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

BETWEEN:

ORPHAN WELL ASSOCIATION and ALBERTA ENERGY REGULATOR

APPELLANTS
(Appellants)

and

GRANT THORNTON LIMITED and ALBERTA TREASURY BRANCHES

RESPONDENTS
(Respondents)

and

ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF SASKATCHEWAN AND ATTORNEY GENERAL OF BRITISH COLUMBIA

INTERVENORS

JOINT FACTUM OF THE APPELLANTS ORPHAN WELL ASSOCIATION and ALBERTA ENERGY REGULATOR

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

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PART I: OVERVIEW AND STATEMENT OF FACTS

A. INTRODUCTION

1. At issue in this appeal is whether the Province of Alberta, in managing its resources under section 92(A) of the *Constitution Act*, can in the grant of leases and licenses for development impose conditions that require companies to restore land to its original state, which will survive subsequent claims by secured creditors. This important environmental duty has always been deemed by Alberta to be inherent in the right to drill and "part of the general law of Alberta enacted to protect the environment and for the health and safety of all citizens."[1] If this authority exists, did Parliament in enacting section 14.06 of the *BIA*[2], enable secured creditors, which have benefitted from a regulatory system without which there would not be an energy industry, to use receivers to better their position by renouncing end-of-life obligations? Conversely, given that section 14.06 grants no express power of renouncement, can it be read consistent with its purpose of protecting insolvency professionals from personal liability without the far-reaching unintended consequences arising from the Majority Decision under appeal?

2. This Court should approach the issues bearing in mind that the doctrine of cooperative federalism should, absent clear language and clear facts, should be interpreted and applied in a manner that does not render inoperative important powers at the core of provincial jurisdiction. With respect, the courts below did not take this approach.

3. The decision under appeal (the "**Majority Decision**") has upset the status quo by overturning 25 years of law under which end-of-life environmental obligations were a public duty to be addressed by those responsible.[3] In doing so, the Majority Decision erred in adopting an expansive and unsupported interpretation of a provision of the *BIA*, designed only to protect receivers from personal liability. Such an interpretation fails to recognize and effectively eviscerates, the exclusive jurisdiction of provinces to manage natural resource development,

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1 *PanAmericana de Bienes y Servicios v. Northern Badger Oil & Gas Limited*, 1991 ABCA 181 ("***Northern Badger***") at para. 21 Northern Badger

2 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3[2] ("***BIA***"), section 14.06 BIA

3 *Redwater Energy Corporation (Re),* 2016 ABQB 278 ("**Redwater QB**") Redwater QB and *Orphan Well Association v. Grant Thornton Limited,* 2017 ABCA 124 ("**Redwater CA**") Redwater CA

property and civil rights within their own borders as provided for in the *Constitution Act*.[4] In reading in powers not explicitly provided, and upholding common-law rights at the expense of core provincial regulatory powers, the Court found multiple provisions in provincial legislation to be in conflict with the *BIA* and adopted a strained interpretation of section 14.06 of the *BIA* that enables receivers, trustees and creditors to avoid the regulatory obligations that the insolvent licensee was bound by and accepted as a condition of the mineral lease and license to drill.

4. The Majority Decision also incorrectly characterized regulatory obligations as provable claims, effectively reducing all environmental and safety obligations to unsecured monetary claims. This impairs the ability of the Alberta Energy Regulator ("**AER**") to effectively regulate Alberta's largest and most important industry. An industry that impacts hundreds of thousands of hectares within its territory, and thousands of people.

5. The Majority Decision also rejects the "polluter pays" principle that underlies virtually all of Alberta's oil and gas legislation by shifting liability from the polluter to innocent third parties and the public. The Majority Decision provides Alberta Treasury Branches ("**ATB**") with an unexpected windfall and permits secured creditors to shift obligations agreed to as part of the lease of the mineral rights and licensing, to innocent landowners, companies, and potentially, taxpayers. This is despite the fact that the lenders were aware of these duties when they advanced their loans and understood that their collateral exists only as a result of a highly regulated activity that is subject to these prior public obligations to address end-of-life obligations. These obligations are unique in that they are anticipated, inevitable, and a necessary part of exploration and development of energy resources.

6. One of the unintended consequences of the Majority Decision is that the obligation of energy companies to restore land to its original state is no longer a relevant consideration by Lenders when issuing a loan. Lenders are now incentivized to prohibit debtors from spending current cash flow remediating environmental damage that these companies created. Secured creditors are also incentivized to place those companies into insolvency so that the obligations

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4 *Constitution Act, 1867*, (UK), 30 & 31 Vict, c 3 ("***Constitution Act***") Constitution Act

can be dumped onto the public as the Majority Decision permits them to do.[5] The Majority Decision means companies have more value in receivership than while solvent and had to clean up after themselves.

7. The appellants submit that such an outcome is not what was intended by the legislature through its amendments to the *BIA* nor is it what was intended by this Court through its decision in *AbitibitBowater*.[6]

B. STATEMENT OF FACTS

8. The background and facts in this appeal are set out in detail in the Majority Decision, and key facts are summarized below.[7]

(a) The Alberta Oil and Gas Regulatory Regime and the AER

9. Section 92(5) and (13) of the *Constitution Act* provides that provinces have exclusive jurisdiction over provincial public lands, property, and civil rights. Section 92(A) of the *Constitution Act* confers exclusive jurisdiction on provinces to make laws related to the exploration, development, conservation, and management of non-renewable natural resources.[8]

10. Pursuant to these powers and with the help of over 1200 AER staff, Alberta has for almost 80 years developed and implemented robust cradle-to-grave energy regulations. The AER is the quasi-judicial administrative and regulatory body that oversees all aspects of upstream energy development in Alberta. The AER's mandate is to ensure the safe, efficient, orderly, and environmentally responsible development of energy resources over their entire life cycle.[9] These regulations are expansive, detailed, and complex, and deal with technical and

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5 Fenner Stewart, "Orphan Well Association v. Grant Thornton Limited: What's at Stake in Redwater" (15 November 2017), *ABlawg*, online: Stewart Article

6 *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67 ("***AbitibiBowater***") AbitibiBowater

7 *Redwater CA, supra* at paras. 4-23, 117-145 Redwater CA

8 *Constitution Act*, *supra* at 92 and 92(A) Constitution Act

9 *Responsible Energy Development Act*, SA 2012, c. R-17.3, s. 2 Responsible Energy

legal matters. As of October 2015, the AER regulated about 350,000 wells, 77,650 facilities, and 430,000 kilometres of pipeline.[10]

11. Several authorizations are required to explore and produce oil and gas in Alberta. These include authorizations for mineral rights, surface access, and AER licences and approvals. In most cases, mineral leases are granted by the Alberta Crown. Where the Crown grants a lease of its own mineral rights, a fundamental term expressed on the face of the grant is that the grantee will abide by all relevant laws governing extraction; such laws include those implemented by the AER in relation to addressing end of life obligations. Once a company has acquired leases subject to these conditions, it must qualify as a "licensee" under the provincial energy regulations. All entities, including receivers and trustees, must be licensees as it is these entities that are subject to the rules of general application set by the AER. Finally, surface access must be negotiated with surface owners to facilitate access to and the construction of infrastructure required to conduct drilling and production operations. Where landowners are unwilling to enter into a lease, the licensee may apply to the Alberta Surface Rights Board for access, who routinely compels access to private land notwithstanding an owner's objection.[11]

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 used for recreational purposes or by indigenous persons for traditional land-use activities. In all cases, it is intended that disruption will be minimal and temporary and that sites will be restored to their original condition following energy development and extraction. Abandonment in the regulatory sense refers to the permanent dismantlement of a well or facility in a manner prescribed by the regulations or rules to ensure that the well or facility is left in a permanently safe and secure condition.[12] Abandonment and reclamation are necessary for ensuring that risks to public health and safety

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[10] Affidavit of Bob Curran, sworn November 10, 2015 (Volume IV, Tab 34 of the Appellants Record)

[11] *Surface Rights Act*, RSA 2000, c S-24 section 12; See also Redwater Ca, paras. 123 – 141 Surface Rights Act

