Alberta regulatory scheme both operationally conflicted with and frustrated the purposes of the BIA, which include prioritizing claims against insolvent corporations.

The AER and the OWA appealed the decision of the Alberta Court of Appeal.

The Supreme Environmental Moot Court of Canada granted leave to appeal the decision of the Alberta Court of Appeal on the following questions:

- 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?

For the purposes of this Moot, the OWA and the AER have jointly appealed the decision of the Alberta Court of Appeal and have jointly retained counsel. The Trustee is responding to the Appeal.

## APPENDIX A:

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The appeal of the decision in *Orphan Well Association v Grant Thornton Limited*, 2017 ABCA 124 was heard by the Supreme Court of Canada (“SCC”) on February 15, 2018. The SCC has not yet released its decision on the appeal.

The instructions below apply to all parties if the SCC releases its appeal decision prior to Oral Argument on March 2, 2019.

- ◆ If the SCC releases its decision before Oral Argument, the parties will still moot an appeal of the Alberta Court of Appeal decision. The parties will not moot an appeal of the SCC decision.
- ◆ If the SCC releases its decision before facta are due, parties are expected to incorporate the SCC decision into their facta to the extent reasonably possible, depending on how close the decision is released to the facta due dates.
- ◆ If the SCC releases its decision after facta are due, parties will incorporate the SCC decision into their oral arguments to the extent reasonably possible.

The Supreme Environmental Moot Court of Canada is not bound by SCC decisions. Parties should treat SCC decisions as persuasive, but non-binding authorities that may be pleaded in support of or against the parties’ positions.