S.C.C Court File No.

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

ORPHAN WELL ASSOCIATION AND ALBERTA ENERGY REGULATOR

APPLICANTS
(Appellants)

-and-

GRANT THORNTON LIMITED AND ALBERTA TREASURY BRANCHES

RESPONDENTS
(Respondents)

APPLICATION FOR LEAVE TO APPEAL AND MOTION TO EXPEDITE
(ORPHAN WELL ASSOCIATION AND ALBERTA ENERGY REGULATOR, APPLICANTS)
(Pursuant to S.40 of the *Supreme Court Act*, R.S.C. 1985, c.S-26)

ALBERTA ENERGY REGULATOR
1000, 250 5 St. SW
Calgary, AB T2P 0R4

Keely R. Cameron
Patricia Johnston, Q.C.
Tel: 403-476-9381 / 403-297-4339
Fax: 403-297-7031
Email: keely.cameron@aer.ca
patricia.johnston@aer.ca

BENNETT JONES LLP
4500, 855 2 Ave SW
Calgary, AB T2P 0E1

Ken Lenz Q.C.
Michael W. Selnes
Tel: 403-298-3317 / 403-298-3311
Fax:
Email: lenzk@bennettjones.com
selnesm@bennettjones.com

Counsel for the Applicants, Orphan Well Association and Alberta Energy Regulator

SUPREME ADVOCACY LLP

340 Gilmour Street, Suite 100
Ottawa, ON K2P 0R3

Marie-France Major
Tel: 613-695-8855
Fax: 613-695-8560
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for counsel for the Applicants

GOWLING WLG (CANADA) LLP
1600, 421 7 Ave SW
Calgary, AB T2P 4K9

Tom Cumming
Tel: 403-298-1938
Fax: 403-695-3538
Email: tom.cumming@gowlingwlg.com

CASSELS BROCK & BLACKWELL LLP
Suite 1250, Millennium Tower
440 2 Ave SW
Calgary, AB T2P 5E9

Jeffrey Oliver
Tel: 403-351-2921
Fax: 403-648-1151
Email: joliver@casselsbrock.com

Counsel for the Respondent, Grant Thornton Limited

BLAKE, CASSELS & GRAYDON LLP
3500, 855 2 St. SW
Calgary, AB T2P 4J8

Kelly Bourassa
Ryan Zahara
Telephone: 403-260-9697/403-260-9628
Fax:
Email:kelly.bourassa@blakes.com
ryan.zahara@blakes.com

Counsel for the Respondent, Alberta Treasury Branches

ATTORNEY GENERAL OF ALBERTA
ALBERTA JUSTICE AND SOLICITOR GENERAL
9th Floor, John E. Brownlee Building
10364 – 97 Street
Edmonton, AB T5J 3W7

Lillian Riczu
Lisa Semenchuk
Tel: 780-422-9114
Fax: 780-425-0307
Email:Lillian.riczu@gov.ab.ca
Lisa.Semenchuk@gov.ab.ca

Counsel for the Minister of Justice and Solicitor General of Alberta, Intervenor in Court of Appeal

JUSTICE CANADA
Prairie Region, EPCOR Tower
300, 10423—101 Street NW
Edmonton, AB T5H 0E7

B. Hughson
Tel: 204-983-2391
Fax: 204-983-3636
Email: bhughson@justice.gc.ca

Counsel for the Attorney General of Canada, Intervenor in Court of Appeal

MINISTRY OF JUSTICE (SK)
820 — 1874 Scarth Street
Regina, SK S4P 4B3

James Fyfe
Tel: 306-787-7886
Fax: 306-787-9111
Email:james.fyfe@gov.sk.ca

Counsel for the Attorney General for Saskatchewan, Intervenor in Court of Appeal

MINISTRY OF JUSTICE (BC)
400-1675 Douglas St.
PO Box 9289, Stn. Prov. Govt.
Victoria, British Columbia V8W 9J7

Aaron Welch
Phone:250-356-8589
Fax:250-387-0700
Email: aaron.welch@gov.bc.ca

Counsel for British Columbia (Natural Gas Development) and the British Columbia Oil and Gas Commission, Intervenor in Court of Appeal

MEMORANDUM OF ARGUMENT OF THE APPLICANTS

PART I- OVERVIEW AND STATEMENT OF FACTS

Overview

1. The development of Canada's oil and gas resources has played and continues to play a critical role in Canada's economy. Given the impact of such development on the environment, traditional land use, and the landowners on whose property development takes place, regulations are necessary to ensure that exploration and production of oil and gas occurs in a manner that protects the public and the environment. This is achieved by enforcing requirements that ensure responsible exploration and production of a public resource, including ensuring abandonment and reclamation once development is complete. It is appropriate that this cleanup occurs at the expense of the entity that caused the pollution to ensure that development continues to be of net benefit for all Canadians.

2. In Alberta alone, over 300 000 oil and gas licences to operate have been issued. Included in this number are more than 167 000 operating wells, 30 000 operating facilities, and 422 000 kilometres of oil and gas pipelines. These licences include *inchoate* environmental liabilities estimated at over $30 billion and impact millions of acres of land.

3. The issues raised in this application include (1) whether the interests of creditors in an insolvency of an oil and gas company trump safety and environmental obligations that were known and agreed to at the time of licensing; and (2) the ability of a province to exercise its exclusive jurisdiction to regulate natural resources during insolvency proceedings.

4. With over 75 years of experience, the Alberta Energy Regulator ("**AER**") is the single regulator of all upstream oil and gas activities in the Province of Alberta. The AER's mandate includes providing "efficient, safe, orderly and environmentally responsible development of energy resources in Alberta."[1]

[1] *Responsible Energy Development Act,* SA 2012, c R-17.3 ("*REDA*"), section 2.