[12] *Oil and Gas Conservation Act*, RSA 2000 Chapter O-6, ("**OGCA**") section 1(1)(a) OGCA

are minimized and that environmental impacts are addressed so that landowners and users may resume use of the land.[13]

13. The requirement to address end of life obligations is a condition of and integral to regulatory authorizations to explore, drill and produce energy resource assets. This foundational principle upon which oil and gas regulatory regimes have been built, not only in Alberta, but in other provinces, was recognized in the 1991 *Northern Badger* decision, which involved the AER's predecessor and legislation substantially the same as present, the Alberta Court of Appeal confirmed that end-of-life abandonment obligations are an inchoate or inherent part of the issuance of a well licence and are not provable claims in bankruptcy.[14]

14. As stated in *Northern Badger* by the former Chief Justice Laycraft:

> It is evident that the regulatory regime contained in these statutes and regulations contemplates that all wells drilled for oil or gas will one day be abandoned. That is so whether the well is unsuccessful or whether it produces large quantities of oil or gas. At some point, when further production is not possible or the cost of production of remaining quantities exceeds the revenue which could be obtained from it, the process of abandonment is required of the well licensee. In those situations where there is no solvent entity able to carry out the abandonment duties the wells become, in the descriptive vernacular of the oil industry, "orphan wells". Thus the direct issue in this litigation, in my opinion, is whether the *Bankruptcy Act* requires that the assets in the estate of an insolvent well licensee should be distributed to creditors leaving behind the duties respecting environmental safety, which are liabilities, as a charge to the public.[15]

15. The Alberta Court of Appeal also considered whether the AER's predecessor was merely a creditor whose claim should be proven along with all others, and concluded it was not:

> There are two aspects to the question whether the board had a "provable claim" in the bankruptcy. The first is whether Northern Badger had a liability; the second is whether that liability is to the board so that it is the board which is the creditor. I respectfully agree that Northern Badger had a liability, inchoate from the day the wells were drilled, for their ultimate abandonment. It was one of the expenses, inherent in the nature of the properties themselves, taken over for management by the receiver. With respect, I do not agree, however, that the public officer or

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13 *Redwater CA, supra* at para. 118 – 121 Redwater CA

14 *Northern Badger, supra* at paras. 32, 36 Northern Badger

15 *Northern Badger, supra* at para. 29 Northern Badger

> public authority given the duty of enforcing a public law thereby becomes a "creditor" of the person bound to obey it.
>
> The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life. Rules relating to health, or the prevention of fires, or the clearing of ice and snow, or the demolition of unsafe structures are examples which come to mind. But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.
>
> It is true that this board has the power by statute to create in its own favour a statutory debt if it chooses to do so. It may, under s. 92(1) and (2) of the *Oil and Gas Conservation Act* (discussed above), do the work of abandonment itself and become a creditor for the sums expended. But the board has not done so in this case. Rather it is simply in the course of enforcing observance of a part of the general law of Alberta.
>
> . . .
>
> In my view, the board is not, at this point, a "creditor" of Northern Badger with a claim provable in its bankruptcy. The problem presented by this case is not to be solved, therefore, by determining whether the board ranks as a creditor of Northern Badger before or after the secured creditors. Rather it must be determined whether the receiver, which was the operator of the oil wells in question, had a duty to abandon them in accordance with the law. [16]

16. Consistent with the polluter-pays principle, the Province of Alberta's approach through the AER includes requirements to ensure that end-of-life obligations are addressed by the parties responsible for fulfilling them. Requirements include the AER's licensee liability rating program ("**LLR Program**") and its licence transfer requirements. Both have existed for several years and are intended to perform a gatekeeper function and prevent costs associated with end-

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[16] *Northern Badger*, *supra* at paras. 32-36 Northern Badger

of-life obligations from being borne by the public of Alberta and to minimize the risk to the Orphan Fund administered by the Orphan Well Association ("**OWA**").[17]

17. The LLR Program applies throughout the life cycle of a licensee's operations. The program views a licensee's sites collectively as a "package", requiring the licensee to ensure that it has sufficient assets to address its end of life 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.[18] While this system is not perfect, it attempts to draw the appropriate balance among a large number of considerations including protection of the environment, stimulating resource exploration and development and addressing the legitimate concerns of all stakeholders.

(b) The Orphan Well Association

18. The OWA is a nonprofit organization that operates pursuant to the authority delegated to it by the AER which enables it to carry out end of life activities in relation to properties designated by the AER as "orphans". An orphan is an AER licensed property that has no viable licensee and for which no other entity is readily available to conduct abandonment or reclamation.[19]

19. The OWA is a predominantly industry-funded association. Its board of directors is made up of representatives of the Canadian Association of Petroleum Producers, the Explorers and Producers Association of Canada, the AER, and Alberta Environment and Parks.[20] It was initially created to ensure that the small number of orphan wells were appropriately handled, for the benefit of all stakeholders in the Province.

20. Recourse to the OWA is intended to be a last resort. Its ability to complete abandonment or reclamation depends on funding, which is beyond its control.[21] The OWA was never intended

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17 *Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process* ("**Directive 006**") Directive 006

18 *Redwater CA, supra* at para. 135–136 Redwater CA

19 Affidavit of David Wolf sworn on September 22, 2015 (the "**Wolf Affidavit**") at paras. 1-4 (Volume IV, Tab 31 of the Appellants Record)

20 Wolf Affidavit, *supra* at paras. 1-5

21 Wolf Affidavit, *supra* at paras. 8-9

as a place to dump thousands of unremediated sites, or billions of dollars of liabilities. Nor was the OWA established to supplement the insolvency process and to provide receivers and trustees with a backstop for uneconomic abandonment liabilities. The OWA has neither the funding, nor the present capability, to handle this large volume. It is not realistic that the OWA will continue to function if the number of orphans continues to grow at the rate that has been occurring because the OWA relies on responsible, solvent licensees paying for their competitors' obligations.

21. The number of new orphan wells increased from 80 in 2013/2014 to 591 in 2014/2015. As of the summer of 2017, the total number of wells and sites exceeded 1,800, with another 1,100 expected in the near future. The potential cost as a result of the Majority Decision is up to $8.6 billion.[22] An increase in the number of insolvent corporations abandoning wells and sites, which has undoubtedly occurred and will continue to occur because of the Majority Decision, has substantially and unsustainably increased the OWA's inventory well beyond its ability to reclaim these sites in any reasonable period of time.[23]

(c) The Redwater Insolvency

22. Redwater Energy Corporation ("**Redwater**") was granted license eligibility and first obtained licenses in 2009. As part of becoming a licensee, Redwater was bound to comply with applicable requirements, including end of life obligations.

23. In 2013, subsequent to assuming these obligations, ATB advanced funds to Redwater pursuant to commitment letters dated January 31, 2013, and August 19, 2013. ATB lent funds to Redwater after investigating and determining the end-of-life obligations associated with Redwater's assets. ATB's *Industry Knowledge Guide – Oil and Gas Extraction* notes that "[t]he 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

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[22] Dachis, B, Shaffer, B, and Thivirerge, V. (2017). *C.D. Howe Institute, Commentary No. 492, All's Well that Ends Well: Addressing End-of-Life Liabilities for Oil and Gas Wells* at p. 4 C.D. Howe Institute

[23] Wolf Affidavit, *supra* at paras. 7, and 15-16

its calculation of a customer's borrowing base.[24] ATB had a practice of managing its exposure to these costs by requiring debtors such as Redwater to budget and set aside funds for these obligations.

24. In 2014, Redwater held 84 well licences, 7 facility licences, and 36 pipeline licences, all in central Alberta.[25] As a result of financial difficulties, Redwater attempted to sell its assets, but did not receive any offers that would fully repay its loan. As a result, on May 12, 2015, ATB was granted a Court-appointed receiver over all of Redwater's assets. Shortly thereafter the receiver advised that it was only taking possession of 20 of Redwater's 127 AER-licensed sites. The receiver's position was that because of its renouncement, the Redwater estate had no obligation to fulfill any regulatory requirements associated with those sites and the AER could not apply its LMR program when the receiver went to sell the assets it retained.

25. 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. The order directed Redwater and its working interest participants in some of the wells to carry out abandonment in accordance with AER requirements.[26]

26. While the AER has the discretion to carry out abandonment work, 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 did not intend to perform any abandonment work at any of Redwater's AER-licensed sites.

