File No. 37627

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF ALBERTA)

BETWEEN

ORPHAN WELL ASSOCIATION and ALBERTA ENERGY REGULATOR

APPELLANTS

– and –

GRANT THORNTON and ALBERTA TREASURY BRANCHES

RESPONDENTS

– and –

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PART 1: OVERVIEW OF POSITION AND FACTS

1. The central issue on this Appeal is the application of Alberta's legislation in the circumstances of this case, where Redwater Energy Corporation (Redwater) has been adjudged bankrupt.

2. The majority of the Court of Appeal found that the provincial licencing scheme and the licensee liability rating (LLR) program which is established in AER *Directive 006*[1] are in direct conflict with the *Bankruptcy and Insolvency Act* (the *BIA*)[2] and also that the provincial scheme frustrates the purpose of the *BIA*. Thus, the constitutional principle of paramountcy renders the provincial legislation inapplicable.

3. The Majority erred in its interpretation of Alberta's regulatory regime by blurring the lines among distinct parts of Alberta's oil and gas regime. The result of the decision below is that the polluter pays principle which "has become firmly entrenched in environmental law in Canada,"[3] wherein the polluter has the obligation to deal with end of life obligations and rectify contamination associated with oil and gas infrastructure, no longer exists.

4. Alberta's position is that the majority erred in finding a conflict or a frustration in purpose. Section 14.06(4) of the *BIA*, properly interpreted, does not permit the trustee to renounce the end of life obligations imposed by the provincial regulatory scheme at issue. Therefore as s. 14.06 of the *BIA* does not apply in this case, there is no operational conflict in enforcing the end of life obligations on trustees and receiver-managers under the provincial regulatory regime.[4] Further, compliance with the licensee liability rating (LLR) program, which is established in AER *Directive 006*,[5] may affect the value of individual licences but it does not alter priorities among creditors.[6]

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[1] *Directive 006*: Licensee Liability Rating (LLR) Program and Licence Transfer Process [*Directive 006*] [Appellant's Record (AR), vol. IV, page 85, Affidavit of Patricia Johnston sworn August 13, 2015, Exh. A].
[2] RSC 1985, c B-3.
[3] *Imperial Oil Ltd v Quebec (Minister of the Environment),* 2003 SCC 58 at para 23.
[4] *Orphan Well Association v Grant Thornton Limited*, 2017 ABCA 124 at para 233, Martin JA [Redwater CA] [AR, vol I, at 151].
[5] Directive 006, *supra* note 1.
[6] Redwater CA, *supra* note 4 at para 242 [AR, vol I, at 149].

5. There is no case law to support an interpretation that s. 14.06 of the *BIA* applies where the environmental consequences of the debtor's activities attach to land owned by persons other than the debtor. Therefore it is Alberta's position that the threshold has not been met for *Abitibi*[7] to apply.

6. Further, and in any event, there is no operational conflict between the federal and provincial regimes. Neither can there be said to be a frustration of federal purpose. A proper appreciation of the language of the *BIA*, placed in the context of the evolution of the statute, results in an interpretation of the statute that allows the provincial regime to subsist and to achieve the important public safety and environmental protection objectives vital to it.

7. In relation to the constitutional questions stated, it is Alberta's position that given the jurisdiction of provinces over public lands, property and civil rights as well as the development, conservation and management of natural resources, it cannot have been Parliament's intention to eviscerate the core of that jurisdiction. There is no evidence to that effect and the language of the federal *BIA* is far from clear.

8. The Attorney General of Alberta accepts the Statement of Facts as set out in the Joint Factum of the Appellants, the Orphan Well Association and Alberta Energy Regulator.

PART II: POSITION ON THE CONSTITUTIONAL QUESTIONS

9. The constitutional questions have been stated as follows:

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: Licencee 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

[7] *Newfoundland and Labrador v Abitibi Inc*, 2012 SCC 67 [*Abitibi*].

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 priorities 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?

10. When Alberta's regulatory regime is properly understood and interpreted Alberta submits that there is no conflict or frustration of purpose and questions 1 and 2 should be answered no.

11. Alberta submits the third question should be answered yes: the interpretation of the *BIA* by the Alberta Court of Appeal affects the core of provincial jurisdiction.