5. A decision of the majority of the Alberta Court of Appeal—*Orphan Well Association v. Grant Thornton Limited*[2] ("***ABCA Decision***")—has frustrated the ability of the AER to carry out its mandate. The majority's decision disregarded the division of powers, undermined the notion of cooperative federalism and held that the *Bankruptcy and Insolvency Act*[3] ("**BIA**") permits receivers and trustees to renounce an insolvent debtor's interest in uneconomic licensed sites for the benefit of creditors. The majority also found that the end-of-life obligations associated with the renounced assets constitute a provable claim and that the AER was not permitted to apply its requirements during an insolvency where they would negatively impact the value of the retained assets of the estate. These findings were made notwithstanding Alberta case law and legislation, which provide that a licensee, which is defined to include a receiver or trustee, is responsible for all abandonment, remediation, and reclamation (end-of-life) obligations related to all of its licensed assets. It was also notwithstanding the majority's finding that the test set out by this honourable court in *Newfoundland and Labrador v. AbitibiBowater Inc.* ("***Abitibi***") [4] was not met in the "narrow and technical sense."[5] These findings improperly impair the ability of Alberta to regulate property, civil rights and energy development and do not represent a state of the law that is best for Canada and Canadian citizens.

6. The majority's decision permits oil and gas companies to avoid the agreed-to end-of-life obligations that were the basis upon which exploration and production was permitted in the first instance. It enables receivers and trustees to pick and choose which requirements they are prepared to comply with. It creates the potential for licensees to threaten and choose insolvency and renouncements over compliance as the decision permits renouncements of sites and their obligations for the economic benefit of creditors. This enables the transfer of consequences, for risks knowingly undertaken by sophisticated actors such as lenders, to citizens with no choice in the matter – those whose land is burdened with the development, those who live in proximity to the development and those that pay provincial taxes.

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[2] *Orphan Well Association v. Grant Thornton Limited,* 2017 ABCA 124 ("*ABCA* Decision")**.[TAB 3C]**

[3] *Bankruptcy and Insolvency Act,* RSC 1985, c B-3

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

[5] *ABCA Decision, supra* at para. 76. **[TAB 3C]**

7. The overall effect of the decision is that, despite having exclusive jurisdiction to regulate energy development under the constitution,[6] provinces are effectively prevented from regulating oil and gas companies in insolvency proceedings. Their ability to regulate companies outside of insolvency is also impaired given that there is now a clear path and option for walking away from liabilities.

8. The majority's decision replaces the polluter-pay principle with the practice of having third-party industry members and, potentially, the public foot the bill for addressing these public duties. It also places insolvency professionals, debtors, and creditors in a better position than they would otherwise be in, and it acts to incentivize insolvencies.

9. These issues are significant to Canada because of the implications of the decision on provinces, insolvencies, and the environment not only in relation to oil and gas but in other regulated industries as well. The importance of these issues was not only recognized by the lower courts but is also evidenced by the fact that even at the appeal level other provinces intervened.

10. It is of national importance that the judiciary protect the right of Canadians to a natural environment free of pollution[7] by safeguarding the right of provinces to exercise their exclusive jurisdiction over property rights, civil rights, and the development, conservation, and management of non-renewable natural resources.

Statement of Facts

11. The oil and gas industry is the main driver of the Alberta economy. To become an oil and gas producer, a number of authorizations are required, including mineral leases, surface leases, and AER licences and approvals. In most cases, mineral leases are granted by the Alberta Crown. Where the Crown provides a lease, one of the terms is that the grantee will abide by all relevant laws governing extraction. Surface leases are usually on land owned by private landowners and are required to provide a place for the infrastructure needed to carry out operations.

12. In most cases, development occurs on private land often owned by farmers and ranchers. In some cases the land is owned by the Crown and may be land used by indigenous persons for

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[6] *Constitution Act, 1867*, (UK), 30 & 31 Vict, c 3, section 92(A).
[7] *Ontario v. Canadian Pacific Ltd.*, [1995] 2 SCR 1031, 24 OR (3d) 454 at para. 55.

carrying out traditional land-use activities. In some cases these landowners voluntarily consent to the development occurring on their land. In other cases it may occur despite their objections as a result of regulatory findings that the public interest in permitting the development exceeds the temporary inconvenience of approving the activity. In all cases it is intended that disruption will be minimal and temporary and that sites will be properly abandoned and reclaimed. Abandonment and reclamation are necessary for ensuring that risks to public health and safety are minimized and that environmental impacts are addressed so that landowners and users may resume use of the land.[8]

13. In 1991, the Alberta Court of Appeal issued its decision in *PanAmericana de Bienese y Servicios v. Northern Badger Oil & Gas Limited*[9] ("***Northern Badger***"). *Northern Badger* recognized the duty to abandon as a duty owed to the public and found that "the process of abandonment of oil and gas wells is part of the general law of Alberta enacted to protect the environment and for the health and safety of all citizens."[10] It also found that these end-of-life abandonment obligations are an inherent part of the issuance of a well licence and are not provable claims in bankruptcy.

14. This ruling was and is consistent with the foundation upon which the oil and gas regulatory regime in not only Alberta but in other provinces, including Saskatchewan and British Columbia, has been built. This robust, full-life-cycle regime requires companies as a condition of approval to ensure that their end-of-life obligations will be met. These obligations are anticipated, and the costs associated with them can generally be calculated throughout the life cycle of the operations.