27. On October 28, 2015, a bankruptcy order was issued for Redwater to appoint the receiver to the additional role as trustee over the estate of Redwater. 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.

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[24] *Redwater CA, supra* at para. 141 Redwater CA

[25] *Redwater CA, supra* at para. 139 Redwater CA

[26] Affidavit of Patricia Johnston sworn August 13, 2015, p. 48 (Volume IV, Tab 29 of the Appellants Record)

The receiver and trustee brought a cross application for approval of its sales process and challenged the constitutionality of the positions of the AER and OWA.[27]

(d) Decision of the Court of Queen's Bench

28. 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. He held that a trustee can renounce licensed assets under 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 concluded 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 subject to environmental liabilities, including compliance with abandonment orders.[28] The following provisions of provincial legislation were found to be inoperative to the extent of the conflict: 1(1)(cc), 27, 29, 30, and 106 of the *Oil and Gas Conservation Act* ("***OGCA***"), sections 1(1)(n), 23, 25, 26, and 51 of the *Pipeline Act*, article 6 of *Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process*, and articles 4, 8, and 10 of appendix 2 of *Directive 006* ("**Provisions**").

29. The Court also applied the three-part test set out in the *AbitibiBowater* decision[29] to determine whether, in the alternative, the AER's abandonment orders are provable 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. However, he ultimately found that the *AbitibiBowater* test was satisfied based on his acceptance that the sites (at least the ones without working-interest participants) would likely be deemed to be orphans and that they may be addressed by the OWA at some future time. The fact that compliance with AER requirements required posting of security for abandonment obligations was found to frustrate the distribution scheme under the *BIA*. Application of the AER's transfer requirements,

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27 *Redwater CA, supra* at para. 8 Redwater CA
28 *Redwater QB, supra* at paras. 150–156 Redwater QB
29 *AbitibiBowater, supra* at para. 26 AbitibiBowater

specifically consideration of the seller's LMR, was also found to frustrate the distribution scheme under the *BIA*.[30]

(e) Decision of the Court of Appeal

30. The majority of the Court of Appeal (the "**Majority**") dismissed the appeal and 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 situations where insolvency professionals are concerned about personal liability and that while AER licences are permissive, the underlying 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 *AbitibiBowater* 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 regime in the *BIA*.

31. In her dissent, Justice Martin relied on the principles of cooperative federalism. Justice Martin emphasized the importance of interpreting federal and provincial laws as existing harmoniously wherever possible, and in the absence of a clear conflict, she found that the doctrine of paramountcy would not render provincial law inoperative.

32. Justice Martin 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.[31]

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.[32] In reaching this finding, she noted that Chief Justice McLachlin in *AbitibiBowater*

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30 *Redwater QB, supra* at para. 173–178 Redwater QB
31 *Redwater CA, supra* para. 112 Redwater CA
32 *Redwater CA, supra* at paras. 171-174 Redwater CA

cited *Northern Badger* as an example of regulatory obligations that are part of the general law and that survive restructuring.[33]

34. Justice Martin found that section 14.06 could not be used to avoid environmental obligations in the oil and gas context because AER 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 remediated by the Crown. As this cannot occur for oil and gas wells because 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 renouncement of some environmental obligations, it does not allow the broad disclaimer rights enabled by the decision. 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 in legislation.

35. In finding that provincial legislation does not result in a "monetary claim" as defined in *AbitibiBowater,* Justice Martin contrasted the licensing and regulatory regime to the facts at play in *AbitibiBowater*. She noted the evidence that the AER did not intend to perform the abandonment work and that even if the OWA eventually did the abandonment work, it would involve a significant timeline and would not result in the abandonment work being performed by, or funded by, the provincial government. Accordingly, it was not "sufficiently certain" that a regulatory body or the provincial government would perform the work and be in a position to assert a monetary claim. In relation to the AER's LMR and transfer requirements, she noted these are ongoing regulatory obligations that apply to all licensees and that predate bankruptcy. Any requirement to post security does not turn the AER into a creditor because it is simply seeking to enforce licence conditions.[34]

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

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[33] *Redwater CA, supra* at para. 171 Redwater CA; *AbitibiBowater, supra* at paras. 70-74 AbitibiBowater

[34] *Redwater CA, supra* at paras. 166-188 Redwater CA

PART II: STATEMENT OF ISSUES

37. The issues that arise from this appeal are set out in detail in the Appellants' application for leave to appeal and in their notice of question of constitutional law. These issues can be summarized as follows:

(a) Did the Court of Appeal error in its approach to this case through over emphasizing creditor's rights, rather than providing for the appropriate constitutional balance of powers;

(b) Did the Court of Appeal error in its interpretation of section 14.06(4) of the *BIA*;

(c) Did the Court of Appeal error in its application of the test established in *AbitibiBowater*; and

(d) Did the Court of Appeal error in finding that there was a conflict between the federal and provincial legislation and that the doctrine of paramountcy was engaged.

PART III: STATEMENT OF ARGUMENT

A. THE COURT OF APPEAL ERRED IN ITS APPROACH TO THIS CASE ON THE BASIS OF CREDITOR'S RIGHTS, RATHER THAN A MATTER OF THE APPROPRIATE CONSTITUTIONAL BALANCE OF POWERS

38. The Majority erred in its approach to this entire case. Both lower courts framed the issue as one of creditor's rights first, with constitutional considerations as an afterthought. This approach led to inappropriately expansive interpretations of section 14.06 of the *BIA* and the scope of a provable claim under the *BIA*. Had the Court of Appeal started with the proposition that sections 91 and 92 of the *Constitution Act* are equally important, and approached this case through the principles of cooperative federalism endorsed by the Supreme Court of Canada, a different outcome would have been resulted.

39. There is no question that pursuant to the *Constitution Act*, sections 92(5) and 92(A), the Province of Alberta has jurisdiction over its own land and natural resources. 80% of the leases

granted over mineral rights in Alberta belong to the Province.[35] Whether or not they are owned by the Province, Alberta has exclusive jurisdiction to regulate natural resources, property and civil rights in the Province under sections 92(21) and 92(A) of the *Constitution Act*. The government of Canada has exclusive jurisdiction over bankruptcy under section 91(21) of the *Constitution Act*. In the present case, it is common ground that all legislation at issue was validly enacted.

40. Under the doctrine of paramountcy, provincial laws that conflict with federal laws may be rendered inoperative in either of two scenarios: first, if it is impossible to comply with both laws; and second, even if it remains possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal law.[36] The burden is on the party alleging the conflict to establish that one exists.

41. This Court has previously cautioned that the doctrine of paramountcy should be narrowly construed and that courts should favour harmonious interpretations of allegedly conflicting legislation.[37] This Court has also previously directed that "the Court should avoid blocking the application of [provincial] measures which are taken to be enacted in furtherance of the public interest."[38] When applying the doctrine of paramountcy, this Court has determined the appropriate approach to be taken:

> …In keeping with co-operative federalism, the doctrine of paramountcy is applied with restraint. It is presumed that Parliament intends its laws to co-exist with provincial laws. Absent a genuine inconsistency, courts will favour an interpretation of the federal legislation that allows concurrent operation of both laws…*Conflict must be defined narrowly, so that each level of government may act as freely as possible within its respective sphere of authority.*[39] [Citations omitted]

42. Prior to the Majority Decision, provincial and federal legislation operated in harmony for over 25 years. Receivers and trustees accepted mandates over oil and gas assets and were able to

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35 *Constitution Act*, *supra* at 91(21) and 92(A) Constitution Act

36 *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 ("**Moloney**") at para. 17–18 Moloney

37 *Saskatchewan (Attorney General) v. Lemare Lake*, 2015 SCC 53 at paras. 20-21 Saskatchewan (Attorney General) v. Lemare Lake

38 *Canadian Western Bank v. Alberta*, 2007 SCC 22 at para. 37 CWB

39 *Moloney*, *supra* at para, 27 Moloney

sell and transfer the assets in accordance with both sets of laws. This coexistence is consistent with section 69.6 of the *BIA*, which provides that regulatory processes (excluding the enforcement of a payment) are not stayed by insolvency.[40] Canada's Senate Standing Committee on Banking, Trade and Commerce has recognized the important role of regulatory authorities by noting the importance of this exclusion given that "administrative tribunals decide a number of issues that are important to Canadians…Moreover, administrative tribunals decide issues in a number of other areas that have a public interest component, including disputes related to the environment, justice and securities, among others."[41]

43. As set out in this factum, Parliament did not intend in enacting section 14.06 to profoundly interfere with Alberta's exclusive authority to regulate energy development. Such a drastic outcome is a conclusion that could be reached only with clear and unambiguous language. The language is not clear. The authority to renounce contaminated, private and Crown assets to the Crown does not even exist in section 14.06. As set out below, an interpretation consistent with provincial legislation is both possible and appropriate. As stated in *Moloney*, [42] the general rule of law is that where dual compliance is possible because federal legislation can be interpreted so as not to interfere with provincial legislation, that interpretation should be preferred.

