Court File No. 37627

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

B E T W E E N:

ORPHAN WELL ASSOCIATION and ALBERTA ENERGY REGULATOR

Appellants
(Appellants)

- and -

GRANT THORNTON LIMITED and
ATB FINANCIAL (formerly known as ALBERTA TREASURY BRANCHES)

Respondents
(Respondents)

- and -

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(Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND FACTS

A. Overview

1. Ensuring participants in highly regulated activities comply with regulations enacted to protect the environment and human safety is primarily a provincial concern. Although certain regulatory orders can be compromised in bankruptcy,[1] orders like the ones issued by the Alberta Energy Regulator (the "AER") in this case can and should continue to operate in bankruptcy.

2. Where a regulator takes steps to ensure regulated activities are carried out in compliance with a regulatory scheme enacted to protect the public (such as the AER's decision not to approve the transfer of Redwater's well licences unless compliance with the AER's Licence Liability Risk ("LLR") program was demonstrated), it does not act as a "creditor" of any particular regulated entity, even if its decision indirectly imposes costs on that entity.

3. Similarly, the fact that an order (such as the AER's abandonment orders and its decision on Redwater's transfer application) may impose costs on a regulated entity or decrease the resell value of licences does not make the order "monetary in nature" under the *Abitibi* test. It is only when it is sufficiently certain that the regulator will itself perform work and seek reimbursement that a regulatory order becomes a monetary one. That certainty did not exist here.

B. Facts

4. Ontario relies on the facts as set out by the Appellants.

5. Like Alberta, Ontario has passed a detailed regulatory scheme to govern the development of oil and gas resources under its exclusive jurisdiction over provincial public lands, property and civil rights, and non-renewable resources.[2]

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[1] *Newfoundland and Labrador v. Abitibibowater Inc.*, 2012 SCC 67, [2012] 3 SCR 443 ("*Abitibi*")

[2] *Constitution Act, 1867*, ss. 92(5) and (13) and 92A

6. In Ontario, older Crown land grants tended to grant title to both surface and mineral rights while more recent Crown land grants have tended to reserve mineral rights to the Crown.[3] Before oil and gas resources can be exploited, the development company must first have title to those resources or lease those rights from the titleholder.

7. Obtaining permission to exploit oil and gas resources in private ownership is often a matter of private negotiation and lease. Oil and gas resources held in private ownership must generally be pooled before they can be exploited.[4] With respect to oil and gas resources held by the Crown, Part IV of the *Mining Act* allows the Minister of Natural Resources and Forestry (the "Minister") to grant exploration and drilling licences and production and storage leases.[5]

8. Once a lease or licence to exploit mineral resources has been obtained from the private owner or the Crown, a separate well licence must be obtained from the Minister under the *Oil, Gas, and Salt Resources Act* ("OGSRA") before any well is drilled, operated, deepened, altered, or entered or any other activity on or in a well is conducted.[6] Various types of injection activities require a separate injection permit under OGSRA.[7]

9. Under OGSRA, the Minister may attach such terms, conditions, duties, and liabilities to licences or permits as the Minister considers proper.[8] The Minister may, and in certain cases shall, seek a report from the Mining and Lands Commissioner (to be replaced by the Mining and Lands Tribunal) and/or the Ontario Energy Board before exercising that discretion.[9]

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[3] *Public Lands Act*, RSO 1990, c. P.43, ss. 60-61
[4] *Oil, Gas and Salt Resources Act*, RSO 1990, c. P.12, ss. 7.1-8; O.Reg. 245/97, ss. 8-15
[5] RSO 1990, c. M.14, ss. 1 and 100-02; O.Reg. 263/02
[6] RSO 1990, c. P.12, ss. 10
[7] *Oil, Gas and Salt Resources Act*, *supra*, s. 11
[8] *Oil, Gas and Salt Resources Act*, *supra*, s. 13
[9] *Oil, Gas and Salt Resources Act*, *supra*, s. 13; *Ministry of Natural Resources Act*, RSO 1990, c. M.31, s. 6 to be amended by SO 2017, c. 8, Sch. 17, s. 3 (not yet in force); *Ontario Energy Board Act, 1998*, SO 1998, c. 15, Sch. B, s. 40

10. A well licence or permit can only be transferred with the Minister's written consent.[10] A person aggrieved by the Minister's refusal to consent to the transfer of an OGSRA licence or permit can appeal it to the Mining and Lands Commissioner (or Tribunal) which is required to hold a hearing into the matter and report back to the Minister.[11]

11. The Ontario Energy Board has jurisdiction to designate areas (including underground geologic formations) as gas storage areas and authorize the injection of gas into, the storage of gas in, and the removal of gas from the designated areas.[12] An OGSRA licence is also required for the wells used in such projects.[13] The Ontario Energy Board also regulates the construction of various types of hydrocarbon pipelines.[14]

12. Under OGSRA, the holder of a licence or permit shall comply with any terms, conditions, duties, or liabilities to which the licence or permit is subject.[15] Well operators must take every precaution reasonable in the circumstance to ensure that their employees and agents comply with OGSRA and its regulations.[16] Failure to comply is grounds for an inspector to issue an order for compliance.[17] Failure to comply is also a provincial offence.[18]

13. Wells must be designed, constructed, operated, maintained, and abandoned (plugged) in accordance with the *Oil, Gas and Salt Resources of Ontario Provincial Operating Standards* ("Provincial Standards") published by the Ministry of Natural Resources and Forestry and