15. Consistent with the polluter-pays principle, the AER's cradle-to-grave regulatory approach includes requirements to ensure that end-of-life obligations are addressed by the parties responsible for them. Such requirements include the AER's licensee liability rating program ("**LLR Program**") and its transfer requirements. Both have existed for several years and are intended to prevent costs associated with end-of-life obligations from being borne by the public

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[8] *ABCA Decision, supra* at para 118–121. **[TAB 3C]**
[9] *PanAmericana de Bienes y Servicios v. Northern Badger Oil & Gas Limited*, 1991 ABCA 181 ("*Northern Badger*").
[10] *Northern Badger, supra* at para. 21.

of Alberta and to minimize the risk to the Orphan Fund administered by the Orphan Well Association ("**OWA**").[11] The OWA was established as a last resort to address end-of-life obligations associated with oil and gas sites that are true orphans, not those that are simply unprofitable. The OWA is primarily funded by industry, and as of September 2015 it had about 695 wells to be abandoned and 503 sites to be reclaimed, which it aspires to complete in 10 to 12 years.[12] As of the date of this application, these numbers have more than doubled.

16. The LLR Program is the primary mechanism used by the AER to ensure that licensees will address their end-of-life obligations. The program applies throughout the life cycle of a licensee's operations. The program takes a holistic approach to a licensee's operations, viewing its sites collectively as a "package" and requiring the licensee to ensure that it has sufficient oil and gas operating assets to address its liabilities. Each licensee has a liability management ratio ("**LMR**") that is calculated monthly and at the time of transfer (sale) to assess whether its operations produce enough to cover its liabilities. Where a licensee's LMR drops below 1.0, the licensee is required to improve its LMR through any one or more of the following: (i) conducting abandonment work, which will reduce remaining deemed liabilities; (ii) transferring additional assets or liabilities to another AER licensee; or (iii) posting security (the shortfall between the deemed assets and liabilities).[13]

17. A licensee's LMR is also considered when the AER reviews an application to transfer licences. As part of a licence transfer application, in addition to reviewing compliance histories and other factors, the AER reviews the effects of a proposed transfer on both parties. Under legislation, the AER has full unfettered discretion to grant or withhold a licence both at the initial stage and as part of the transfer process. The AER does not typically permit transfers that will result in any party's LMR falling below 1.0 unless security is posted; this ensures that sufficient funds are available to address end-of-life obligations.[14]

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[11] *Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process* (Directive 006).
[12] *ABCA Decision, supra* at para. 144. **[TAB 3C]**
[13] *ABCA Decision, supra* at para. 135–136. **[TAB 3C]**
[14] *ABCA Decision, supra* at para. 134–137. **[TAB 3C]**

18. All oil and gas companies and lenders know these regulatory requirements and end-of-life obligations. The AER's LLR Program and requirements apply to all licensees regardless of whether a licensee is insolvent. Licensee is defined to include a receiver or trustee, thereby ensuring that there remains a party responsible for the care and custody of licensed sites, for site safety, and for emergency response.[15]

A The Redwater Insolvency

19. Redwater held 127 AER issued licenses consisting of 84 well licences, 7 facility licences, and 36 pipeline licences.[16]

20. In 2013, Alberta Treasury Branches ("**ATB**") advanced loan funds to Redwater pursuant to commitment letters dated January 31, 2013, and August 19, 2013. ATB lent funds to Redwater with full knowledge of the end-of-life obligations associated with Redwater's assets. ATB's "Industry Knowledge Guide – Oil and Gas Extraction" notes "[t]the costs for the borrower of abandoning a well and returning the well and land site to their pre-drilled condition can be significant…Abandonment liability and calculations are required in third party engineering reports." The Redwater third-party reports included these calculations, and ATB's representative confirmed that ATB considers abandonment and reclamation liabilities in its calculation of a customer's borrowing base.[17]

21. In 2014, Redwater experienced financial difficulties after a number of acquisitions and unsuccessful drilling which resulted in Redwater and ATB agreeing that Redwater would sell its assets. While the sale resulted in offers, none of the offers would result in full repayment of Redwater's loan. On May 12, 2015, ATB applied, successfully, for the appointment of a receiver over all of Redwater's assets.[18]

22. Upon notice of the appointment, and consistent with the *Northern Badger* decision, the AER advised that it was not a creditor and that Redwater's environmental obligations were unaffected by the insolvency. The AER also took the position that the receiver was legally

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[15] *ABCA Decision, supra* at para 138. **[TAB 3C]**
[16] *ABCA Decision, supra* at para. 139. **[TAB 3C]**
[17] *ABCA Decision, supra* at para 141. **[TAB 3C]**
[18] *Redwater Energy Corp. (Re),* 2016 ABQB 278 ("ABQB Decision"), paras. 10–12**. [TAB 3A]**

obligated to address the environmental obligations of Redwater before distributing funds to creditors, and the AER warned that it would not approve transfers unless it was satisfied that both Redwater and the receiver could fulfill their environmental obligations.[19]

23. On July 3, 2015, the receiver advised through its counsel that it was only taking possession and control of 20 of Redwater's 127 AER-licensed sites. Specifically, the receiver took possession of Redwater's most valuable assets and did not take possession of (i.e., it renounced) the less valuable ones. The receiver's position was that because of its renouncement, the AER could not apply its LMR program when the receiver went to sell the assets it retained.

24. As a result of the receiver's refusal to acknowledge responsibility for care and custody and related statutory obligations of the renounced properties, the AER issued closure and abandonment orders for the sites renounced by the receiver.