44. Quite apart from constitutional principles, the Majority erred by adopting an interpretation of section 14.06 that has a number of absurd outcomes. It allows receivers and trustees to operate and sell provincially-owned regulated interests free from any regulation at all. Regulation of energy resource activity is extremely complex. It requires technical expertise and a balancing of competing stakeholder interests and public safety and environmental concerns throughout the life cycle of development. Receivers are now immune from that regulation while they manage oil and gas assets, sometimes for years at a time. The AER has also been largely stripped of its ability to qualify purchasers of assets from receivers. The regulatory regime

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40 *BIA*, *supra* at section 69.6 BIA

41 Canada, Senate, Standing Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: Senate of Canada, 2003) at p.161 Debtors and Creditors Sharing the Burden

42 *Moloney*, *supra* Moloney

requires the careful consideration of a number of factors in determining whether to grant the privilege of holding a license in the first instance. It is in nobody's interest to allow this potentially dangerous and necessarily environmentally damaging activity to be carried out by the unqualified, not to mention those who are careless or unscrupulous.

B. THE COURT OF APPEAL ERRED IN ITS INTERPRETATION AND APPLICATION OF SECTION 14.06 OF THE *BIA*

(a) The Primary Purpose of Section 14.06 of the *BIA* is to Protect Insolvency Practitioners from Personal Liability

45. With respect, the Majority Decision accepted an interpretation of section 14.06 that is far too expansive. As recognized by Justice Martin in her dissent, "The extraordinary power claimed by the trustees to pick and choose when they will comply with validly enacted and generally applicable provincial laws would require a clear, express and unambiguous grant of that extraordinary power."[43] Notably, section 14.06 is silent in this regard. The Appellants submit that section 14.06 should be read consistently with the sections' purpose of protecting trustees and receivers from personal liability.

46. Both the Court of Queen's Bench of Alberta and the Court of Appeal correctly identified that the purposes of section 14.06 of the *BIA* are (1) to protect insolvency practitioners from personal liability, and (2) to encourage them to accept mandates notwithstanding ongoing environmental obligations in order to reduce the number of abandoned sites across Canada.[44] The intent was not to allow trustees and receivers to renounce or disclaim assets from the estate of bankrupt in order to enhance the recovery for secured creditors at the expense of other stakeholders.

47. Sections 14.06(2) and (4) both expressly speak of the personal liability of the trustee. Section 14.06(2) was added to the *BIA* as part of a series of amendments in 1992 (the "**1992 Amendments**") following decisions such as *Re Lamford*. [45] The 1992 Amendments shielded trustees from all environmental liabilities that arise before their appointment and from all

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43 *Redwater CA*, at paras. 189 and 206 Redwater CA

44 *Redwater QB*, at paras. 128 – 129 and Redwater CA, at para. 197 Redwater QB

45 *Lamfort Forest Products Ltd., Re*, 1991 CanLII 8243 (BC SC) Lamfort Forest

liabilities arising post appointment, excepting out those arising from negligence, and after subsequent amendments in 1997, from gross negligence.[46]

48. Debates in Parliament are useful in determining the pith and substance of section 14.06. In cases of clear ambiguity, they provide direct evidence as to the intention of the legislative drafters. The Appellants concede that debates recorded in Hansard cannot prevail over the plain wording of legislation or its subsequent judicial interpretation;[47] however, in this instance, and in light of the different interpretations reached by the Majority and Justice Martin's dissent, the Hansard record relating to the 1992 Amendments is of particular probative value.

49. The correct purpose of section 14.06 was best described by Mr. Jacques Hains, the Director of the Corporate Law Policy Directorate at the Department of Industry Canada, who between June and November of 2007 testified before multiple meetings of the Standing Senate Committee on Banking, Trade and Commerce, which was considering further amendments to the *BIA* (the "**1997 Amendments**"). Mr. Hanes directly addressed why section 14.06(2) was added to the *BIA* in the 1992 Amendments, emphasising the dual purpose of encouraging individual mandates and protecting insolvency professionals from personal liability. He said the following:

> The aim is to provide a better definition of the liability of insolvency professionals and practitioners in order to encourage them to accept mandates where there may be problems related to the environment. It is hoped that this will reduce the number of abandoned sites both for the benefit of the environment and the safeguard of businesses and jobs.
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> …
>
> I repeated that the purpose of such provision [14.06] is to encourage practitioners to accept mandates and to reduce the number of abandoned sites in the country. If there are any environmental difficulties, there will be someone on the spot to inform the appropriate authority. The other provisions I have described will also apply, including the priority status granted to environmental claims.[48]
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> …

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46 *Redwater CA*, *supra* at paras. 193-194 Redwater CA

47 *Redwater CA*, *supra* at para. 67 Redwater CA

48 Canada, Parliament, House of Commons, Standing Committee on Industry, Minutes of Proceedings and Evidence, 35th Parl, 2nd Sess, No 16 (11 June 1996) at 1545-1554 Minutes of Parliament Proceedings

> What Parliament tried to do in 1992 was to provide a relief to insolvency practitioners – essentially these are receivers and trustees, although it was only trustees in 1992 – because they were at risk when they accepted a mandate to liquidate an insolvent business. That was so because, technically and legally speaking, they are vested with the assets of the bankrupt individual; they become more or less the owner of those assets and are in control of them. Under environmental law, therefore, they could have been subject to personal liability to clean up the environment. I am speaking of personal liability here, meaning "out of their own pocket".[49]

50. Notably missing from the debates concerning this legislation is a discussion of the billions of dollars in environmental costs that the amendments will shift from insolvent companies and secured creditors to provinces and the public. There is no discussion about the legislation rendering comprehensive regulatory regimes designed to protect the environment inoperative as against trustees and insolvent corporations. There is no discussion about a wholesale change to the way oil and gas company insolvencies are conducted. This is because none of these consequences were either considered or intended by the 1992 or 1997 Amendments.

51. The intent of section 14.06 is to protect receivers and trustees from personal liability. While admittedly awkward, it may be read as consistent with this purpose and prior law, including *Northern Badger*. The words do not mandate an expansive power to abandon or disclaim assets of an estate. Neither the wording of section 14.06 nor the Hansard debates support the Respondents' position that Trustees can pick and choose which regulatory obligations apply to them and renounce at any time and for any reason.[50]

(b) Section 14.06(4) Requires Both an Order and Personal Liability of a Trustee or Receiver as a Condition Precedent to Disclaimer

52. Section 14.06(4) can and should be read to provide trustees who are (a) subject to a regulatory order respecting real property and (b) subject to possible personal liability for that order, with the opportunity to abandon or release real property involved in order to avoid any personal liability for complying with or failing to comply with that order. This interpretation is

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[49] Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, No. 13 (4 November 1996) Proceedings of Standing Senate Committee

[50] *Redwater CA, supra* at paras. 205-206 Redwater CA

consistent with the purpose and language of section 14.06 and should be adopted by this Honourable Court.

53. The requirement for an order and the qualifying words "personally liable" in section 14.06(4) are condition precedents, and are key to understanding the section. Specifically, section 14.06(4) provides that the Trustee is "not ***personally liable*** for failure to comply with the order" and "is not ***personally liable*** for any costs that would be incurred by any person carrying out the terms of the ***order***".[51]

54. The Court must consider the words that were used in section 14.06(4), "Trustee" and "personally liable" as well as the words that were not: "estate" and "bankrupt". The words "estate" and "bankrupt" appear more than 100 times each throughout the *BIA*, and are clearly considered as distinct concepts from the Trustee who administers them. Nothing in section 14.06 excuses liability of either the "bankrupt" or the "estate". Nothing in the section absolves the estate from complying with regulatory orders or obligations respecting the property released, and such a provision should not be read into the legislation. That was not the purpose of the section.