PART III: STATEMENT OF ARGUMENT

A. Statutory Interpretation

12. The majority of the Court of Appeal made three principal errors:

(a) misinterpretation of the provincial regulatory scheme;

(b) misinterpretation of s. 14.06 of the *BIA* on the Redwater facts; and

(c) misapplication of *Abitibi*.

i. Errors in Interpreting Alberta's Oil and Gas Regulatory Regime

13. The Majority in the Court below identified the *profit à prendre* interest under the *Mines and Minerals Act* to be the real property of the debtor for the purposes of s.14.06(4). The Majority erred in combining this real property interest with the end of life obligations and the environmental consequences from two distinct parts of the regime to reach the conclusion that the environmental consequences and the end of life obligations attach to the oil and gas deposits.

14. The Majority erred in conflating the three distinct parts of Alberta's oil and gas regime, picking and choosing components from each to apply to the other without regard to the regime as a whole or the distinctiveness of each part. The three distinct parts are:

a) oil and gas deposits;

b) surface (the land); and

c) the link between the surface and the oil and gas deposits.

15. The only part of this regulatory regime which is at issue on this appeal is the link between the surface and the oil and gas deposits under the impugned *Oil and Gas Conservation Act* ("OGCA") and the *Pipeline Act*.[8]

16. The Oil and Gas Deposits – The Provincial Crown owns the majority of oil and gas deposits, with some historically held by private owners. The Provincial Crown issues mineral leases under the *Mines and Minerals Act.*[9] The interest in mineral leases is a *profit à prendre*.

17. The Land (Surface) – The land (surface) on which oil and gas activities are conducted is either owned by private landowners or by the public, as administered by the Provincial Crown under the *Public Lands Act*.[10] It is clear in this case that Redwater did not own any of the land on which its oil and gas activities took place. For access to privately

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[8] *Oil and Gas Conservation Act*, RSA 2000, c O-6 [*OGCA*]; *Pipeline Act*, RSA 2000, c P-15 [*Pipeline Act*].
[9] *Mines and Minerals Act*, RSA 2000, c M-17, ss 2, 11.
[10] *Public Lands Act*, RSA 2000, c P-40, ss 2, 2.1 [*Public Lands Act*].

owned land, those wanting to conduct oil and gas activities must enter into private access arrangements or alternatively, a right of entry order must be obtained from the Surface Rights Board under the *Surface Rights Act*.[11] For access to public land, those wanting to conduct oil and gas activities must obtain a public lands disposition under the *Public Lands Act.*[12] The ownership of the land remains unaffected.

18. The environmental consequences of oil and gas activities attach to and are a part of the surface. In other words, it is land that becomes contaminated. The environmental consequences of Redwater's operations do not attach to the oil and gas deposits.

19. The Licence Link (Connecting the Land use with Oil and Gas Deposits) – Under the *OGCA*, the AER issues well licences and facility licences. A well licence gives permission to the holder to drill a well from the surface to access (extract) the oil and gas contained in the oil and gas deposit.[13] A facility licence gives permission to the holder to construct and operate a structure associated with the recovery or processing of hydrocarbons.[14] The AER also issues pipeline licences under the *Pipeline Act* which give permission to the holder to construct and operate a pipeline to convey hydrocarbons.[15] These licences do not grant access to the land, any interest in this land nor any interest in the oil and gas deposit itself.[16]

20. The end of life obligations, designed to prevent environmental consequences, are a component of the licence link.

21. All of the obligations under each of the licences held by one licence holder, such as Redwater, are connected together as a package by AER's *Directive 006* and the LLR program.[17]

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[11] *Surface Rights Act*, RSA 2000, c S-24, s 12.
[12] Public Lands Act, supra note 10, s 20.
[13] OGCA, *supra* note 8, s 11.
[14] *Ibid*, s 12.
[15] *Pipeline Act*, *supra* note 8, s 6.
[16] OGCA, *supra* note 8, ss 16-17.
[17] Redwater CA, *supra* note 4 at paras 134 – 138 [AR vol I, page 125].

22. In summary, the land, the licence link and the oil and gas deposit are each comprised of unique components. The components are not interchangeable. The Majority's mixing and matching of components among the three parts leads to the erroneous conclusion that the trustee could disclaim Redwater's interests in the oil and gas deposits thus relieving Redwater of all its end of life obligations. The environmental consequences of Redwater's operations do not vanish but are left to private land owners or the public to deal with.