25. Accompanying the closure and abandonment orders was the AER's standard cover letter dated July 15, 2015. The letter states that failure to comply with the orders will result in the AER using its enforcement process and powers to require responsible parties to abandon the properties and that the AER will exercise all remedies available to it to recover costs from Redwater. In its evidence before the court, the AER stated that it is extremely rare for the AER to conduct abandonment of AER licensed sites and that it will only do so where it has exhausted all available enforcement options and where there remains a financially viable licensee or responsible person who has not conducted the abandonment work. The AER also advised that it did not anticipate nor did it intend to perform any abandonment work at any of Redwater's AER-licensed sites.

26. On October 28, 2015, a bankruptcy order was issued for Redwater appointing the receiver as trustee. The previously renounced assets were renounced for a second time. The AER and OWA applied to have the renouncements declared void and to compel the receiver and trustee to comply with the environmental orders. The receiver and trustee brought a cross

[19] *ABCA Decision, supra* at para. 5. [**TAB 3C]**

application for approval of its sales process and challenged the constitutionality of the positions of the AER and OWA.[20]

B Decision of the Court of Queen's Bench

27. On May 19, 2016, Chief Justice Wittmann of the Alberta Court of Queen's Bench released his reasons for judgment, dismissing the applications of the AER and OWA and awarding judgment in favour of the receiver/trustee and ATB ("***ABQB Decision***").

28. Chief Justice Wittmann held that a trustee can renounce licensed assets pursuant to section 14.06 of the *BIA* and paragraph 3(a) of the receivership order, pursuant to which the trustee only took possession and control of certain AER-licensed assets. Given this finding, he found that there was an operational conflict between the *BIA* and provisions under provincial legislation that deem a receiver manager/trustee to be a licensee and to assume environmental liabilities, including compliance with abandonment orders.[21]

29. Chief Justice Wittmann also proceeded to apply the three-part test set out in *Abitibi* to determine whether in the alternative, the AER's abandonment orders are monetary claims as opposed to regulatory obligations. He found that in the narrow and technical sense it was not sufficiently certain that the AER would carry out the abandonment work. The evidence was that the sites would likely be deemed to be orphans and that they may be addressed by the OWA at some future time. He also found that the fact that compliance with AER requirements required payment or posting of security frustrated the distribution scheme provided for under the BIA. He also found that application of the AER's transfer requirements, specifically consideration of a party's LMR, was contrary to the *BIA* and that the AER is an "enforcing authority clothed as a creditor."[22]

C Decision of the Court of Appeal

30. The majority of the Court of Appeal upheld the reasoning of Justice Wittmann, which focused on the rights of secured lenders to enforce security in a predictable and profitable manner. The majority found that section 14.06(4) of the *BIA* does not limit renouncement to

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[20] *ABCA Decision, supra* at para. 8. **[TAB 3C]**
[21] *ABQB Decision, supra* at paras. 150–156. **[TAB 3A]**
[22] *ABQB Decision, supra* at para. 173–178. **[TAB 3A]**

situations in which there are concerns about personal liability and that while AER licences are permissive, the necessary mineral lease constitutes a *profit a prendre* that is an interest in real property and therefore subject to section 14.06. The majority also found that the 1997 amendments to section 14.06 of the *BIA* and the subsequent decision in *Abitibi* overruled *Northern Badger*. Finally, the majority held that the *BIA* takes precedence over provincial legislation in the event of a conflict and found that "financial conditions" imposed by the AER disrupt the priority claims set out in the *BIA.*

31. In dissent, Justice Martin, relied in part on the principles of cooperative federalism, to conclude that there was no conflict. Justice Martin emphasized the importance of interpreting federal and provincial laws as existing harmoniously where possible, and in the absence of a clear conflict, she found that the doctrine of paramountcy would not render provincial law inoperative.

32. Rather than premise her analysis with the assumption that licensing obligations are debts, she correctly framed the issue as, "given Alberta's exclusive jurisdiction to regulate its oil and gas resources, do the licence obligations created by provincial legislation conflict with or frustrate the scheme of priorities set out in the *BIA*?" She found that there was no conflict or frustration and that the schemes can continue to coexist.[23]

33. Justice Martin held that *Northern Badger* has not been overruled, and she reaffirmed that end-of-life obligations imposed in return for access to a public resource are a public duty owed to citizens.[24] In reaching this finding, she noted that Chief Justice McLachlin in *Abitibi* cited *Northern Badger* as an example of regulatory obligations that are part of the general law that survive restructuring.[25]

34. Justice Martin found that section 14.06 could not be used to avoid environmental obligations in the oil and gas context because licences are not real property. She noted that section 14.06 creates a *quid pro quo* in which a super-priority in favour of the Crown is created over real property that the Crown remediates. As this cannot occur for oil and gas wells because

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[23] *ABCA Decision, supra* para. 112. **[TAB 3C]**
[24] *ABCA Decision, supra* at paras. 171-174. **[TAB 3C]**
[25] *ABCA Decision, supra* at para. 171[TAB 3C]; *Abitibi, supra* at paras. 70-74.

the land if remediated by the Crown is actually owned either by the Crown already or by a third-party landowner, she held that section 14.06 was not intended to apply to Alberta's regulatory environment for oil and gas wells. Therefore, even if section 14.06 allows for the renouncement of some environmental obligation, it does not allow for the broad disclaimer rights enabled by the *ABQB Decision*.

35. She also emphasized that allowing trustees or receivers to pick and choose when they will comply with valid and generally applicable provincial law would be a power so extraordinary that it would require clear and express articulation.

PART II STATEMENT OF ISSUES

36. The issues raised by the lower courts' decisions as set out more fully in the notice of application for leave to appeal, justify the granting of leave to appeal because they raise the following issues of national and public importance:

(a) Given the exclusive jurisdiction of provinces to regulate their natural resources, do regulatory obligations created by provincial legislation conflict with or frustrate the scheme of priorities set out in the *BIA*?