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[10] *Oil, Gas and Salt Resources Act*, *supra*, s. 10.1; O.Reg. 263/02, s. 25
[11] *Oil, Gas and Salt Resources Act*, *supra*, s. 10.1
[12] *Ontario Energy Board Act, 1998*, *supra*, ss. 36.1-38
[13] *Oil, Gas and Salt Resources Act*, *supra*, s. 11(2)
[14] *Ontario Energy Board Act, 1998*, *supra*, ss. 89-90
[15] *Oil, Gas and Salt Resources Act*, *supra*, s. 13(3)
[16] *Oil, Gas and Salt Resources Act*, *supra*, s. 12
[17] *Oil, Gas and Salt Resources Act*, *supra*, s. 7
[18] *Oil, Gas and Salt Resources Act*, *supra*, s. 19

adopted under O.Reg. 245/97.[19] The operator of a dry oil or gas well or a well that is no longer used is required to plug the well (what in Alberta is known as abandoning the well) as soon as practical and, in any case, within 12 months after it is determined to be dry or is taken out of use.[20] Operators are also required to return the well site to its original condition as nearly as practical and as soon as practical, but no later than 6 months from the plugging date.[21]

14. A Ministry inspector can order the operator of a well to plug a well or decommission a facility used to store, process or transport any substance produced from or injected into the well within such time as the inspector considers appropriate if (a) the inspector is of the opinion that the well or facility represents a hazard to the public or the environment; or (b) any activity relating to the well or facility has been suspended (e.g. where the well has not been in use for 12 months, as required by s. 19 of O.Reg. 245/97).[22] Such an order can be appealed to the Minister, who may then appoint a designate for the purpose of disposing of the appeal.[23]

15. Finally, like everyone else in the province, well operators must obtain all environmental compliance approvals required under the *Environmental Protection Act* and the *Ontario Water Resources Act*, not discharge contaminants into the natural environment that cause or may cause an adverse effect or exceed prescribed limits, not discharge material into waters that may impair the quality of that water, and prevent, eliminate, and ameliorate spills.[24] If a well operator fails to

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[19] O.Reg. 245/97, s. 2; *Oil, Gas and Salt Resources of Ontario, Provincial Operating Standards*, Version 2.0 (27 March 2002)
[20] O.Reg. 245/97, s. 19; Provincial Standards, ss. 11.01-11.14
[21] Provincial Standards, s. 11.13
[22] *Oil, Gas and Salt Resources Act*, *supra*, s. 7.0.1
[23] *Oil, Gas and Salt Resources Act*, *supra*, s. 7.0.2
[24] *Environmental Protection Act*, RSO 1990, c. E.19, ss. 6, 9, 14, 20.1-20.18, and 91-93; *Ontario Water Resources Act*, RSO 1990, c. O.40, ss. 30 and 53

comply, it can be issued regulatory orders by a Provincial Officer or Director appointed under those Acts, issued an administrative monetary penalty, or charged with a provincial offence.[25]

PART II – POSITIONS ON APPELLANTS' ISSUES

16. Ontario's position is that the dissenting reasons of Martin J.A. (as she then was), not the reasons of the majority below, correctly express the law on all of the appellants' issues.

PART III – ARGUMENT

A. The *BIA* Must Leave Space for the Operation of Provincial Environmental Law

17. In interpreting the *BIA* in this case, this Court should take care to ensure, as Martin J.A. did in the Court below, that sufficient space remains for provincial regulatory laws to continue to operate except where Parliament clearly intended to oust them. This Court has repeatedly cautioned that courts should be reluctant to find constitutional conflict between concurrent federal and provincial authority; instead, courts must strive, where possible, to adopt interpretations that allow both federal and provincial legislation to continue to operate.[26]

18. In particular, when determining whether the continued application of provincial regulatory legislation would frustrate the purposes of the *BIA*, a restrained interpretation of the federal purpose should be adopted, lest the discredited "occupied field" theory of paramountcy be revived.[27]As this Court held in *Marcotte,* "[t]he mere fact that Parliament has legislated in an

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[25] *Environmental Protection Act, supra*, ss. 7-8, 17-18, 94-95, 97-98, 124-30, 157-57.1, and 182.1-91; *Ontario Water Resources Act, supra*, ss. 16, 16.1-16.3, and 106.1-113

[26] *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at 186-91; *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2005 SCC 13 at para. 21, [2005] 1 SCR 188; *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town*), 2001 SCC 40 at paras. 34 and 46, [2001] 2 SCR 241; *Canadian Western Bank v. Alberta*, 2007 SCC 22 at paras. 24, 36-37, and 69-75, [2007] 2 SCR 3; *Alberta (A.G.) v Moloney*, 2015 SCC 51 at para. 27, [2015] 3 SCR 327; *Saskatchewan (A.G.) v Lemare Lake Logging Ltd.*, 2015 SCC 53 at para. 21, [2015] 3 SCR 419

[27] *Canadian Western Bank, supra* at paras. 69–75. See also *Marine Services International v Ryan Estate*, 2013 SCC 44 at para. 72, [2013] 3 SCR 53 and *Lemare Lake, supra* at para. 27

area does not preclude provincial legislation from operating in the same area."[28] This Court also recently affirmed in *Lemare Lake* that "the purpose of federal legislation should not be artificially broadened beyond its intended scope."[29]

19. A broad approach to identifying conflicts carries particular risks when dealing with bankruptcy and insolvency laws. As this Court and the Privy Council have repeatedly recognized, the federal power to legislate in relation to "Bankruptcy and Insolvency" necessarily operates against a backdrop of property and civil rights that falls within exclusive provincial jurisdiction. The entirety of the federal power in relation to bankruptcy and insolvency has been "carved out" of the provincial power to legislate in relation to property and civil rights.[30]