23. This could not have been the intent of Parliament in enacting s. 14.06 of the *BIA*.

ii. Errors in Interpreting Section 14.06 of the *BIA*

24. The Majority erred in concluding Redwater's interest in the oil and gas deposits are capable of being disclaimed by the trustee under the *BIA* s.14.06 (4)(a) by compounding the following three errors:

a) the physical oil and gas deposits become contaminated as a result of Redwater's operations;

b) the orders imposing environmental obligations on Redwater issued by the AER relate to the oil and gas deposits;[18] and

c) the oil and gas deposits are "property involved in a bankruptcy", i.e. the property of Redwater for the purpose of *BIA* s. 14.06(4).

25. The environmental consequences of Redwater's operations attach to the surface land and it is these private lands or public lands that are contaminated by Redwater's operations. The oil and gas deposits are not contaminated by Redwater's operations. Therefore, the oil and gas deposits are not property involved in a bankruptcy for the purpose of s. 14.06 and are not capable of being disclaimed by the trustee.

26. The AER orders enforcing end of life obligations do not relate to the oil and gas deposits. The end of life obligations are in place to avoid environmental consequences to the surface lands.

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[18] *Ibid* at paras 71, 75 [AR vol I, at 106-107].

27. The trustee cannot disclaim surface land that is contaminated because Redwater has no interests in the surface land and the trustee can only deal with property interests of Redwater under s. 14.06. Further, s. 14.06 is strictly about environmental claims relating to the debtor's land. It does not deal with any other "environmental claims" and specifically not those where the debtor has caused contamination on land owned by others. Section 14.06 is inapplicable to the Redwater facts because s. 14.06 does not deal with land owned by innocent others.

28. Section 14.06 cannot apply to either surface lands or Redwater's interests in the oil and gas deposits and there are no other real property interests held by Redwater to which s. 14.06 could be applied.

iii. *Abitibi* does not Apply to the Redwater Facts

29. In *Abitibi*, this Court found that not all obligations to restore environmental damage are provable claims in bankruptcy.[19] This is such a case and Redwater's liability for the environmental consequences of its operations are unaffected by Redwater's bankruptcy.

30. This Court's interpretation of s. 14.06, contained in *Abitibi* does not apply to the Redwater facts because:

1. The owners of the surface lands are not regulators or creditors of Redwater, and
2. The Crown's super priority under s. 14.06(7) is meaningless for the oil and gas industry in Alberta.

31. Owners are not regulators or creditors - When a regulatory body such as the AER exercises its enforcement powers against a debtor to remediate the environmental damage to the debtor's own land and the debtor's environmental obligation reduces to a monetary amount, a regulator can become a creditor in bankruptcy proceedings for the regulator's costs of remediation. However, private landowners have no regulatory authority to compel the debtor to clean up their land. Neither do these landowners have

[19] Abitibi, supra note 7.

any remedy in the *OGCA* or the *Pipeline Act* for the environmental damage caused by Redwater's operations.[20]

32. Even if remediation costs reduce to a monetary amount, private landowners are unable to take advantage of s. 14.06(7) to obtain a priority over secured creditors for the contamination of their land.[21] They do not automatically become creditors with a provable claim absent a pre-existing debtor-creditor relationship with Redwater. Thus, without this pre-existing relationship, the interests of these landowners will not prevail in the bankruptcy process. Private landowners have no certainty that the Bankrupts estate would respond to a request for reimbursement of cleanup costs.[22]

33. Further, enforcement of Redwater's end of life obligations to prevent the environmental consequences of its operations to lands owned by others does not have the effect of reordering the priorities in Redwater's bankruptcy.[23]

34. Even if there was a "debt", it is the cost to correct the environmental damage to the surface land. Here, the "debt" does not attach to the oil and gas deposit. Therefore, the "debt" is owed to the surface landowner, whether private landowner or the Crown. By contrast, the debts in *Abitibi* attached to the debtor's land and were owed to a regulator.[24]

35. Here, even if s. 14.06 permits the trustee to disclaim Redwater's interest in the oil and gas deposit, because the "debt" or the cost of environmental remediation does not attach to the oil and gas deposit, the debt is unaffected by the bankruptcy. Therefore, Redwater's end of life obligations survive the bankruptcy. Because the bankruptcy does not extinguish the "debt", *Moloney* relied on by the Majority is distinguishable.[25]

36. Crown's Super Priority - Because the surface (land) bears the burden of the environmental consequences of Redwater's operations and is owned by either the public

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[20] OGCA, *supra* note 8 and *Pipeline Act, supra* note 8.
[21] Redwater CA, *supra* note 4 at para 78 [AR vol I, at 108].
[22] *Ibid*, at para 184 [AR vol I, at 136].
[23] *Ibid* at para 158 [AR vol I, at 130].
[24] Abitibi, supra note 7.
[25] *Alberta (AG) v Moloney,* 2015 SCC 51; Redwater CA, *supra* note 4 at para 87 [AR vol I at p 145].