(b) How is section 14.06(4) of the *BIA* to be interpreted? Does it enable a receiver or trustee to pick and choose which provincial laws it will comply with?

(c) Are end-of-life obligations associated with oil and gas development also duties owed to the public?

37. The Applicants also submit that constitutional questions are engaged by the *ABCA Decision* which further demonstrates the public importance of this matter. The Applicants propose the following constitutional questions:

(a) Does sections 1(1)(cc), 27, 29, 30, and 106 of the *Oil and Gas Conservation Act*, RSA 2000, c O-6, sections 1(1)(n), 23, 25, 26, and 51 of the *Pipeline Act*, RSA 2000, c P-15, Article 6 of *Directive 006: Licensee Liability Rating (LLR) Program and License Transfer Process* ("**Directive 006**") and Article 4, 8, and 10 of Appendix 2 of Directive 006 conflict with or frustrate the powers enumerated under section 14.06 of the *Bankruptcy and*

Insolvency Act, RSC, c B-3 (the "***BIA***") such as to make the provincial law inoperative by virtue of the doctrine of paramountcy?

(b) Does sections 1(1)(cc), 27, 29, 30, and 106 of the *Oil and Gas Conservation Act*, RSA 2000, c O-6, sections 1(1)(n), 23, 25, 26, and 51 of the *Pipeline Act*, RSA 2000, c P-15, Article 6 of *Directive 006* and Article 4, 8, and 10 of Appendix 2 of Directive 006 established pursuant to Alberta's exclusive jurisdiction to regulate its natural resources established under section 92A(1) of the *Constitution Act*, 1867, 30 & 31 Vict, c 3 (the "***Constitutional Act***") conflict with or frustrate the scheme of priorities enumerated under section 136 of the *BIA* such as to make the provincial law inoperative by virtue of the doctrine of paramountcy?

(c) Does section 14.06 of the *BIA*, as interpreted by the Alberta Court of Appeal, impermissibly impair the core provincial jurisdiction and legislative authority to regulate natural resources pursuant to section 92(13) or 92A of the *Constitution Act* 1867 such as to make the federal law inapplicable by virtue of the doctrine of interjurisdictional immunity?

PART III STATEMENT OF ARGUMENT

A These are Issues of Public and National Importance

38. This case raises issues of public and national importance. The importance of the case was recognized by Chief Justice Wittmann in the *ABQB Decision*. He noted that the issues raised and the potential environmental and financial repercussions of his decision are important to the energy industry, the financial industry, and the public. He also recognized the need for clarification regarding the protection of receivers and trustees, their ability to sell and renounce licensed assets, and the rights and priorities of creditors in such circumstances.[26]

39. The strong dissent of Justice Martin in the *ABCA Decision* demonstrates that this is a complex issue on which there is no consensus. Accordingly, clarity is required not only for the industries noted above but for all regulated industries that may be affected by this precedent.

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[26] *ABQB Decision, supra* at para 1. **[TAB 3A]**

40. Given the implications of the *ABCA Decision* on the ability of provinces to regulate matters within their exclusive jurisdictions and the effects of the *ABCA Decision* on both the environment and the public who may bear some of the costs and loss of use of their lands as a result, it is critical that the decision on this matter be correct.

41. Further, the questions at issue on this appeal meet the criteria of public importance as they engage constitutional questions, raise a novel point of law and involves questions of legal interpretation that will have far reaching impacts on Canadians.

B The Decision of the Court of Appeal Obstructs the Ability of Provinces to Manage Natural Resource Development

42. The majority stated that its decision would not prevent provinces from regulating end-of-life obligations, but rather that such regulation must occur before insolvency.[27]

43. In reaching this conclusion, the majority failed to recognize that regulation must occur throughout the life cycle of energy development. Wells and facilities and their associated impacts do not cease to exist upon receivership. Nor is it an answer that provinces need to anticipate an insolvency and race against creditors to ensure that end-of-life obligations are addressed before creditors call in their loans.

44. It is well recognized the jurisdiction of provinces over natural resources is one of the mainstays of provincial power. The effect of this case is to permit the *BIA* to interfere with this core power by severely impeding a province's ability to regulate, which the majority did by equating regulatory requirements with monetary claims, permitting the renouncement of the public duty to address environmental obligations, and interfering with the discretion to approve or deny transfer requests on any terms or conditions. Taking the majority decision to its logical conclusion, receivers and trustees now appear to be able to walk away from a pipeline spill or well blowout if addressing the disaster would diminish distribution of funds.

45. This finding has overturned the foundational principle that has guided oil and gas development, that principle being that end-of-life obligations associated with oil and gas

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[27] *ABCA Decision, supra* at para.25. **[TAB 3C]**

development are *inchoate*, are owed to the public at large, and must be addressed by the debtor in priority to other obligations as a regulatory duty.

46. This principle is core to a province's management of natural resources, which fall within its exclusive jurisdiction. It is on this understanding that licences have been granted, land owners have permitted use of their land, and creditors have advanced borrowings. Now, after 75 years of regulated oil and gas development, with over $30 billion in liabilities in Alberta alone, the rules have been changed such that debtors can enter into insolvency proceedings and shed their liabilities while maintaining assets for their benefit and that of their creditors.

47. In reaching its findings, the majority ignored the principles of cooperative federalism and framed these important issues based on an assumption that licence obligations are debts, not public duties,[28] notwithstanding previous findings to the contrary.

48. Justice Martin, in contrast, recognized the importance of protecting the environment for all Canadians and the role of cooperative federalism in ensuring that legislative safeguards are protected and enforced.[29] This is consistent with the presumption that Parliament intends that its federal laws coexist with provincial laws.[30]

49. It also recognizes that there is nothing express in the *BIA* which provides that companies in insolvency proceedings are exempt from compliance with provincial laws. Nor should there be, as such findings would upset the balance between federal and provincial powers.