55. In contrast, personal liability of the Trustee is a very different matter. The proper interpretation of section 14.06(4) requires that the personal liability of the Trustee be at issue before the Trustee exercises the powers provided under the section. This interpretation empowers the Trustee to renounce any personal liability if compliance with an Order is too onerous or difficult, and it is consistent with extending the protections granted to trustees under section 14.06(2) in order to ensure that trustees would not personally bear the liabilities the estate could not cover.

56. If Parliament wanted to extend the rights enumerated under section 14.06(4) beyond the personal liability of the trustee and to reduce liabilities of the bankrupt estate, it would have explicitly done so, just as it has referred to the separate concepts at hundreds of other points in the *BIA*. The transfer of responsibility for billions of dollars of environmental liability is not to be lightly inferred.

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[51] *BIA*, *supra*, section 14.06 BIA

57. Section 14.06(4) refers to an "order". It is this language that differentiates the section from 14.06(2), which only applies generally to environmental obligations. Section 14.06(4) allows a trustee to disclaim *personal liability* for any expenses arising from specific orders issued after it accepts its mandate, such as an order to remediate after a pipeline release or well blow out.

58. In this instance, the Majority Decision found that an "order" should be given wide meaning, noting that the term "order"

> is not limited to orders directing that remedial work be done, but would include an order or directive permitting the transfer of assets of a bankrupt company only if sufficient funds are earmarked to cover remediation obligations. [52]

59. With respect, the Majority Decision's interpretation is too broad; it effectively includes all regulations that touch on environmental matters, including ongoing public obligations. It ignores that the intent was to protect trustees from liabilities they could not foresee,[53] not enable them to shield creditors from obligations that they were aware of at the time of lending.

60. Nor does section 14.06(4)(c) enable renouncements at any time, simply to avoid regulatory obligations and increase creditor recovery. Such interpretation is not consistent with the plain reading of section 14.06, with its purpose, or with cooperative federalism. It ignores that the only other authority provided to renounce assets is contained in section 20 of the *BIA*, which does not apply here.[54] Any other power to renounce assets would need to reside in the common law, and such authority would be subordinate to provincial legislation. To find otherwise would be to permit the common law to remove the ability of provinces to regulate because at any time if a receiver of trustee did not want to comply with a requirement it could simply renounce.

(c) Section 14.06(5) and (6)

61. While the language in section 14.06(5) is admittedly broad, and refers to enabling a trustee to assess the economic viability of complying with an order, it does not go beyond

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52 *Redwater CA, supra* at para. 71 Redwater CA
53 *Redwater CA, supra* at para. 214 Redwater CA
54 *BIA, supra*, section 20 BIA

personal liability of the Trustee in relation to those orders. This section merely allows a Trustee to seek extra time to assess an estate to determine whether compliance with an order is possible given the assets in the estate, as this may not always be initially apparent. If a Trustee determines after the stay period that compliance would not be economical, and that attempting compliance would put the Trustee at risk of personal liability, then its rights under section 14.06(4) would be preserved. Nothing in section 14.06(5) indicates that the stay is for anything more than to give a Trustee more time to address any concerns it may have about personal liability.

62. Such an interpretation is consistent with section 14.06(6) which reads as follows:

> 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. [Emphasis added][55]

63. The key words in this section are "claims for". This section does not state that the receiver's or trustee's costs of remedying the condition or damage shall not rank as costs of the administration. While this distinction is subtle, it is important; the words "claims for" are different than the language used elsewhere in section 14.06. This section would only have the meaning advocated by the respondents (namely that the statutory priorities under the *BIA* would be upset if abandonment costs ranked as costs of administration) if the words "claims for" were removed.

64. Some meaning must be attributed to these words and they cannot be ignored. "Claims" are made by parties other than the Trustee; the Trustee does not have a "claim" in the insolvency. If the Trustee conducts the abandonment, or more likely applies funds from the estate to do so, these costs would not be "claims". It merely has costs that are secured as costs of administration. This Court must note that in section 14.06(1.2) and elsewhere in the *BIA*, namely section 136, there is no reference to "claims" of the trustee.[56]

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55 *BIA*, *supra* at section 14.06(6) BIA

56 *BIA*, *supra* at sections 14.06(6) and 136 BIA

65. The proper interpretation of section 14.06(6) is to prevent a third party from asserting its claim as a cost of administration. The section does not state, and in fact could not reasonably state, that such expenses related to abandonment, when carried out by the Trustee or the Estate are not costs of administration.

(d) AER Licences are not "Real Property"

66. Section 14.06 allows renouncement of "real property", not regulatory interests or personal property. Oil and gas licenses are regulatory tools rather than interests in real property. They set out regulatory obligations, compliance with which does not depend on an interest in real property. In fact, the lapse of a licensee's surface or mineral interest would equally trigger the need to carry out end of life obligations.[57]

67. While the Majority Decision correctly identified oil and gas leases that provide mineral or surface rights as *profits a prendre* that are distinct from the regulatory licenses discussed above, it incorrectly held that section 14.06(4) applies to such leases.[58] Oil and gas assets only have value in the context of a regulatory regime and to the extent the holder has regulatory authorization to exploit them. Absent the Surface Rights Act, one is not permitted to occupy another's land for exploration. Causing environmental harm would be illegal without permission to do so. Compliance with regulatory requirements, including addressing of end of life obligations is the condition upon which this permission is granted. Oil and gas leases are unique, and require as a condition compliance with regulator requirements. While leases may generally be described as real property interests, they are not real property in the specific sense contemplated in section 14.06.

68. As noted by Justice Martin, in dissent:

> Sub-section 14.06(4) was not intended to operate in Alberta's regulatory environment. The balance struck by s. 14.06 does not take into account the third party surface owner, who is a common player in the Alberta system. The diminution in value of the party's land will be the result of the debtor's failure to fulfill obligations that were statutorily imposed when the licence was issued, and the lender, who knew of the obligations when funds were advanced, will benefit.

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57 *OGCA, supra* at para. 3.012 OGCA

58 *Redwater CA, supra* at para. 41 Redwater CA

> Sub-section 14.06(4), and its reference to a trustee renouncing interest in real property, simply does not apply to the end of life obligations attached to AER licenses. Even assuming the assets can be renounced, the end of life obligations would continue to bind the remaining parts of the estate.[59]

69. The *profits a prendre* under consideration in this case can also be distinguished from the real property interests involved in *AbitibiBowater*, *Nortel*, and *Northstar*. In those cases, the Courts were considering true real property, land currently or previously owned by a debtor and that was contaminated. It was not Crown or third party land subject to specific conditions upon acquisition. The contamination in those cases was unexpected and likely unlawful; it was not guaranteed and regulated from the beginning as a condition of development. These facts are materially different from the case before this Court, so a different approach is required.

(e) Section 14.06(7) Need for a Trade-Off

70. A coherent interpretation of section 14.06 requires reading all of its subsections in harmony. Sections 14.06(4) and (7) were enacted together as part of the 1997 Amendments to establish a statutory *quid pro quo* that balances the interests of the trustee with those of the Crown. They work in tandem so that if a piece of real property is renounced or disclaimed and then remediated by the province, the Crown will receive a super-priority charge over the sales proceeds from that land.