(not the AER) or a private landowner, it is impossible to give the Crown the super priority contemplated by s. 14.06(7). The restitutionary principle underlying the grant of this security interest relied on by the Majority does not apply here because the debtor does not own the land that is contaminated.[26]

37. On the Redwater facts, the super priority is unavailable as there is nothing owned by Redwater over which such a priority could be granted; both the land and the oil and gas deposits are owned by either the public or private landowners.

38. *Abitibi*, *Nortel* and *Northstar* are distinguishable on this important fact. In each of those cases the debtor owned the fee simple interest in land that was contaminated and the regulator ordered the debtor to clean up those lands.[27] In each of those cases it was appropriate for the Crown to have the benefit of a super priority for its costs of remediation that attached to the debtor's land based on the restitutionary principle.

39. Alternatively, even if there was a real property interest of the debtor of the nature contemplated by s. 14.06 at issue here, the *Abitibi* test is not met for the reasons noted by Justice Martin.[28]

B. Paramountcy

40. The test for conflict is whether there is operational conflict and if not, whether there is nonetheless frustration of the federal purpose. To prove that provincial legislation frustrates the purpose of the federal enactment, the challenger must first establish the purpose in a fairly specific manner and then prove that provincial legislation is incompatible with this purpose. [29]

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[26] Redwater CA, *supra* note 4 at para 55 [AR vol I, at p 100].
[27] *Abitibi, supra* note 7; *Re Nortel Networks Corporation*, 2013 ONCA 599; *Re Northstar Aerospace Inc*, 2013 ONCA 600 as quoted in Redwater CA, *supra* note 4 at para 219 [AR vol I at p 145].
[28] Redwater CA, *supra* note 4 at paras 174, 184, 187 [AR vol I, at 133 and 135].
[29] *Saskatchewan v Lemare Lake Logging,* 2015 SCC 53 at paras 26-27 [*Lemare Lake*].

41. As was the case with the secured creditor who challenged provisions of the *Saskatchewan Farm Security Act* in *Saskatchewan v Lemare Lake Logging,*[30] there is no operational conflict here. In *Lemare Lake*, the secured creditor could comply with both sets of laws by observing the longer periods required for the appointment of a receiver under provincial law. Here, receivers can comply with provincial law and did so prior to this matter, without breaching federal law. As there is no express contradiction and no operational conflict, Alberta's focus will be on the question of frustration of federal purpose.

42. The fundamental rule of interpretation is that where a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict.[31] Related to this principle of interpretation is the concept that merely because Parliament has legislated in any area does not create a presumption that it intended to oust provincial action in relation to that subject. The bar for concluding that there is a frustration of federal purpose is accordingly very high under the "restrained approach" that this Court has emphasized must be followed.

43. Applying the principle of cooperative federalism in this matter requires that one pay careful attention to the nature and purposes of the provincial scheme that interlocks with insolvency law. This Court has underscored the need to avoid improperly broadening the intended purpose of a federal enactment. The goal is to "facilitate interlocking federal and provincial schemes and to avoid unnecessary constraints on provincial legislative action."[32]

44. Here there is no doubt of the validity of the *BIA*, authorized by the federal power over "bankruptcy and insolvency" in s. 91(21) of the *Constitution Act, 1867*. There is also no doubt and no question about the validity of the provincial regulatory scheme being considered. Provinces have the exclusive jurisdiction to create personal property rights,

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[30] *Ibid* at paras 18, 25.
[31] *Ibid* at para 20.
[32] *Ibid* at para 23.

their transfer and their general characteristics pursuant to their power over the management of public lands and the power over property and civil rights in the province granted by s. 92(5) and s. 92(13) of the *Constitution Act, 1867*. Clearly then, provinces have the exclusive right to create licences to engage in certain activities subject to conditions and contingencies. In addition provinces have exclusive jurisdiction to develop, conserve and manage their natural resources under s. 92A of the *Constitution Act, 1982*.[33]

45. In *Bank of Montreal v. Marcotte*, this Court provided important observations on the need to ensure that federal entities such as banks not be placed in an elevated position with respect to general provincial laws such as the contractual norms designed to govern commercial relations in a province and to provide for civil remedies.[34] Arguments that banks in that case or companies in this case seeking insolvency protection, or receivers or secured creditors in this matter, should be granted "sweeping immunity from provincial laws of general application" should be rejected.[35]

i. The Provincial Scheme

46. It is Alberta's submission that s. 14.06 of the *BIA* simply does not apply on the facts of this case and thus the doctrine of paramountcy need not be considered.