20. The *BIA* is not a comprehensive code of property and civil rights as they pertain to insolvent and bankrupt persons. Rather, the *BIA* depends upon and is inextricably entwined with provincial laws relating to property and civil rights:

> Even though bankruptcy is clearly a federal matter, and even though it has been established that the federal Parliament alone can determine distribution priorities, the *BIA* is dependent on provincial property and civil rights legislation in order to inform the terms of the *BIA* and the rights of the parties involved in the bankruptcy.[31]

21. Moreover, s. 72(1) of the *BIA* expressly directs that provincial laws should continue to apply unless there is a conflict with the *BIA*.[32] In interpreting the *BIA*, therefore, this Court should prefer an interpretation, whenever possible, that allows provincial laws of general

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[28] *Bank of Montreal v. Marcotte*, 2014 SCC 55 at para. 72, [2014] 2 SCR 725. See also *Canadian Western Bank*, *supra* at para. 74
[29] *Lemare Lake*, *supra* at para. 23
[30] *Husky Oil Operations Ltd. v Canada (Minister of National Revenue)*, [1995] 3 SCR 453 at para. 81; *Tennant v Union Bank of Canada*, [1894] AC 31 at paras. 26–28 (PC); *Reference re: An Act respecting Assignments and Preferences by Insolvent Persons (Ont.)* [1894] JCJ No 1 at para. 27 (PC); *Cushing v Dupuy* (1880), 5 AC 409 at para. 13 (PC)
[31] *Giffen (Re)*, [1998] 1 SCR 91 at para. 64
[32] *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, s. 72(1)

application, including environmental laws, to operate in bankruptcy. As this Court noted in *Canadian Western Bank,* "the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest."[33] To do otherwise would be "undesirable in a federation where so many laws for the protection of workers, consumers and the environment … are enacted and enforced at the provincial level."[34]

22. Therefore, as Martin J.A. noted in the Court below, only ***clear*** conflicts should render provincial laws inapplicable in bankruptcy:

> A mere effect on bankruptcy generally, such as an effect on the value of a bankrupt's estate or the amount that is available for distribution under the bankruptcy regime, does not frustrate the purpose of the *BIA*, and does not render a provincial law inapplicable in bankruptcy: see *Northern Badger* at para 63. This is made explicit by s 72(1) of the *BIA*, which ensures that provinces continue to have the ability to regulate property and civil rights during bankruptcy.[35]

23. Regulatory obligations provinces enact in the public interest inevitably have compliance costs but the mere fact a dollar value can be assigned to compliance does not relieve bankrupts from compliance with all regulatory obligations. Absent a clear statement from Parliament that provincial regulatory obligations should be overridden, the presumption that federal and provincial laws co-exist remains.[36] Parliament knows how to override provincial regulatory orders when it wishes to do so.[37] The *BIA* does not purport to do so, except where a regulatory order is so clearly an enforceable demand by the regulatory authority to itself obtain money from the bankrupt that it constitutes a claim provable in bankruptcy.

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[33] *Canadian Western Bank*, *supra* at para. 37
[34] *Canadian Western Bank*, *supra* at para. 45 (quoting Hogg)
[35] Reasons of Martin J.A., paras. 155-56, Appellants' Record, Vol. I, Tab 3, pp. 129-30; *Husky Oil*, *supra* at paras. 29-30 and 38 (Gonthier J.) and 142-48 (Iacobucci J. dissenting)
[36] Reasons of Martin J.A., paras. 112-14, Appellants' Record, Vol. I, Tab 3, pp. 118-19
[37] See e.g. *Companies Creditors' Arrangement Act*, RSC 1985, c. C-36, s. 11.1(3)

B. Section 14.06 Does Not Allow Bankrupts to Abandon Their Regulatory Obligations

24. Section 14.06 of the *BIA* does not, contrary to the findings of the majority in the Court below, allow a bankrupt to avoid its obligation to comply with environmental remediation orders by disclaiming property subject to them. Reading the text of the provision in context makes it clear that the purpose of s. 14.06 is to ensure trustees are not held ***personally*** liable for certain environmental orders, not to insulate bankrupts entirely from their environmental obligations. Moreover, s. 14.06 applies only to real property, not personal property like well licences.

(1) The Power to Disclaim Real Property Protects Trustees from Personal Liability

25. The text of s. 14.06(4) makes it clear that the power to disclaim real property subject to environmental remediation orders is intended to protect trustees from ***personal*** liability for those obligations, not to determine whether the bankrupt's estate can be held liable for compliance:[38]

Non-liability re certain orders	**Immunité – ordonnances**
(4) Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of ***requiring a trustee*** to remediate any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, ***the trustee is not personally liable*** for failure to comply with the order, and ***is not personally liable*** for any costs that are or would be incurred by any person in carrying out the terms of the order, …	**(4)** Par dérogation au droit fédéral et provincial, mais sous réserve du paragraphe (2), le syndic ***est, ès qualités, dégagé de toute responsabilité personnelle*** découlant du non-respect de toute ordonnance de réparation de tout fait ou dommage lié a l'environnement et touchant un bien visé par une faillite, une proposition ou une mise sous séquestre administrée par un séquestre, et ***de toute responsabilité personnelle*** relativement aux frais engagés par toute personne exécutant l'ordonnance : …
(c) if the trustee had, before the order was made, abandoned or renounced or been divested of any interest in any ***real property***, or any right in any immovable, affected by the condition or damage.	**c)** si, avant que l'ordonnance ne soit rendue, il avait abandonné tout droit sur l'immeuble en cause ou tout intérêt sur ***le bien réel*** en cause ou y avait renoncé, ou s'en était dessaisi.