71. This balance was recognized by this Court in *AbitibiBowater* where it considered the below Hansard evidence:

> Parliament recognized that regulatory bodies sometimes have to perform remediation work (see House of Commons, Evidence of the Standing Committee on Industry, No 16, 2nd Sess., 35th Parl., June 11, 1996). When one does so, its claim with respect to remediation costs is subject to the insolvency process, but the claim is secured by a charge on the contaminated real property and certain other related property and benefits from a priority. …Thus, Parliament struck a balance between the public's interest in enforcing environmental regulations and the interest of third party creditors in being treated equitably.[60]

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59 *Redwater CA, supra* at para. 223 Redwater CA

60 *AbitibiBowater, supra* at para. 32 AbitibiBowater

72. This passage accords with the Appellants' interpretation of sections 14.06(4) and (7). For the statutory compromise discussed above to have meaning, it must apply to the unique nature of oil and gas assets. In the case of mineral leases, there is no value if the lien applies to the *profit a prendre*, or the surface lease. The wells and facilities renounced are mostly exhausted, and the underlying value of the minerals has already been harvested by the company for its benefit and the benefit of its creditors. Once a producing oil or gas well is slated for abandonment, the underlying hydrocarbons can no longer be harvested and the mineral lease itself is rendered valueless. As noted by Justice Martin in her dissent, section 14.06, and the compromise inherent in it, is effective only where it is the debtor's real property that has suffered environmental damage. By enacting section 14.06(7), Parliament intended to provide a meaningful source of recompense if the Crown incurs expenses to clean up a debtor's real property. If section 14.06 is allowed to apply to AER licenses or to mineral leases, this key intention is rendered meaningless.

(f) Section 14.06(8) Narrowly Allows for Claims for Expenses After the Date of Bankruptcy

73. Finally, 14.06(8) must be considered by this Court when considering the overall meaning and internal harmony of section 14.06. Section 14.06(8) states the following:

> 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. [emphasis added][61]

74. This section allows for environmental claims that occur after the date of the bankruptcy to be brought against the bankrupt estate, but this does not mean that environmental obligations will always stand as claims. This section acknowledges that while claims for costs incurred after a party enters into insolvency proceedings are normally stayed, there will be times when government or other authorities intervene, conduct clean-up work, and wish to make a claim against the estate. This is consistent with the third branch of the *AbitibiBowater* test (which is discussed below), because it allows parties to make claims for costs incurred after the date of bankruptcy if it is sufficiently certain that those costs will be incurred.

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[61] *BIA*, *supra* at section 14.06(8) BIA

75. Nothing in this subsection supports the conclusions of the Majority Decision. To the contrary, it reinforces that important environmental claims that are fully crystallized can be taken into account even after insolvency proceedings are commenced, which would otherwise be in doubt.

(g) A Broad Interpretation of Section 14.06 is a License to Ignore Regulation

76. Under the Majority Decision, a two-tiered regulatory regime is created in which trustees are immune to regulation and licensees are treated differently, subject to different requirements based on whether they are in insolvency proceedings. Not only does this incentivise strategic insolvencies, it also "creates disproportionate burdens on the third-party landowners forced to live with the physical evidence of unfulfilled obligations."[62] Further, contrary to previous decisions of this Court it provides creditors with greater access to the assets in the estate then they were entitled to prior to insolvency.[63]

77. Predictably, this decision has resulted in some companies relying on the Majority Decision to avoid regulatory obligations by using insolvency proceedings to renounce some assets and then reacquire the rest through a credit bid or the creation of a new corporation. This practice, the risk of which was raised by the Appellants and recognized by Justice Martin in her dissent,[64] will only be more common in the future. This was noted by Justice Martin, when she stated the following:

> It is more realistic to assume that individuals will operate as rational economic actors who organize 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 among the first sacrifices made in times of fiscal difficulty.

78. Secured creditors, receivers and trustees all have a single priority in insolvency: to maximize the value of the insolvent estate. It is inconceivable that trustees and receivers would

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62 *Redwater CA, supra* at para. 130 Redwater CA
63 *RBC v. North American Life Assurance Co,* [1996] 1 SCR 325 at para. 18 RBC
64 *Redwater CA, supra* at paras. 105, 244 Redwater CA

assume end of life liabilities associated with unprofitable assets, when they can simply disclaim them on the broad grounds permitted and encouraged by the Majority Decision.

79. Further, the Majority Decision shifts the regulatory function away from a technical regulator with experience in balancing various stakeholder interests to a receiver motivated primarily by the maximization of recovery for creditors. The Alberta regulatory regime has already significantly accommodated the insolvency process by allowing receivers to operate as licensees notwithstanding in many cases their lack of qualification. To go one step further and allow these accounting firms to be unregulated licensees, with virtual immunity from either liability or regulatory oversight, cannot have been intended by Parliament.

C. THE AER IS NOT ASSERTING A PROVABLE CLAIM ACCORDING TO THE TEST ESTABLISHED IN *ABITIBIBOWATER*

(a) Overview of *AbitibiBowater*

80. In *AbitibiBowater*, this Court established a three-part test to determine whether a particular order is a "claim provable in bankruptcy" within the meaning of section 2 of the *BIA*, thereby subjecting that order to the insolvency process. The three requirements of the *AbitibiBowater* test are that (1) there must be a debt, a liability, or an obligation to a *creditor*; (2) the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*; and (3) it must be possible to attach a *monetary value* to the debt, liability or obligation (emphasis of Deschamps J).[65]

81. Under this test, not every provincial regulatory order is a claim provable in bankruptcy. Only those orders that are monetary in nature and that will ripen into a financial liability owed to the regulatory body are subject to the insolvency process.[66] This requires sufficient certainty that money will be spent and ultimately claimed against the estate. As was noted by the Honourable Chief Justice of this Court in her *AbitibiBowater* dissent, there is "a fundamental distinction

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[65] *Redwater CA, supra* at para. 60 Redwater CA; *AbitibiBowater, supra* at para. 26 AbitibiBowater

[66] *Redwater CA, supra* at para. 169 Redwater CA

between ongoing regulatory obligations owed to the public, which generally survive the restructuring, and monetary claims that can be compromised."[67]

82. This distinction between provable claims and regulatory obligations is critical, because if all obligations that may require a receiver to expend money can be considered provable claims, the regulatory system based on the exclusive jurisdiction of the province over natural resources will be effectively neutered.

83. Consistent with the principles of cooperative federalism, the definition of "provable claim" should be interpreted narrowly, to protect the public and environment, while permitting the orderly restructuring or dissolution of insolvent corporations. Such an approach would enable insolvency professionals to distribute the assets in the estate in accordance with the rules that the debtor was bound by at the time of licensing and permit regulators and provinces to continue to regulate for the benefit of the public and environment. Not only would this uphold this Court's recognition that not all orders issued by regulatory bodies are provable claims, it would also ensure a level playing field for companies and creditors by ensuring that all parties are bound by the rules regardless of insolvency proceedings.

(b) *AbitibiBowater* did not Overrule *Northern Badger*

84. The distinction between obligations owing to a creditor and regulatory obligations must be applied carefully in the context of end-of-life obligations in the Alberta oil and gas industry, which are different from other forms of environmental liability. Prior to the Majority Decision, it was absolutely clear at common law[68] and by statute[69] that a licensee in Alberta is responsible for the abandonment, remediation, and reclamation of oil and gas wells and facilities, regardless of whether the licensee is insolvent. These obligations form part of the general law of Alberta and were conditions under which the activity was permitted to proceed.

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67 *AbitibiBowater* at para. 72 AbitibiBowater

68 *Northern Badger*, *supra* at paras. 32-33 Northern Badger and *AbitibiBowater*, *supra* at para. 73 AbitibiBowater, *Redwater CA*, *supra* at 172 Redwater CA

69 *OGCA*, *supra* at sections 16(3)(b), 27(1), 29, and 30 OGCA and *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 ("**EPEA**") at section 137 EPEA

85. While the decision in *AbitibiBowater* clarified the scope of *Northern Badger*, by recognizing that some regulatory orders may be converted into monetary claims provable in bankruptcy, it did not overrule Chief Justice Laycraft's decision as was suggested by the Majority Decision.[70] Rather, courts must still apply the *AbitibiBowater* test to determine whether the substance of the provincial regulations, and the orders derived therefrom, satisfy all three branches of the *AbitibiBowater* test.[71]

(c) The AER is not a "Creditor"

86. The Majority Decision erred by holding that the abandonment orders issued by the AER and the AER's LLR program requirements meet the first branch of the *AbitibiBowater* test. In each case, the AER was not acting as a creditor, but rather was enforcing well known regulatory requirements for the benefit of the public. If enforcement of such requirements were obligations owed to a creditor, then any rules that cost money to comply with, would be demoted to "provable claims". This would prevent regulators and provinces from regulating during an insolvency proceeding, which is the very time when the enforcement of regulations is most important given the higher risk posed by licensees that are in insolvency proceedings.