47. Frustration of Purpose – there is no evidence that the purpose of the *BIA* is frustrated by obliging oil and gas companies to fulfill the conditions on their licenses regarding end of life obligations.

48. Further, the LLR Program scheme does not misdirect the value in the AER issued licences from the creditors of the estate to the AER. The LLR program provides that an appropriate ratio must be maintained each month which a regulated party such as Redwater can do by conducting abandonment and reclamation of one or more well sites, providing a security deposit or potentially obtaining another licence to a producing well.[36]

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[33] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[34] *Bank of Montreal v Marcotte*, [2014] 2 SCR 725 at para 79.
[35] *Ibid* at para 84.
[36] Affidavit of Patricia Johnston, sworn August 13, 2015, para 14 [AR vol IV, at 8].

The LLR scheme is simply providing a number of options for ensuring that end of life obligations are met. Bankruptcy does not and cannot prohibit the AER from including obligations on licences which, in effect, bind the package of licenses that one licenceholder has.

49. It is now trite law that a trustee in bankruptcy is in no higher position than the bankrupt and accordingly, the property that vests in the trustee comes "warts and all".[37] As noted by Justice Martin, the package of licences includes conditions on end of life obligations and this is what the receiver holds.[38]

50. The evidence on the Record fails to disclose the broad purpose of the federal provisions contended for by the Respondents. Given the paucity of evidence supporting their view, this Court should prefer an interpretation that allows for the two interlocking schemes to continue to subsist. Indeed, the evidence that is available favors an interpretation of s. 14.06 that restricts it to a narrow range of situations, focusing on the protection from personal liability of a trustee or receiver, within the context of the remediation of lands for environmental purposes. The evidence does not support the view that Parliament intended to grievously impair a broad-based licensing regime such as Alberta's, which includes necessary ongoing remediation obligations, including end of life obligations. The intent of s. 14.06 was not to enable trustees and receivers to act in a manner that would be highly prejudicial to third party landowners and other stakeholders in order to enhance financial recovery of secured creditors at the expense of the former. It was not intended to allow trustees and receivers to renounce or disclaim assets in situations such as the one before the Court.[39]

ii. *Abitibi* Has Limited Significance for the Analysis Under Paramountcy

51. Given the nature of the provincial course of action and the legislation adopted to respond to one specific state of affairs, as well as the legal arguments advanced in *Abitibi*,

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[37] *Saulnier v Royal Bank of Canada*, 2008 SCC 58 at para 50.
[38] Redwater CA, *supra* note 4 at paras 241-242 [AR vol I, at 150-151].
[39] See Factum of Appellants at paras 49-50, 56.

it is crucial that *Abitibi* not be given undue significance when analyzing the radically different provincial legislation under review in this matter.

52. *Abitibi* was not a case involving the scrutiny of a broadly based licensing and regulatory scheme that is said to be in conflict with the *BIA*. Rather, the case involved analysis of specific actions and orders of a provincial regulatory agency. It addressed the question of whether those orders issued with respect to environmental remediation of lands owned at the time of the degradation by *Abitibi* could be treated as monetary claims under the *Companies' Creditors Arrangement Act*.[40] The constitutional questions for the Court did not address matters of paramountcy but instead, whether specific provisions were *ultra vires* Parliament.

53. The *Abitibi* matter needs to be placed in its factual context, one much different than this case. Following the announcement that *Abitibi* was closing a mill, its last operation in the province, Newfoundland took a number of aggressive steps designed specifically to improve its financial position *vis-à-vis* the company. The purpose of the legislation and the ensuing orders were significantly different than the purposes served by Alberta's licensing and regulatory regime.

54. Certainly this Court's statements pertaining to the interpretation of the federal provisions that were analyzed in *Abitibi* have significance. The decision cannot however provide guidance on the central questions of the federal purpose of the relevant provisions of the *BIA*, (specifically in relation to their interaction with comprehensive legislation designed to ensure responsible development and stewardship of Alberta's natural resources in a manner that protects the interests of third party landowners and other stakeholders). Nor can it assist with an assessment of how the vital provincial purposes being served are meant to interface with the federal bankruptcy and insolvency laws.