[38] *Bankruptcy and Insolvency Act*, *supra*, s. 14.06(4) [Emphasis added]

26. The remainder of s. 14.06 makes it clear that the trustee's power to disclaim only absolves the trustee of personal liability for environmental remediation. Like s. 14.06(4), ss. 14.06(1.2) and (2) expressly deal with trustees' personal liability for certain liabilities, not protecting the bankrupt's estate from those liabilities. In 1992, s. 14.06(2) was added to Bill C-22 because "the ability of a debtor to obtain a trustee, or a creditor to obtain a receiver, could be extremely limited if trustees or receivers were unwilling to serve for fear of incurring liability for the debtor's clean-up operations." The House of Commons committee that added it was "sympathetic to the plight of trustees and receivers who might be reluctant to act because of their concern about ***personal liability*** for environmental problems on properties they took over."[39]

27. Bill C-5 in 1997 changed the test for a trustee's personal liability for post-appointment environmental obligations from due diligence to gross negligence. At the same time, ss. 14.06(1.2) and (4) were added to provide additional protection to trustees from personal liability for successor employer wage obligations and environmental remediation orders. As the Parliamentary Secretary explained at Second Reading, these sections were intended to protect trustees from personal liability, not eliminate claims against the bankrupt's estate:

> Then there are the insolvency practitioners such as trustees and receivers. They need adequate protection ***against personal liability for claims that would otherwise lie against the debtor or estate. Without adequate protection against personal liability***, trustees and receivers would either not deal with sensitive estates or would systemically opt for liquidation when they would have opted for trying to salvage the business and preserve the jobs that depend on it.[40]

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[39] House of Commons, Standing Committee on Consumer and Corporate Affairs and Government Operations, "First Report" in *Evidence*, 34th Parl., 3rd Sess., No. 15 (7 October 1991) at 15:28-15:29 [Emphasis added]

[40] *House of Commons Debates*, 35th Parl., 2nd Sess., No. 50 (27 May 1996) at 3031 [Emphasis added]

28. The majority of the Court below erroneously found that s. 14.06(4) extends beyond situations where trustees may be personally liable.[41] In doing so, it failed to consider the clear language of the section's opening words which restrict the impact of a disclaimer to the trustee's personal liability. As Martin J.A. correctly found, s. 14.06 does not allow "trustees to pick and choose which regulatory obligations apply to them," much less to the bankrupt's estate.[42]

(2) The Power to Disclaim Property Is Limited to Real Property, Not Personal Property

29. The trustee's ability to disclaim property under s. 14.06(4)(c) is also limited by its express terms to "any interest in any real property, or any right in any immovable." It does not purport to apply to personal property, such as a well licence.

30. When two subsections of the same provision use the same language, they should be interpreted as having the same meaning.[43] The Crown's right to a superpriority charge under s. 14.06(7) for costs the Crown itself incurs remedying environmental harm is similarly limited to real property. When Bill C-5 was before the Standing Senate Committee on Banking, Trade and Commerce, stakeholders asked for s. 14.06(7) to be extended to chattels, equipment, and other types of business assets or personal property. The Committee expressly declined to do so.[44] It is clear that s. 14.06(7)'s reference to real property means it only applies to real property. Section 14.06(4), enacted at the same time, should be interpreted to only apply to real property as well.

31. The power of a trustee to disclaim property therefore applies to real property such as mineral rights to underground oil and gas. It does not apply to personal property such as a licence to exploit those mineral rights.

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[41] Reasons of Slater J.A., paras. 65-72, Appellants' Record, Vol. I, Tab 3, pp. 105-07
[42] Reasons of Martin J.A., paras. 193-206, Appellants' Record, Vol. I, Tab 3, pp. 139-42
[43] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Toronto: LexisNexis, 2014) at §§ 8.32-8.35
[44] Senate, Standing Committee on Banking, Trade and Commerce, "Twelfth Report – Appendix" in *Proceedings*, 35th Parl., 2nd Sess., No. 17 (11 February 1997) at 20-21

32. The majority of the Court below recognized that s. 14.06 does not absolve a bankrupt's estate of liability for environmental damage or release the estate from complying with regulatory orders.[45] It also recognized that well licences are personal property, not real property.[46] But it improperly conflated title to the underlying mineral rights with the regulatory decision to permit the transfer of a well licence.[47] As Martin J.A. correctly found, s. 14.06(4) is restricted to real property and does not extend to regulatory licences required to exploit that real property.[48]

C. The AER's Orders Are Not Claims Provable in Bankruptcy

33. In *Abitibi*, this Court set out a three-part test for determining when a regulatory order that is not framed in monetary terms is nevertheless a claim provable in bankruptcy:

> First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation.[49]

34. That test was articulated in the "unique context" of that case's facts. Newfoundland had expropriated all of Abitibi's assets in the province and cancelled pending legal proceedings by Abitibi against it, all without any compensation. It then sought to compel Abitibi to take specific remedial action on properties the province now owned.[50] As Martin J.A. noted, applying a test created in that unique factual context to the very different factual context of a regulator deciding whether to authorize the transfer of assets intended to be used on an ongoing basis in a heavily regulated activity requires a careful look at how certain aspects of that test should be applied.[51]