87. Further, it would render the first branch of the *AbitibiBowater test* meaningless. As recognized by Ann Lund, "The first part of the *AbitibiBowater* test borrows language from the *NorthernBadger* case which distinguished between debts owed to the Crown and duties owed to the public."[72] It is important that such distinction is recognized. This ensures that the court appropriately balances the exclusive powers of the provincial and federal legislatures.

88. The first branch of the *AbitibiBowater* test is discussed at length by Madam Justice Martin in her dissent. She writes at paragraph 185:

> In my view, the regulatory regime also does not satisfy the first requirement of the *Abitibi* test for monetary claims – that the regulatory body is a creditor of the insolvent debtor. The obligation to abandon a well and reclaim the well site,

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70 *Redwater CA, supra* at para. 63 Redwater CA

71 *Redwater CA, supra* at paras. 172-175 Redwater CA

72 Lund, Anna. "Lousy Dentists, Bad Drivers, and Abandoned Oil Wells: A New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law" (2017), 80 Sask L Rev 157 at p.178 Lousy Drivers

> imposed on a licensee by provincial legislation, is not, in my view, the claim of a creditor. This was the view of Laycraft CJA in *Northern Badger* at para. 32-33, when he noted that the cost of abandoning licensed wells "was one of the expenses, inherent in the nature of the properties themselves, taken over for management by the Receiver". That cost is not owed to the Regulator, or to the province.[73]

89. The point is that the obligation to return the property to its original state is both a term of the lease, and a fundamental duty owned and accepted as a condition of ownership and the right to drill. It is not something that is trumped by the subsequent grant of security; it is part of the fundamental character of the asset and the activity.

90. As Justice Deschamps noted in *AbitibiBowater*, "As a matter of principle, reorganization does not amount to a license to disregard the rules". This Court is the gatekeeper of those rules and must ensure that the law is applied contextually to the orders in question to ensure that the regulatory regime remains effective. The AER is a regulator, not a creditor.

(d) There is No Certainty Abandonment will be Completed, and a Claim Made

91. The key consideration under the third branch of the *AbitibiBowter* test is whether it is "sufficiently certain" that the regulatory body will perform the abandonment and, as a result, assert a monetary claim.[74] While the Appellants urge this Court to apply this test to the higher standard articulated by Chief Justice McLachlin in *AbitibiBowter*, namely that "sufficient certainty" should be interpreted as requiring a "likelihood approaching certainty,"[75] under either standard this branch of the test is not met.

92. The Alberta Court of Queen's Bench recognized this uncertainty in the following finding:

> Does this situation meet the sufficient certainty criterion as described in *AbitibiBowater*? The answer is no in a narrow and technical sense, since it is unclear whether the AER will perform the work itself or if it will deem the properties subject to the orders, orphans. If so, the OWA will probably perform

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73 *Redwater CA, supra* at para. 185 Redwater CA
74 *AbitibiBowater, supra* at paras. 37 and 46 AbitibiBowater
75 *AbitibiBowater, supra* at para. 86 AbitibiBowater

> the work, although not necessarily within a definite timeframe. [emphasis added][76]

93. Despite this uncertainty, both lower courts, ultimately found that the "sufficiently certain" criterion was met. In reaching this conclusion, the court introduced a new element to the test, whether there is an "intrinsically financial" element to a claim. If such an approach were to apply, it would effectively make all environmental orders provable claims, as at some point in time there will inevitably be end of life liabilities that will be borne by someone, assuming other important governmental priorities do not intervene. Such an approach fails to give appropriate deference to a regulator and creates a presumption that regulators are seeking an unfair financial benefit just because compliance may cost money.

94. The Ontario Court of Appeal in *Nortel* warned against such an approach when it considered the respondents' argument that the more general language in Justice Deschamps reasons should apply and that as long as an order requires an expenditure of funds, it is monetary in nature. Specifically, the Court in *Nortel* stated the following:

> The respondents' approach is not only inconsistent with *AbitibiBowater Inc., Re*, it is too broad. It would result in virtually all regulatory environmental orders being found to be provable claims. As Deschamps J. observed, a company may engage in activities that carry risks. When those risk materialize, the costs are borne by those who hold a stake in the company. [emphasis added] [77]

95. The modified test adopted by the Majority Decision is inconsistent with *AbitibiBowater*, is overly broad, and should be corrected by this Court. Validly enacted provincial regulatory obligations and rules should be presumed enforceable, absent clear evidence that they are disguised monetary claims.

96. The learned authors of the Majority Decision failed to appreciate that it is unlikely that any claim will ever be made against the insolvent estate. The AER has no statutory obligation to carry out abandonment work and has specifically stated that it has no intention of performing the work in this instance. It is not in the business of performing abandonment work itself, and it rarely, if ever, does so. The AER's process is to first direct any working interest participants to

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[76] *Redwater QB, supra* at para. 173 Redwater QB

[77] *Nortel Networks Corporation (Re)*, 2013 ONCA 599, at paras. 26-33 Nortel

seek a transfer of the site or to carry out abandonment and reclamation activities. Where there is no working interest participant, or other responsible parties, the AER declares the sites "orphans" and refers the sites to the OWA. As both the Honourable Chief Justice Wittmann[78] and Justice Martin[79] noted in their reason, the OWA has no power to seek reimbursement from the licensee, and it can only recoup some of its costs if a prior security deposit was held by the AER. The OWA is not going to make a claim provable or otherwise against the insolvent estate.

97. As the OWA is neither the regulator, nor the Crown, the Appellants further submit that the *AbitibiBowater* test does not apply because it requires that the abandonment will be completed by the regulator. The OWA, while operating under delegated authority, is an organization at arm's length from the AER with a different mandate and Board. Its role is to carry out abandonments and reclamation activities for orphan sites to the extent that it has funds available. Unlike *AbitibiBowater*, where abandonment was to be conducted by the Newfoundland Ministry of Environment, the abandonment work done by the OWA is generally not funded by the public purse. Except for a 2009 government contribution to the OWA, historically, virtually the OWA's entire funding came from industry. The OWA has no taxing authority.

98. Even if the OWA could restore property to its original condition and make a provable claim against an estate, which it has no authority to do, the massive backlog and lack of funding means the estate will be finalized and the trustee discharged long before this is possible. When this case started, the OWA aspired to get through its inventory of orphan wells and sites in 10 – 12 years. Since then, and largely because of this case, the inventory has more than quadrupled. Without more funding, simple math pushes this aspirational horizon well beyond that time frame, assuming no more orphans. A study by the C.D. Howe Institute indicates the expenses may approach $8.6 billion,[80] which is about ten times the current inventory of orphan wells and facilities.

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78 *Redwater QB, supra* at para. 169 Redwater QB

79 *Redwater CA, supra* at para. 180 Redwater CA

80 Dachis, B, Shaffer, B, and Thivirerge, V. (2017). *C.D. Howe Institute, Commentary No. 492, All's Well that Ends Well: Addressing End-of-Life Liabilities for Oil and Gas Wells* at p. 4 C.D. Howe Institute

99. Even with some potential funding from the federal government through a $30 million grant and from the provincial government through a $230 million loan, the OWA will not be able to address its existing inventory of orphans in a time period any reasonable person would call certain. It will still have insufficient funds to address abandonment for a generation or longer. While this could be sped up if the government were to require a higher levy, a higher levy could actually result in further insolvencies, which would add to the problem.

100. Any abandonment and reclamation done by the OWA depends on significant contribution from industry or the government over several decades. There is no certainty of such funding. The inventory of properties requiring abandonment and reclamation has increased dramatically over the past few years, and should the current economic downturn continue, or when another occurs, the ability of other industry participants to fund the OWA will be compromised further. Reclamation is one of many government priorities, competing with health, education and other issues, and is subject to change every time an election is won. Given the marked increase in work, coupled with the OWA's limited resources and inability to seek reimbursement from licensees, there is no certainty of abandonment of the Redwater assets. Such certainty will be reduced further if companies are permitted to continue to renounce assets. The only thing that is certain is that no provable claim will be asserted as there is no power to do so, and any claim would not be crystallized for many years.