55. For the reasons just expressed and for the reasons set forth in paras 29-39 (above), it is Alberta's position that *Abitibi* does not apply on the facts of this case. Further and in

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[40] RSC 1985, c C-36.

the alternative, the test in *Abitibi* is not met: there is no debt owed to a creditor; the debt did not occur prior to bankruptcy, and it is not possible to attach a monetary value to the debt. In addition, a full appreciation of the nature of Alberta's legislation leads to the conclusion that federal law was never designed to displace it in the manner contended for by the Respondents and proper limits must be placed on the interpretation of s.14.06 so that vital provincial powers and responsibilities are respected.

56. As noted by Justice Martin:

- The obligations imposed by the Alberta regime are ongoing regulatory obligations owed to the public; specifically a public obligation is imposed by the regulatory regime and as well obligations are imposed in return for access to a public resource.[41]
- The requirement to post security as part of the licence transfer is not a debt owed to the AER or the province. It is part of the conditions attached to the licence.[42]
- The abandonment work is not performed by, or funded by, the provincial government and there is not sufficient certainty that the work will be done, either by the AER or the OWA and no certainty at all that a claim for reimbursement would be made.[43]
- The LLR program applies to all licensees and pre-dates the bankruptcy. The continued application of the program upon insolvency falls outside the spirit of *Abitibi*.[44]

57. In the alternative, if we are wrong in our evaluation of the scope of *Abitibi*, we suggest that aspects of the test might require reexamination with a view to supplementing or refining it in order to better balance the goals of the two levels of government. "Assessing

[41] Redwater CA, *supra* note 4 at paras 174, 184 [AR vol I, at 133 and 135].
[42] *Ibid* at para 187 [AR vol I, at 136].
[43] *Ibid* at paras 179-187 [AR vol I, at 134-135].
[44] *Ibid* at para 187 [AR vol I, at 136].

whether or not a regulatory claim is provable [has become] an unpredictable and fact-specific enterprise." [45]

58. Given the important public interest issues at stake (health, safety and the environment)[46] the final part of the test should not be whether a monetary value can be attached to a regulatory interest rather there should be a more nuanced balancing of interests.

iii. Recognizing the Importance of Public Interest Purposes within the Paramountcy Analysis

59. This Court has been alert to the need to afford ample opportunity for interlocking provincial and federal laws where the former serves important public purposes relating to health, safety and environmental protection concerns. That approach should be adopted in this matter. In *Rothmans*, the federal tobacco legislation allowed retailers to display tobacco products in their stores.[47]

60. Provincial law prohibited such displays in relation to individuals under the age of 18. In concluding that there was no conflict, the Court had regard to the health problems provincial law was addressing, concerns that were found to be shared by the federal government. The natural public health problems ascribed with tobacco consumption were identified as a substantial and pressing concern under federal law and these encompassed the provincial concerns pertaining to the advertising of tobacco products directed at youth. The latter were thus not viewed as frustrating federal purpose despite the clear difference in approach taken in the two statutes.

61. In this matter, the Court should have regard to the important public interests being served and recognize that these interests are consistent with general federal objectives.

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[45] Anna Lund, "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 165.

[46] Benjamin Dachas, Blake Shaffer and Vincent Thivierge, "All's Well that Ends Well: Addressing End-of-Life Liabilities for Oil and Gas Wells" C.D. Howe Institute Commentary 492; Lucija Muehlenbachs, "80,000 Inactive Oil Wells: A Blessing or a Curse?" (2017) 10:3 The School for Public Policy, The University of Calgary.

[47] *Rothmans, Benson & Hedges v Sask* [2005] 1 SCR 188 at paras 20-25.

In addition, Parliament has demonstrated that it values Alberta's licencing regime pertaining to safety and environmental protection and has incorporated it by reference into federal law, applicable on Indian reserves in the province. There it should operate without any possible conflict with the *BIA*.[48]

C. Interjurisdictional Immunity

62. Were the Respondent's interpretation of the federal provisions to be correct, the result would be to trigger the need to consider core provincial jurisdiction and Alberta would then invoke the doctrine of interjurisdictional immunity. Consideration of this issue would preferably lead to the need to revisit paramountcy and to call into question the Respondent's approach anew. There is no reason to believe that Parliament intended to impair core provincial jurisdiction. That being said, it is useful to analyze the matter from the vantage point of interjurisdictional immunity.

63. The test for interjurisdictional immunity is set out in *Canadian Western Bank* ("*CWB*")[49] and applied in such later cases as *COPA*,[50] *Quebec Lacombe*,[51] *Vancouver International Airport,*[52] and *Rogers*.[53.]