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[45] Reasons of Slater J.A., paras. 54(c), 57, and 62, Appellants' Record, Vol. I, Tab 3, pp. 100, 102, and 104
[46] Reasons of Slater J.A., paras. 29-41, Appellants' Record, Vol. I, Tab 3, pp. 90-93
[47] Reasons of Slater J.A., para. 63(b), Appellants' Record, Vol. I, Tab 3, p. 104
[48] Reasons of Martin J.A., paras. 207-28, Appellants' Record, Vol. I, Tab 3, pp. 142-48
[49] *Abitibi*, *supra* at para. 26 [Emphasis in original]
[50] *Abitibi*, *supra* at para. 50
[51] Reasons of Martin J.A., paras. 166-88, Appellants' Record, Vol. I, Tab 3, pp. 132-37

35. Ontario asks this Court to clarify two aspects of the *Abitibi* test. First, this Court should clarify that the first step of the test is not automatically satisfied whenever a regulatory order impacts a bankrupt. Thus, in refusing applications to transfer well licences where the applicable regulatory requirements were not met, the AER was not acting as a creditor of Redwater.

36. Second, this Court should adopt the Ontario Court of Appeal's analysis in *Nortel* and *Northstar* and clarify that the third step of the test is not met whenever a regulatory order may require a bankrupt to spend money to comply. Thus, neither the AER's refusal to transfer the well licences nor its order to abandon wells is monetary in nature under the *Abitibi* test.

(1) The AER Was Not Acting as a Creditor of Redwater

The Proper Test for Determining When a Regulator Is Acting as a Creditor:

37. In *Abitibi*, Deschamps J. held that the only determination to be made at the first step of the test "is whether the regulatory body has exercised its enforcement powers against a debtor."[52] The question of whether the regulatory obligation imposed can be translated into monetary terms is considered later at the third step of the test.

38. This articulation of the first step of the test made sense for the regulatory orders at issue in *Abitibi* that required Abitibi to submit remediation action plans for five industrial sites and complete approved remediation actions. In making those orders, the province was acting as a creditor of Abitibi because it stood to benefit directly from Abitibi remediating the sites. As Gascon J. (as he then was) found at first instance, "as the current owner of most of the lands in respect of which the remediation expenses have been ordered, the Province ends up being the intended beneficiary of the expenditures that it has used its discretion to order."[53]

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[52] *Abitibi*, *supra* at para. 27

[53] *Re Abitibibowater Inc.*, 2010 QCCS 1261 at para. 166

39. For the first step of the *Abitibi* test to have meaning, however, there must be situations where the other two steps of the test could be met (i.e., the bankrupt faces a regulatory obligation imposed during the relevant time frame that is expressible in monetary terms) but the order is still not a provable claim because the regulator is not a creditor of the bankrupt. Otherwise, there is no work for the first step to perform.

40. A more nuanced examination of the relationship between regulator and regulated actor is required where, as here, a regulator is considering whether to authorize the continued use of a bankrupt's assets by others in a regulated industry on a going-forward basis. As this Court made clear in *Abitibi*, insolvency does not confer a licence to pollute or to otherwise engage in highly regulated activities without regard to the rules that apply to that activity.[54]

41. Where a regulator exercises a discretionary authority to establish policies, set standards, impose licence conditions, authorize or refuse to authorize the transfer of a licence, etc., it is acting on behalf of the public as a whole and does not have the same creditor-like relationship with a particular entity as Newfoundland did with Abitibi. This remains the case even if the regulator's actions indirectly impose costs on the regulated entity.

42. The first step of the test should, as the Alberta Court of Appeal did in *Northern Badger*, acknowledge that some regulatory duties are owed to the regulator as a creditor, while others are owed more generally to the public as a whole:

> 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.[55]

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[54] *Abitibi*, *supra* at para. 41

[55] *PanAmericana de Bienes y Servicios v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181 at para. 33 ("*Northern Badger*")

43. As Martin J.A. held in the Court below, *Abitibi* considered, but did not overrule *Northern Badger*.[56] The facts of *Abitibi* met the *Northern Badger* test (and thus the first step of the *Abitibi* test) because Newfoundland was directly requiring Abitibi to remediate particular sites it had expropriated. It stood "as the direct beneficiary, from a monetary standpoint, of Abitibi's compliance with the EPA Orders" and "Abitibi's liability in that regard [was] an asset for the Province itself."[57] Newfoundland thus was seen to be a creditor of Abitibi.

Applying the Test to the AER's Decision Not to Authorize the Transfer of Well Licences:

44. Here, the fact that well licences can only be transferred in accordance with the LLR program does not make AER a creditor of any particular licence holder. Rather, as Laycraft C.J.A. held in *Northern Badger* and Martin J.A. reaffirmed in the present case, the obligation to comply with the conditions imposed on regulatory licences is "inherent in the nature of the properties itself."[58] The fact that there are inherent limitations on the value of a regulatory licence imposed by the fact that transfers will only be approved if the transferor is in compliance with regulatory requirements does not make the regulator a creditor of the bankrupt.