D. THERE IS NO CONFLICT BETWEEN THE FEDERAL AND PROVINCIAL LEGISLATION AND PARAMOUNTCY IS NOT ENGAGED

101. When section 14.06 of the BIA is approached from the perspective that it is presumed to operate alongside important provincial laws and regulations, the conflict disappears and the doctrine of paramountcy is not engaged. The section does not provide receivers with the power to renounce anything but their personal liability, and absent clear and unequivocal language, such a broad and intrusive power should not be read in to the statute. Likewise, there is no express exemption of receivers from regulatory requirements, either generally or with respect to end of life obligations. The statute can be read in harmony with existing legislation and that is the appropriate approach.

102. In concluding that there is no conflict between the AER's regulatory regime and the BIA, Justice Martin in her dissent stated the following:

> The continued application of the regulatory regime following bankruptcy does not determine or reorder priorities among creditors, but rather values accurately the assets available for distribution. The value of the debtor's estate must take into account the end of life obligations associated with the licenses that form a part of that estate. If this means that, in the end, there is less value available for distribution to the creditors, that is part of the bankruptcy scheme and the risk that the creditor takes when lending on the basis of the debtor's assets, with their associated obligations.

103. This is consistent with other jurisprudence. In Northern Badger, the court found that the legislation was:

> general law regulating the operation of oil and gas wells, and safe practices relating to them, for the protection of the public. It is not aimed at subversion of the scheme of distribution under the Bankruptcy Act though it may incidentally affect that distribution in some cases. It does so, not by a direct conflict in operation, but because compliance by the Receiver with the general law means that less money will be available for distribution.

104. The Appellants concede that if the AER's legislation is interpreted as imposing personal liability on a trustee, then there is a conflict to that extent. However, the AER has never sought to impose liability on receivers or trustees over and above the value of the assets they administer. The inclusion of receivers and trustees in the definition of "licensee" enables them to operate the licensed assets, a privilege that is restricted to licensees. The definition only applies to a receiver or trustee of property of a licensee. While the definition of licensee does not explicitly provide that the receiver's liability is limited to the assets in the insolvency estate, such federal requirements are obviously read in to the provision and is explicitly included in other legislation administered by the AER, namely the *Environmental Protection and Enhancement Act*.[81]

105. Similarly, the whole context of declaring provincial law inoperative falls away when one properly categorizes the obligations at issue as regulatory obligations, rather than provable claims. The Court should not lightly infer that a regulator seeking to safeguard the environment as part of a comprehensive overall regulatory scheme is making a disguised claim. The AER is

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[81] *EPEA, supra* at section 240 EPEA

not a creditor. In addition, it is virtually certain no claim will ever be crystallized and made against the insolvent estate. The OWA has no power to make such a claim. Even if it had such a power, the large inventory of orphans and limited resources means the estate will be wound-up at least a decade before such a claim could come to fruition. There is no certainty as required by *AbitibiBowater*, which in all circumstances should have led the Court below to conclude the obligation to restore land to its original condition is a regulatory obligation, and not a provable claim.

E. CONCLUSION

106. With respect, the Majority Decision fails to give any deference to a complicated working regulatory system constitutionally mandated at the core of provincial power. Instead, the Majority Decision effectively nullifies much of Alberta's ability to regulate its own resources, with no clear constitutional ability to fill the void left behind. The Majority Decision is based on an overreaching interpretation of section 14.06 that is not supported by either the purpose or wording of the section. The Majority Decision finds that a provision that was intended to protect receivers and trustees from personal liability actually permits a dramatic intrusion into a core provincial power. This decision has resulted in significant unintended consequences that if not rectified will result in thousands of renounced sites sitting on the landscape, interfering with the ability of innocent landowners and land users to enjoy the impacted sites as environmental conditions remain unaddressed and potentially worsen. The Appellants urge this Honourable Court to overturn this catastrophic outcome and restore the balance expected by the citizens of Canada and the authors of the Canadian Constitution.

PART IV: SUBMISSION ON COSTS

107. The Appellants do not seek costs and submit that costs should not be ordered against them.

PART V: ORDER REQUESTED

108. The Appellants respectfully request that this appeal be allowed and the following additional relief be granted:

(a) The declarations of Wittmann J. in paragraphs 3, and 5-16 of the order pronounced May 19, 2016, be set aside;

(b) An Order that the proceeds from the sale of the Redwater assets be used to address Redwater's end of life obligations; and

(c) A declaration be made confirming that regulatory obligations to abandon and reclaim provincial oil and gas assets are public duties.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of December, 2017.

Per: _____
Keely Cameron/Patricia Johnson, Q.C.
Alberta Energy Regulator

Per: _____
Ken Lenz, Q.C./Brad Gilmour/Mike Selnes
Bennett Jones LLP
Solicitors for the Appellant Orphan Well Association

PART VI: TABLE OF AUTHORITIES

Cases ***Paragraph(s)***

Other

STATUTORY PROVISIONS

Bankruptcy and Insolvency Act, RSC 1985, c B-31 (the "BIA"), section 14.06, 20, and 69.6

Constitution Act, 1867, (UK), 30 & 31 Vict, c 3 ("Constitution Act"), section 91, 92

Environmental Protection and Enhancement Act, RSA 2000, c E-12, sections 137, 240

Oil and Gas Conservation Act, RSA 2000 Chapter O-6, section 1(1)(a)

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

Surface Rights Act, RSA 2000, c S-24, section 12

S.C.C. court file no.: 37627

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

BETWEEN:

ORPHAN WELL ASSOCIATION AND ALBERTA ENERGY REGULATOR
APPELANTS
(Appellants)

-and-

GRANT THORNTON LIMITED and ALBERTA TREASURY BRANCHES

RESPONDENTS
(Respondents)

ATTORNEY GENERAL OF ALBERTA
INTERVENOR

NOTICE OF CONSTITUTIONAL QUESTION
(ALBERTA ENERGY REGULATOR AND ORPHAN WELL ASSOCIATION, APPELLANTS)
(Pursuant to Rule 33(2) of the *Rules of the Supreme Court of Canada)*

TAKE NOTICE that I, Keely Cameron, Counsel for the appellant, Alberta Energy Regulator and I, Ken Lenz, Counsel for the appellant, Orphan Well Association assert that the appeal raises the following constitutional questions:

1. Do sections 1(1)(cc), 27, 29, 30, and 106 of the *Oil and Gas Conservation Act*, RSA 2000, c O-6 ("***OGCA***"), sections 1(1)(n), 23, 25, 26, and 51 of the *Pipeline Act*, RSA 2000, c P-15 ("***Pipeline Act***"), Article 6 of the Alberta Energy Regulator *Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process* ("***Directive 006***") and Articles 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 that the above listed provincial laws are inoperative by virtue of the doctrine of federal paramountcy?
2. Do sections 1(1)(cc), 27, 29, 30, and 106 of the *OGCA*, sections 1(1)(n), 23, 25, 26, and 51 of the *Pipeline Act* , Article 6 of *Directive 006* and Articles 4, 8, and 10 of Appendix 2 of *Directive 006* established pursuant to Alberta's exclusive jurisdiction to regulate its natural resources under section 92A(1) of the *Constitution Act,* 1867, 30 & 31 Vict, c 3 (the "***Constitution Act***") conflict with or frustrate the scheme of authorities enumerated

under section 136 of the *BIA* such that the above listed provincial laws are inoperative by virtue of the doctrine of federal paramountcy?

3. Does section 14.06 of the *BIA*, as interpreted by the Alberta Court of Appeal, impermissibly impair the Province of Alberta's exclusive jurisdiction and legislative authority to regulate natural resources under section 92(13) or 92A of the *Constitution Act* such that section 14.06 of the *BIA* is inapplicable by virtue of the doctrine of interjurisdictional immunity?

AND TAKE NOTICE that an attorney general who intends to intervene with respect to these constitutional questions may do so by serving a notice of intervention in Form 33C on all other parties and filing the notice with the Registrar of the Supreme Court of Canada within four weeks after the day on which this notice is served.

Dated at Ottawa, in the province of Ontario this 16th day of November, 2017.

SIGNED BY

Marie-France Major
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