50. Properly interpreted, section 14.06 of the *BIA* protects insolvency professionals from personal liability. It does not permit debtors to avoid their liabilities, nor does it provide creditors with greater access to a debtor's assets than they would otherwise be entitled to outside of an insolvency. To find otherwise would be to incentivize insolvencies and permit insolvency professionals to "game the system" by not taking possession of assets to avoid compliance with orders.

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[28] *ABCA Decision, supra* at para 112**. [TAB 3C**]
[29] *ABCA Decision, supra* at para 107. **[TAB 3C]**
[30] *Alberta (Attorney General) v. Moloney,* 2015 SCC 51 at para 27.

51. While the majority in the *ABCA Decision* did not think it was likely that licensees would be incentivized to enter into insolvency proceedings for this purpose, Justice Martin in her dissent was not as optimistic. She recognized that the decision may incentivize licensees to restructure for the purpose of renouncing their wells that have significant liabilities while creating a new entity to hold onto their good assets. In doing so, they would be able to avoid the public duties they assumed upon obtaining their licences, while retaining the benefits.[31]

52. Justice Martin noted the following:

> "It is more realistic to assume that individuals will operate as rational economic actors who organized their affairs to maximize their own self-interest, within the limits allowed by law. If they are allowed to avoid or evade the end of life responsibilities attached to their licenses, abandonment and reclamation, so necessary for the environment, would likely be the first sacrifices made in times of fiscal difficulty."[32]

53. Not only do the decisions incentivize renouncements in the interest of maximizing returns for creditors and shareholders and create a competitive disadvantage for licensees that choose not to renounce, they also substantially impacts the ability of provinces to regulate both within and outside of the insolvency process.

54. Licensees can now threaten insolvency proceedings and potential renouncement when faced with regulatory orders or requirements that they do not want to address. One can expect that assessing compliance against the costs of reorganizing will become the norm. Similarly, when faced with competing offers for assets, insolvency professionals and the courts will be motivated solely to maximize the return to creditors, notwithstanding competing public interests. The important gatekeeper function that provincial regulators play in controlling licensing has been significantly impaired because any requirements that may cost money to comply with can be disregarded on the basis that they will negatively impact the returns to creditors.

55. Contrary to the opening statements in *Abitibi*, which say that reorganization does amount to a licence to disregard the rules, the effect of the decision is that compliance is optional where there is a cost of compliance, notwithstanding the public interest purpose behind such

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[31] *ABCA Decision, supra* at para. 244. **[TAB 3C]**
[32] *ABCA Decision, supra* at para. 244. **[TAB 3C]**

requirements. This enables debtors, creditors, and insolvency professionals to pick and choose licences and requirements without having to be saddled with the obligations and duties faced by the licensee pre-insolvency.

56. This creates a two-tiered regulatory regime where licensees are treated differently and subject to different requirements based on whether they are in insolvency proceedings—and the requirements within an insolvency are much more relaxed. It also "creates disproportionate burdens on the third-party landowners forced to live with the physical evidence of unfulfilled obligations."[33]

57. The effects of the decision was aptly summarized in the following legal commentary:

> The practical effect of this decision is that the AER's authority to enforce abandonment orders at the cost of the licensee is unenforceable at precisely the time when the AER most needs to be able to exercise that power i.e., when the licensee is insolvent. Furthermore, one of the AER's principal mechanisms to ensure that a licensee has assets on hand to cover its liabilities (its authority to withhold consent to the transfer of assets which result in the deterioration of the licensee's ability to discharge its obligations) is no longer available. Thus, the entire provincial scheme for protecting Albertans from abandonment costs in relation to non-productive wells is seriously compromised, and, as a result, in the case of a bankrupt licensee the costs of abandonment will necessarily be assumed by the Orphan Well Fund or the province. If the costs are assumed by the Fund this means industry as a whole bears the burden; if the costs are assumed by the province (perhaps by a cash infusion to the Fund) this means that all Alberta taxpayers bear the burden of discharging these abandonment and reclamation obligations."[34]

C Conclusion

58. Hearing of this appeal would enable this court to provide much-needed clarity as to how the conflicting rights and interests of creditors and the public are to be reconciled and whether through cooperative federalism it is possible, as Justice Martin found, for the *BIA* and the Alberta regulatory regime to continue to coexist.

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[33] *ABCA Decision*, *supra* at para 130. **[TAB 3C]**

[34] Nigel Bankes, "Majority of the Court of Appeal Confirms Chief Justice Wittmann's Redwater Decision" (May 3, 2017) ABlawg (blog), online: http://ablawg.ca/2017/05/03/majority-of-the-court-of-appeal-confirms-chief-justice-wittmanns-redwater-decision/

59. The Applicants respectfully submit that this court should grant their application for leave to appeal and hear their appeal on an expedited basis in order to minimize the mischief and harm posed by the decision in the interim.

PART IV SUBMISSION ON COSTS

60. The Applicants do not seek costs and submits that costs should not be ordered against them.

PART V ORDER REQUESTED

61. The Applicants respectfully requests that leave to appeal be granted and the matter be heard on an expedited basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED JUNE 2nd, 2017.

Per: _____
Marie-France Major
Supreme Advocacy LLP
Agents for the Applicants

PART VI- TABLE OF AUTHORITIES

Cases **at para.**

Newfoundland and Labrador v. AbitibiBowater Inc., 2012 SCC 67 5

Ontario v. Canadian Pacific Ltd., [1995] 2 SCR 1031, 24 OR (3d) 454 10

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PART VII- STATUTORY PROVISIONS

Responsible Energy Development Act, SA 2012, c R-17.3 section 2.