45. As Martin J.A. held in the Court below:

> The requirement that a licensee obtain AER approval for licence transfers is fundamentally different from the clean-up orders at issue in *Abitibi*. The province has to be able to maintain control over the transfer of well and pipeline licences during a bankruptcy and there is no reason why that regulatory requirement cannot co-exist with the distribution of a debtor's estate. The trustee must comply with the licensing requirements during the bankruptcy process. The trustee cannot, for example, transfer AER-issued well licences to an unqualified licensee; AER approval is required for any transfer. Similarly, the trustee must comply with the LLR program when seeking to transfer licences.[59]

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[56] Reasons of Martin J.A., paras. 170-75, Appellants' Record, Vol. I, Tab 3, pp. 133-34
[57] *Re Abitibibowater, supra* at paras. 173-76
[58] *Northern Badger, supra* at paras. 32-33; Reasons of Martin J.A., paras. 185 and 187, Appellants' Record, Vol. I, Tab 3, pp. 136-37
[59] Reasons of Martin J.A., para. 187, Appellants' Record, Vol. 1, Tab 3, pp. 136-37

46. Similar issues arise in other regulated sectors. A law practice cannot be transferred to non-lawyers.[60] A nuclear power plant cannot be transferred to an unqualified operator.[61] A liquor licence cannot be transferred to someone unwilling to comply with rules for selling or producing alcohol.[62] In all of these cases, a regulator enforcing the regulatory scheme by refusing to approve a transfer would not be acting as a creditor of the bankrupt. Compliance with the regulatory scheme is inherent in the nature of the licences.

47. When a regulator requires evidence that regulatory requirements will be complied with before approving a licence transfer, it is not acting as a creditor of the transferor, even though its actions may have an indirect impact on the price which can be obtained for the licences. Rather, the regulator is acting in the public interest to ensure that compliance with the regulatory requirements that form an inherent element of those licences will continue post-transfer.

(2) Not All Orders Requiring the Expenditure of Money Are Monetary in Nature

The Proper Test for Determining Whether a Regulatory Order Is Monetary in Nature:

48. In *Abitibi*, this Court made it clear that a regulatory order that is not framed in monetary terms will only meet the third step of the test if there are "sufficient indications that the regulatory body that triggered the enforcement mechanism ***will ultimately perform remediation work*** and assert a monetary claim ***to have its costs reimbursed***. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process."[63]

49. The Court was careful not to suggest that any regulatory order which required the trustee or a third party to expend money in order to comply with it would meet the third step of the test. Instead, it held that "orders relating to the environment may or may not be considered provable

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[60] *Law Society Act*, RSO 1990, c. L.8, s. 26.1
[61] *Nuclear Safety and Control Act*, SC 1997, c. 9, s. 24(4)
[62] *Liquor Licence Act*, RSO 1990, c. L.19, ss. 6(2), 12(1) and 17(2)
[63] *Abitibi*, *supra* at paras. 36, 59, 61, and 99 (cf. paras. 83-86, McLachlin C.J.C. dissenting) [Emphasis added]

claims."[64] It is only where it is sufficiently certain that the regulator ***itself*** will eventually have a claim for ***reimbursement*** from the bankrupt that a regulatory order is monetary in nature.

50. As the Ontario Court of Appeal explained in *Nortel* and *Northstar*, this carefully crafted approach to when a regulatory order is monetary in nature is consistent with the ordinary test for establishing a future or contingent claim. If any order that required the expenditure of money met the third step of the test, virtually every regulatory order would be a provable claim:

> I cannot accept the respondents' proposed interpretation of *AbitibiBowater*. In determining whether a regulatory order is a provable claim, a CCAA court must apply the general rules that apply to future or contingent claims. As I read it, the Supreme Court's decision is clear: ongoing environmental remediation obligations may be reduced to monetary claims that can be compromised in CCAA proceedings only where the province has performed the remediation work and advances a claim for reimbursement, or where the obligation may be considered a contingent or future claim because it is "sufficiently certain" that the province will do the work and then seek reimbursement.
>
> The respondents' approach is not only inconsistent with *AbitibiBowater*, it is too broad. It would result in virtually all regulatory environmental orders being found to be provable claims.[65]

51. To find, as the majority in the Court below did, that the third step of the test is met whenever a regulatory order results in "diverting value from the bankrupt estate" sets the bar too low.[66] It ignores this Court's admonition that the regulatory order must have the potential to "ripen into a financial liability ***owed to the regulatory body*** that made the order" before it can be considered a provable claim.[67] It is not enough to have sufficient certainty that the regulator ***could*** perform remediation itself; there must be sufficient certainty both that it ***will*** do so and that it ***will*** then seek reimbursement from the bankrupt's estate.

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[64] *Abitibi*, *supra* at para. 43
[65] *Re Nortel Networks Corp.*, 2013 ONCA 599 at paras. 31-32. See also *Re Northstar Aerospace Inc.*, 2013 ONCA 600 at para. 14
[66] Reasons of Slater J.A., paras. 73-91, Appellants' Record, Vol. I, Tab 3, pp. 107-12
[67] *Abitibi*, *supra* at para. 3 [Emphasis added]

52. Nor is it sufficient to show that conditions attached to a licence require the expenditure of funds. Participants in highly regulated activities, such as oil and gas production, must meet a wide range of regulatory conditions which all have associated costs. To find that a regulatory obligation on a licence is monetary in nature simply because financial value can be attached to it would be to transform virtually every regulatory obligation into a claim provable in bankruptcy, contrary to the express intentions of this Court in *Abitibi*.[68]

53. Martin J.A. adopted the more balanced approach set out in *Nortel* and *Northstar* and rejected the chambers judge's finding that the third step of the test was met "because the Trustee would have to expend funds, in the nature of the posted security, in order to comply with the orders and that, 'although not expressed in monetary terms, the AER orders are in this case intrinsically financial.'"[69] Martin J.A. found that the mere fact compliance with a regulatory order requires the expenditure of money was insufficient to make it monetary in nature.[70]

54. Whether the third step is met should turn on whether there is sufficient certainty AER would conduct remediation itself and pursue a monetary claim against Redwater's estate, not on whether compliance with Alberta's regulatory scheme will require the expenditure of funds or decrease the price for which the licences can be sold.