64. The promotion of insurance by banks was assessed in *CWB*. The test preserves the core, basic, minimum unassailable aspects of the government's jurisdiction from the legislation of the other level of government that would impair this core. In determining what constituted the core or vital part of federal jurisdiction over banking, this court held that the lending of money and taking of security were vital functions of banking and therefore within the zone of immunity. The promotion of insurance was not.

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[48] *Indian Oil and Gas Regulations*, 1995 SOR94/753 at s 4(c).
[49] *Canadian Western Bank v Alta,* 2007 SCC 22.
[50] *Quebec (AG) v Canadian Owners and Pilots Association*, 2010 SCC 39 (*COPA*).
[51] *Quebec (AG) v Lacombe*, 2010 SCC 38.
[52] *Vancouver International Airport Authority v British Columbia (AG),* 2011 BCCA 89, (2011) 331 DLR (4th) 737.
[53] *Rogers Communications v Chateauguay,* 2016 SCC 23.

65. In *COPA*, this Court provided what has been described as a "robust" application of interjurisdictional immunity.[54] This Court held that the location of airports was 'essential' to the federal power. The provincial law impaired the power, an action described as "a midpoint between sterilization and mere effects."[55]

66. In *Vancouver International Airport*, the British Columbia Court of Appeal, following *COPA*, held that registration of a lien on the leasehold interest in the airport would impair a vital part of the undertaking. It would diminish without preventing the airport's ability to finance the construction and maintenance of the facilities.

67. In principle there is no reason why interjurisdictional immunity should not be engaged in order to protect a province's core jurisdiction. Further, case law indicates or implies the doctrine can be relied upon by a province.[56]

68. Given that it is appropriate to consider interjurisdictional immunity in this matter, if necessary, it is submitted that the situation here can be likened to that before the court in *Vancouver Airport Authority*. It is critical to recognize that the Court's prime reasoning in the case was unrelated to the prospect of a forced sale of the airport lands under the builder's lien regime. Rather, the mere filing of a lien was sufficient to consider that the core of federal jurisdiction was impaired. It is evident that the interpretation of federal insolvency law here contemplated, involving far more invasive and destructive consequences for the provincial scheme than that entailed by the filing of a lien. It must be viewed as impairment of vital and essential aspects of the province's jurisdiction under ss. 92(5), 92(9), 92(13), and s. 92A of the *Constitution*.

69. As Robin Elliot and Peter Hogg correctly observe, federal law, like provincial law, can properly be read down and has been in various circumstances where courts have found

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[54] P W Hogg, *Constitutional Law of Canada* (Toronto: Thomson Reuters Canada, 2007) (loose-leaf 2016) at 15-37 [Hogg].
[55] *COPA supra* note 50 at para 44.
[56] *Canada v PHS Community Services Society* [2011] 3 SCR 134 at para 165; *Medicine Hat (City) v Canada (AG)*, 1985 ABCA 89 (Alta CA).

that it should not apply to provincial legislative schemes or entities[57]. In affirming the principles of federalism, this Court should apply interjurisdictional immunity to preserve core provincial jurisdiction, in the event federal law is here considered to have the potential to conflict with the powers establishing the provincial regulatory scheme. These powers are an essential aspect of the province's ability to manage and regulate development of the resources under its ownership or control in a responsible manner; one that seeks to prevent the clear prospects of a "moral hazard" arising from a situation where responsibilities for abandoned wells can readily be evaded by licensees, placing heavy and unnecessary burdens on landowners in the process.

70. Provincial jurisdiction over natural resources and their exploration and development lies at the heart of s. 92 and s. 92A of the *Constitution Act*, *1867*. Section 92A is a powerful affirmation of the importance of this jurisdiction, which extends to matters of ownership, control and responsible stewardship of these resources.[58]

71. The licensing and regulatory scheme at issue in this matter cannot be interfered with in the manner argued for by the Respondents without impairing the core of this provincial jurisdiction. In the event of a potential conflict, federal provisions must be read down to prevent impairment of the basic powers of the province, which form a vital part of Alberta's ability to manage its resources and protect the well-being of its residents.

72. Federalism is an underlying principle of the Canadian Constitution. The appropriate means of affirming this bedrock principle and the related principle of subsidiarity in this matter is to read down the federal provisions so as not to eviscerate the provincial scheme. In the event one can interpret the federal provisions in the manner called for by the Respondents, it is unlikely that Parliament properly considered the drastic consequences that would inevitably arise.