Mandate of Regulator

2(1) The mandate of the Regulator is

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

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

(i) the disposition and management of public lands,

(ii) the protection of the environment, and

(iii) the conservation and management of water, including the wise allocation and use of water,in accordance with energy resource enactments and, pursuant to this Act and the regulations, in accordance with specified enactments.

(2) The mandate of the Regulator is to be carried out through the exercise of its powers, duties and functions under energy resource enactments and, pursuant to this Act and the regulations, under specified enactments, including, without limitation, the following powers, duties and functions:

(a) to consider and decide applications and other matters under energy resource enactments in respect of pipelines, wells, processing plants, mines and other facilities and operations for the recovery and processing of energy resources;

(b) to consider and decide applications and other matters under the *Public Lands Act* for the use of land in respect of energy resource activities, including approving energy resource activities on public land;

(c) to consider and decide applications and other matters under the *Environmental Protection and Enhancement Act* in respect of energy resource activities;

(d) to consider and decide applications and other matters under the *Water Act* in respect of energy resource activities;

(e) to consider and decide applications and other matters under Part 8 of the *Mines and Minerals Act* in respect of the exploration for energy resources;

(f) to monitor and enforce safe and efficient practices in the exploration for and the recovery, storing, processing and transporting of energy resources;

(g) to oversee the abandonment and closure of pipelines, wells, processing plants, mines and other facilities and operations in respect of energy resource activities at the end of their life cycle in accordance with energy resource enactments;

(h) to regulate the remediation and reclamation of pipelines, wells, processing plants, mines

and other facilities and operations in respect of energy resource activities in accordance with the *Environmental Protection and Enhancement Act*;

(i) to monitor energy resource activity site conditions and the effects of energy resource activities on the environment;

(j) to monitor and enforce compliance with energy resource enactments and specified enactments in respect of energy resource activities.

***Bankruptcy and Insolvency Act*, RSC 1985, c B-3**

No trustee is bound to act

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

Application

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

(a) an interim receiver;

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

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

No personal liability in respect of matters before appointment

(1.2) Despite anything in federal or provincial law, if a trustee, in that position, carries on the business of a debtor or continues the employment of a

***Loi sur la faillite et l'insolvabilité*, LRC 1985, c B-3**

Non-obligation du syndic

14.06 (1) Le syndic n'est pas tenu d'assumer les fonctions de syndic relativement à des cessions, à des ordonnances de faillite ou à des propositions concordataires; toutefois, dès qu'il accepte sa nomination à ce titre, il doit accomplir les fonctions que la présente loi lui impose, jusqu'à ce qu'il ait été libéré ou qu'un autre syndic ait été nommé à sa place.

Application

(1.1) Les paragraphes (1.2) à (6) s'appliquent également aux syndics agissant dans le cadre d'une faillite ou d'une proposition ainsi qu'aux personnes suivantes :

a) les séquestres intérimaires;

b) les séquestres au sens du paragraphe 243(2);

c) les autres personnes qui sont nommément habilitées à prendre — ou ont pris légalement — la possession ou la responsabilité d'un bien acquis ou utilisé par une personne insolvable ou un failli dans le cadre de ses affaires.

Immunité

(1.2) Par dérogation au droit fédéral et provincial, le syndic qui, en cette qualité, continue l'exploitation de l'entreprise du débiteur ou lui succède comme employeur est dégagé de toute responsabilité personnelle découlant de quelque obligation du débiteur, notamment à titre d'employeur successeur, si

debtor's employees, the trustee is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,

(a) that is in respect of the employees or former employees of the debtor or a predecessor of the debtor or in respect of a pension plan for the benefit of those employees; and

(b) that exists before the trustee is appointed or that is calculated by reference to a period before the appointment.

Status of liability

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

Liability of other successor employers

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

Liability in respect of environmental matters

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

(a) before the trustee's appointment; or

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

Reports, etc., still required

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

Non-liability re certain orders

(4) Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of requiring

celle-ci, à la fois :

a) l'oblige envers des employés ou anciens employés du débiteur, ou de l'un de ses prédécesseurs, ou découle d'un régime de pension pour le bénéfice de ces employés;

b) existait avant sa nomination ou est calculée sur la base d'une période la précédant.

Obligation exclue des frais

(1.3) L'obligation visée au paragraphe (1.2) ne peut être imputée à l'actif au titre des frais d'administration.

Responsabilité de l'employeur successeur

(1.4) Le paragraphe (1.2) ne dégage aucun employeur successeur, autre que le syndic, de sa responsabilité.

Responsabilité en matière d'environnement

(2) Par dérogation au droit fédéral et provincial, le syndic est, ès qualités, dégagé de toute responsabilité personnelle découlant de tout fait ou dommage lié à l'environnement survenu avant ou après sa nomination, sauf celui causé par sa négligence grave ou son inconduite délibérée ou, dans la province de Québec, par sa faute lourde ou intentionnelle.

Rapports

(3) Le paragraphe (2) n'a pas pour effet de soustraire le syndic à une obligation de faire rapport ou de communiquer des renseignements prévue par le droit applicable en l'espèce.