Applying the Test to the AER's Abandonment Orders:

55. There is no certainty that AER will ever conduct remediation itself:

> The AER is not in the business of performing abandonment work itself; the evidence of the AER's affiant was that it rarely, if ever, conducts abandonment work on behalf of its licencees, and when it does it virtually never asserts a claim for reimbursement. Specifically, with respect to the Redwater assets, the AER does not intend to perform the abandonment work.[71]

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[68] *Abitibi, supra* at para. 3.
[69] Reasons of Martin J.A., paras. 169 and 176-84, Appellants' Record, Vol. I, Tab 3, pp. 132-36
[70] Reasons of Martin J.A., paras. 183-84, Appellants' Record, Vol. I, Tab 3, pp. 135-36
[71] Reasons of Martin J.A., paras. 179-80, Appellants' Record, Vol. I, Tab 3, pp. 134-35

Even if the Orphan Well Association eventually remediates the wells, it has no authority to seek reimbursement and, in any event, is neither the regulator nor the provincial government.[72]

56. The analysis of the abandonment orders should have stopped there. The majority, however, erred by considering whether the trustee would have to expend funds to comply with the orders.[73] As Martin J.A. found, "with respect, that is an erroneous application of the test."[74] The proper question is whether there was sufficient certainty that the regulator ***itself*** would perform the work and submit a claim for reimbursement. That certainty did not exist.

Applying the Test to the AER's Decision Not to Authorize the Transfer of Well Licences:

57. Deciding whether to approve a transfer of regulatory licences based on whether there has been compliance with the applicable regulatory scheme is even less monetary in nature. It is an inherently regulatory, not monetary, decision to implement a policy that determines what obligations attach to licences, including whether those obligations should be considered at the level of the individual licence or all of the licences held by an individual licencee.

58. In both Alberta and Ontario, the regulator is entitled to decide whether to approve the transfer of well licences. In doing so, it can legitimately take into account whether the previous licence holder has properly complied with the regulatory scheme and require compliance on a going-forward basis as a condition of authorizing the transfer.

59. Contrary to the findings of the majority in the Court below, the fact that compliance with the regulatory scheme may decrease the sale price of the well licences does not create a monetary obligation owed to the regulator as the regulator gains nothing from the diminution in the

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[72] For a similar analysis, see the dissenting reasons of McLachlin C.J.C. and LeBel J.A. in *Abitibi*, *supra* at paras. 91-92, 96, and 101

[73] Reasons of Slater J.A., paras. 77-78 and 89-91, Appellants' Record, Vol. I, Tab 3, pp. 108-09 and 111-12

[74] Reasons of Martin J.A., paras. 183-84, Appellants' Record, Vol. I, Tab 3, pp. 135-36

licences' value.[75] It is the AER, not the trustee, which is entitled to decide whether Redwater's licences should be considered together or separately. Whether there are "warts" on a licence or not does not determine whether a claim is monetary in nature. It is a provincial regulatory decision to determine how and when licences can be transferred.

60. As Martin J.A. found, the AER is "enforcing laws and licence conditions designed to protect the public interest, the environment, and the rights of third-party landowners," not "seeking an unauthorized priority in bankruptcy."[76] The fact that the AER's decision may have impacted the sale price of Redwater's assets does not transform a regulatory decision whether to approve a transfer into a monetary order to recover a debt owing to the AER.

61. This is not a case like *Moloney* or *407* where the Court found that the suspension of a licence was essentially a debt enforcement scheme.[77] Unlike in those cases, there is no pre-existing free-standing debt owed to the regulator which the regulator is attempting to collect by using its power to grant or suspend licences. Rather, the AER is seeking to ensure that the conditions on which the regulatory licences were granted in the first place are complied with.

62. Requiring compliance with the LLR program when well licences are transferred is more akin to the professional misconduct sanctions the Alberta Court of Appeal considered in *Hover*. In that case, the Court held that "the *BIA* does not confer professional licences nor eliminate previously imposed sanctions. Professional sanctions are more than simple debts."[78] Requiring licencees to comply with the LLR program when transferring well licences is intended to protect

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[75] Reasons of Slater J.A., paras. 81-82, Appellants' Record, Vol. I, Tab 3, pp. 109-10
[76] Reasons of Martin J.A., para. 115, Appellants' Record, Vol. I, Tab 3, p. 119
[77] *Moloney*, *supra* at paras. 48-49; *407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)*, 2015 SCC 52 at para. 17, [2015] 3 SCR 397
[78] *Re Hover*, 2005 ABCA 101 at para. 65

the public, not to collect debts owing to the AER. The fact that complying with the LLR program may cost money does not transform the program into a debt collection scheme.

63. To hold otherwise would shift the onus of compliance with Alberta's oil and gas production regulatory scheme, including the LLR program, from licencees to the public and/or the competitors who fund the Orphan Well Association.[79] A properly limited application of the third step of the *Abitibi* test ensures the *BIA* is not used by individuals to avoid or evade their regulatory obligations. As Martin J.A. noted:

> 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 licences, abandonment and reclamation, so necessary for the environment, would likely be among the first sacrifices made in times of fiscal difficulty.[80]

PART IV – SUBMISSIONS ON COSTS

64. As an intervener, Ontario submits that costs should not be awarded to or against it.

PART V – ORAL ARGUMENT

65. In accordance with the Order of Brown J. dated January 18, 2018, Ontario will present oral argument not exceeding five (5) minutes at the hearing of this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1ST DAY OF FEBRUARY, 2018.