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[57] Hogg, *supra* note 54 at 15-38.6-15-38.8; R M Elliott, "Interjurisdictional Immunity after *Canadian Western Bank and Lafarge Canada Inc*" (2008) 43 SCLR (2d) 433.

[58] Dr Nathalie J Chalifour "Making Federalism Work for Climate Change: Canada's Division of Powers over Carbon Taxes" (2008) 22 NJCL 119 at 168.

D. Suspension

73. Should this Court dismiss this appeal, this Intervenor asks the Court to suspend the effect of its ruling to allow the Government of Alberta time to implement options to the current provincial licencing scheme and the LLR program. Given the complexity of the scheme and the enormous public interest ramifications, both financially and to the environment, a minimum of eighteen months suspension is sought.

74. Absent a suspension the effective result will be to allow companies like Redwater to walk from abandonment, remediation and reclamation obligations related to its licenced operation. During the time between the Queen's Bench decision and the Court of Appeal decision in this case, the number of licenced sites renounced by receivers more than doubled.[59]

75. Further and in the alternative, should this Court dismiss this appeal and not grant a suspension, Alberta reserves the right under SCC Rule 62[60] to bring a Motion for a stay of execution.

E. Conclusion

76. It is Alberta's position that as a matter of statutory interpretation, the *BIA* was not intended to apply and does not apply to the facts of this appeal. Further, there is no conflict between the *BIA* and Alberta's licensing and regulatory regime, as these interlocking sets of laws do not involve conflict or the frustration of federal purpose. Finally, in the alternative, the doctrine of interjurisdictional immunity may be invoked to the degree necessary to preserve the provincial regime. Any sweeping interpretation of s. 14.06 of the *BIA*, as advocated by the Respondents, would interfere with the basic and unassailable minimum of provincial powers and needs to be read down so as to preserve that core jurisdiction.

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[59] Factum of the Appellant paragraph 21; see also Affidavit of David Wolff sworn September 22, 2015 [AR vol IV, at 117-118].
[60] SOR/2002-156.

PART IV: COSTS

77. Alberta does not seek costs for its intervention and asks that no costs be ordered against it.

PART V: REQUEST FOR ORAL ARGUMENT

78. As Alberta has played a major role throughout this matter and as it is our legislation and the extent of our jurisdiction that is engaged, we request 30 minutes for oral argument.

All OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of January, 2018.

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PART VI: LIST OF AUTHORITIES

	Statute	Paragraph
1.	*Alberta Energy Regulator Directive 006*: Licencee Liability Rating (LLR) Program and Licence Transfer Process.	2, 4, 9, 21, 48, 56, 73
2.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3.	2, 4, 5, 6, 7, 9, 11, 12, 23, 24, 44, 46, 47, 52, 54, 61, 76
3.	*Companies' Creditors Arrangement Act*, RSC 1985, c C-36.	52
4.	*Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.	9, 44, 68, 70, 72
5.	*Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.	9, 44, 68, 72
6.	*Indian Oil and Gas Regulations*, 1995 SOR94/753.	61
7.	*Mines and Minerals Act*, RSA 2000, c M-17.	13, 16
8.	*Oil and Gas Conservation Act*, RSA 2000, c O-6.	9, 15, 19, 31
9.	*Oil and Gas Conservation Rules,* Alta Reg 151/1971.	15
10.	*Pipeline Act*, RSA 2000, c P-15.	9, 15, 19, 31,
11.	*Public Lands Act*, RSA 2000, c P-40.	17
12.	*Rules of the Supreme Court of Canada*, SOR/2002-156.	75
13.	*Surface Rights Act*, RSA 2000, c S-24.	17

	Case	Paragraph
14.	*Alberta (AG) v Moloney,* 2015 SCC 51.	35
15.	*Bank of Montreal v Marcotte*, [2014] 2 SCR 725.	45
16.	*Canada v PHS Community Services Society* [2011] 3 SCR 134.	67
17.	*Canadian Western Bank v Alta,* 2007 SCC 22.	63, 64
18.	*Imperial Oil Ltd v Quebec (Minister of the Environment),* 2003 SCC 58.	3
19.	*Medicine Hat (City) v Canada (AG)*, 1985 ABCA 89 (Alta CA).	67
20.	*Newfoundland and Labrador v Abitibi Inc*, 2012 SCC 67.	5, 12, 29, 30, 34, 38, 3951, 52, 53, 54, 55, 56, 57