Immunité — ordonnances

(4) Par dérogation au droit fédéral et provincial, mais sous réserve du paragraphe (2), le syndic est, ès qualités, dégagé de toute responsabilité personnelle découlant du non-respect de toute ordonnance de réparation de tout fait ou dommage lié à l'environnement et touchant un bien visé par une faillite, une proposition ou une mise sous séquestre administrée par un séquestre, et de toute responsabilité personnelle relativement aux frais engagés par toute personne exécutant l'ordonnance :

a trustee to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

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

(i) complies with the order, or

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

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

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

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

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

Stay may be granted

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

a) si, dans les dix jours suivant l'ordonnance ou dans le délai fixé par celle-ci, dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur ou pendant la durée de la suspension visée à l'alinéa b) :

(i) il s'y conforme,

(ii) il abandonne, après avis à la personne ayant rendu l'ordonnance, tout droit sur l'immeuble en cause ou tout intérêt sur le bien réel en cause, en dispose ou s'en dessaisit;

b) pendant la durée de la suspension de l'ordonnance qui est accordée, sur demande présentée dans les dix jours suivant l'ordonnance visée à l'alinéa a) ou dans le délai fixé par celle-ci, ou dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur :

(i) soit par le tribunal ou l'autorité qui a compétence relativement à l'ordonnance, en vue de permettre au syndic de la contester,

(ii) soit par le tribunal qui a compétence en matière de faillite, en vue d'évaluer les conséquences économiques du respect de l'ordonnance;

c) si, avant que l'ordonnance ne soit rendue, il avait abandonné tout droit sur l'immeuble en cause ou tout intérêt sur le bien réel en cause ou y avait renoncé, ou s'en était dessaisi.

Suspension

(5) En vue de permettre au syndic d'évaluer les conséquences économiques du respect de l'ordonnance, le tribunal peut en ordonner la suspension après avis et pour la période qu'il estime indiqués.

Frais

(6) Si le syndic a abandonné tout droit sur l'immeuble en cause ou tout intérêt sur le bien réel en cause ou y a renoncé, les réclamations pour les frais de réparation du fait ou dommage lié à l'environnement et touchant le bien ne font pas partie des frais d'administration.

Priorité des réclamations

(7) En cas de faillite, de proposition ou de mise sous séquestre administrée par un séquestre, toute

Costs for remedying not costs of administration

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

Priority of claims

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

(a) is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and

(b) ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

Claim for clean-up costs

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

réclamation de Sa Majesté du chef du Canada ou d'une province contre le débiteur pour les frais de réparation du fait ou dommage lié à l'environnement et touchant un de ses immeubles ou biens réels est garantie par une sûreté sur le bien en cause et sur ceux qui sont contigus à celui où le dommage est survenu et qui sont liés à l'activité ayant causé le fait ou le dommage; la sûreté peut être exécutée selon le droit du lieu où est situé le bien comme s'il s'agissait d'une hypothèque ou autre garantie sur celui-ci et, par dérogation aux autres dispositions de la présente loi et à toute règle de droit fédéral et provincial, a priorité sur tout autre droit, charge, sûreté ou réclamation visant le bien.

Précision

(8) Malgré le paragraphe 121(1), la réclamation pour les frais de réparation du fait ou dommage lié à l'environnement et touchant l'immeuble ou le bien réel du débiteur constitue une réclamation prouvable, que la date du fait ou dommage soit antérieure ou postérieure à celle de la faillite ou du dépôt de la proposition.

Constitution Act, 1867, (UK), 30 & 31 Vict, c 3, section 92(A).

92A. (1) In each province, the legislature may exclusively make laws in relation to
(a) exploration for non-renewable natural resources in the province;
(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and
(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.
(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.
(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.
(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of
(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
(b) sites and facilities in the province for the generation of electrical energy and the production therefrom, whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that

Loi constitutionnelle de 1867 (R-U), 30 & 31 Victoria, c 3, s. 92(A)

92A. (1) La législature de chaque province a compétence exclusive pour légiférer dans les domaines suivants :
(a) prospection des ressources naturelles non renouvelables de la province;
(b) exploitation, conservation et gestion des ressources naturelles non renouvelables et des ressources forestières de la province, y compris leur rythme de production primaire;
(c) aménagement, conservation et gestion des emplacements et des installations de la province destinés à la production d'énergie électrique.
(2) La législature de chaque province a compétence pour légiférer en ce qui concerne l'exportation, hors de la province, à destination d'une autre partie du Canada, de la production primaire tirée des ressources naturelles non renouvelables et des ressources forestières de la province, ainsi que de la production d'énergie électrique de la province, sous réserve de ne pas adopter de lois autorisant ou prévoyant des disparités de prix ou des disparités dans les exportations destinées à une autre partie du Canada.
(3) Le paragraphe (2) ne porte pas atteinte au pouvoir du Parlement de légiférer dans les domaines visés à ce paragraphe, les dispositions d'une loi du Parlement adoptée dans ces domaines l'emportant sur les dispositions incompatibles d'une loi provinciale.
(4) La législature de chaque province a compétence pour prélever des sommes d'argent par tout mode ou système de taxation :
(a) des ressources naturelles non renouvelables et des ressources forestières de la province, ainsi que de la production primaire qui en est tirée;
(b) des emplacements et des installations de la province destinés à la production

differentiates between production exported to another part of Canada and production not exported from the province.

(5) The expression "primary production" has the meaning assigned by the Sixth Schedule.

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

d'énergie électrique, ainsi que de cette production même.

Cette compétence peut s'exercer indépendamment du fait que la production en cause soit ou non, en totalité ou en partie, exportée hors de la province, mais les lois adoptées dans ces domaines ne peuvent autoriser ou prévoir une taxation qui établisse une distinction entre la production exportée à destination d'une autre partie du Canada et la production non exportée hors de la province.

(5) L'expression «production primaire» a le sens qui lui est donné dans la sixième annexe.

(6) Les paragraphes (1) à (5) ne portent pas atteinte aux pouvoirs ou droits détenus par la législature ou le gouvernement d'une province lors de l'entrée en vigueur du présent article.