_____
Josh Hunter

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Hayley Pitcher

Counsel for the Intervener,
the Attorney General of Ontario

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[79] See Alexander Clarkson, "In the Red: Towards a Complete Regime for Cleaning up Environmental Messes in the Face of Bankruptcy" (2011) 69(2) U of T L Rev 31-67 at para. 61
[80] Reasons of Martin J.A., para. 244, Appellants' Record, Vol. I, Tab 3, p. 151

PART VI – TABLE OF AUTHORITIES

	Paragraph(s) Referred to in Factum
CASES	
114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town), 2001 SCC 40, [2001] 2 SCR 241	17
407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy), 2015 SCC 52, [2015] 3 SCR 397	61
Alberta (A.G.) v Moloney, 2015 SCC 51, [2015] 3 SCR 327	17, 61
Bank of Montreal v. Marcotte, 2014 SCC 55, [2014] 2 SCR 725	18
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Marine Services International v Ryan Estate, 2013 SCC 44, [2013] 3 SCR 53	18
Multiple Access Ltd v McCutcheon, [1982] 2 SCR 161	17
Newfoundland and Labrador v. Abitibibowater Inc., 2012 SCC 67, [2012] 3 SCR 443	1, 3, 33-43, 45, 48, 49, 50, 51, 52, 55, 63
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Re Abitibibowater Inc., 2010 QCCS 1261	38, 43
Re Hover, 2005 ABCA 101	62
Re Nortel Networks Corp., 2013 ONCA 599	36, 50, 53
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Reference re: An Act respecting Assignments and Preferences by Insolvent Persons (Ont.), [1894] JCJ No 1 (PC)	19
Rothmans, Benson & Hedges Inc v Saskatchewan, 2005 SCC 13, [2005] 1 SCR 188	17
Saskatchewan (A.G.) v Lemare Lake Logging Ltd., 2015 SCC 53, [2015] 3 SCR 419	17, 18
Tennant v Union Bank of Canada, [1894] AC 31 (PC)	19
LEGISLATION	
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Bankruptcy and Insolvency Act, RSC 1985, c. B-3, ss. 14.06(4), 72(1) / *Loi sur la faillite et l'insolvabilité*, LRC 1985, ch. B-3, art. 14.06(4), 72(1)	17-18, 20-25, 62-63
Environmental Protection Act, RSO 1990, c. E.19, ss. 6, 9, 14, 20.1-20.18, and 91-93 / *Protection de l'environnement (Loi sur la)*, LRO 1990, chap. E.19, art. 6, 9, 14, 20.1-20.18 et 91-93	15
Law Society Act, RSO 1990, c. L.8, s. 26.1 / *Barreau (Loi sur le)*, LRO 1990, chap. L.8, art. 26.1	46
Liquor Licence Act, RSO 1990, c. L.19, ss. 6(2), 12(1) and 17(2) / *Permis d'alcool (Loi sur les)*, LRO 1990, chap. L.19, art. 6(2), 12(1) et 17(2)	46
Mining Act, RSO 1990, c. M.14, ss. 1 and 100-02 / *Mines (Loi sur les)*, LRO 1990, chap. M.14, art. 1 et 100-02	7
O. Reg. 263/02: Exploration Licences, Production and Storage Leases for Oil and Gas in Ontario, s. 25, made under the *Mining Act*, R.S.O. 1990, c. M.14	7, 10
Ministry of Natural Resources Act, RSO 1990, c. M.31, s. 6 to be amended by SO 2017, c. 8, Sch. 17, s. 3 (not yet in force) / *Ministère des Richesses naturelles (Loi sur le)*, LRO 1990, chap. M.31, art. 6 à modifier par LO 2017, chap. 8, annexe 17, art. 3	9
Nuclear Safety and Control Act, SC 1997, c. 9, s. 24(4) / *Loi sur la sûreté et la réglementation nucléaires*, LC 1997, ch. 9, art. 24(4)	46
Oil, Gas and Salt Resources of Ontario, Provincial Operating Standards, Version 2.0 (27 March 2002), ss. 11.01-11.14 / *Normes d'exploitation des ressources en pétrole, en gaz et en sel de l'Ontario*, Version 2.0 (27 mars 2002), art. 11.01-11.14	13

	Paragraph(s) Referred to in Factum
Ontario Energy Board Act, 1998, SO 1998, c. 15, Sch. B, ss. 36.1-38, s. 40, ss. 89-90 / *Commission de l'énergie de l'Ontario (Loi de 1998 sur la)*, LO 1998, chap. 15, annexe B, art. 36.1-38, s. 40, ss. 89-90	9, 11
Ontario Water Resources Act, RSO 1990, c. O.40, ss. 30 and 53 / *Ressources en eau de l'Ontario (Loi sur les)*, LRO 1990, chap. O.40, art. 30, 53	15
Public Lands Act, RSO 1990, c. P.43, ss. 60-61 / *Terres Publiques (Loi sur les)*, LRO 1990, chap. P.43, art. 60-61	6
SECONDARY SOURCES	
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House of Commons, Standing Committee on Consumer and Corporate Affairs and Government Operations, "First Report" in *Evidence*, 34th Parl., 3rd Sess., No. 15 (7 October 1991)	26
House of Commons Debates, 35th Parl., 2nd Sess., No. 50 (27 May 1996)	27
Senate, Standing Committee on Banking, Trade and Commerce, "Twelfth Report – Appendix" in *Proceedings*, 35th Parl., 2nd Sess., No. 17 (11 February 1997)	30
Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Toronto: LexisNexis, 2014)	30