SCC File No: 37627

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

BETWEEN:

ORPHAN WELL ASSOCIATION
ALBERTA ENERGY REGULATOR

Appellants

-and-

GRANT THORNTON LTD
ALBERTA TREASURY BRANCHES

Respondents

-and-

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PART 1: CONCISE OVERVIEW OF POSITION

A. Overview

1. Section 92A of the *Constitution Act, 1867* was the only part of the 1982 constitutional bargain that changed the federal-provincial division-of-powers. Paragraph 92A(1)*(b)* affirmed exclusive provincial legislative authority over the "development, conservation and management of non-renewable natural resources" in each province. The historic context was that while provinces already had general authority over natural resources, the Western provinces, in particular, felt that federal laws and policies had interfered with their ability to use those powers for the benefit of their own residents.

2. A defining feature of *non-renewable* natural resource development is that a significant portion of the necessary costs must occur after exploitation of the resource is no longer economic. If private investors are not required to "internalize" these "end-of-life" costs, the result is a "resource curse." The province's natural wealth becomes a source of social loss. In 1982, the Western provinces had a historical memory of what they considered wasteful approaches to non-renewable resources when under federal authority. In contemporary times, Alberta has managed this problem by developing laws and policies to ensure that transfers of regulatory licenses for productive oil-and-gas assets can only take place if they preserve the availability of revenues from productive assets to address end-of-life costs of post-productive oil and gas wells.

3. The decision of the Court of Appeal below has upended this regime in the context of a bankruptcy and insolvency. Under their interpretation of s. 14.06 of the federal *Bankruptcy and Insolvency Act,*[1] a receiver or trustee can increase the value of the oil and gas assets in the estate beyond what it would be under provincial law by disclaiming post-productive wells. The Alberta Energy Regulator (the "Regulator") was ordered to approve transfers of productive well licenses to a purchaser, regardless of provincial law, leaving the public to deal with the consequences of the post-productive wells left behind.

4. The Attorney General of British Columbia ("AGBC") agrees with the arguments of the appellants that s. 14.06, properly understood in light of the canon against interference with

[1] *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, s. 14.06.

provincial law,[2] has no such meaning. But the focus of the AGBC's submissions is that even if s. 14.06 meant what the majority took it to mean, it would be constitutionally inapplicable under the doctrine of "interjurisdictional immunity."

5. Interjurisdictional immunity arises when an otherwise-valid law of one level of government has a negative impact ("trenches") on a protected core jurisdiction of the other, and the degree of "trenching" is serious enough to amount to "impairment."[3] It is beyond reasonable dispute that the effect of the Court of Appeal's interpretation of s. 14.06 of the *BIA* on Alberta's management and conservation of its oil and gas resources is serious. The text, history and philosophy of s. 92A(1)*(b)* all show that matters critical to the "development, management and conservation of non-renewable resources" – very much including measures designed to ensure that revenues from oil and gas are tied to end-of-life costs – are protected core provincial jurisdiction. Indeed, if s. 92A(1) does not shelter provinces' abilities to make these decisions from the application of otherwise-valid federal legislation, it would have no legal effect at all. It follows that s. 14.06, as interpreted by the Court below, is constitutionally inapplicable to Alberta's *Oil and Gas Conservation Act* [4] and the decisions of the Regulator about the transferability of regulatory oil-and-gas licenses under it.

B. Statement of Relevant Facts

6. The AGBC accepts the facts as stated in the Appellants' factum.

7. Under Alberta's *Oil and Gas Conservation Act*, the operation of an oil or gas well in Alberta requires a regulatory license. Section 24 of the *Act* prohibits transfers of regulatory licenses without obtaining the consent of the Regulator, and empowers the Regulator to attach conditions, restrictions and stipulations to its consent. The Regulator's Directive 006 sets out an important (albeit not exclusive) aspect of how this consent power will be exercised.

8. The ratio between the deemed asset and liability values of each upstream gas licensed facility (such as a well, pipeline or upstream gas plant) is calculated and a Liability Management Ratio (LMR) is aggregated on the basis of the totality of a licensee's licensed properties. A licensee is generally required to keep this LMR above 1.0. The LMR can be raised by posting a

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[2] *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 [*Moloney*], at para. 27.
[3] *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 [*COPA*], at para.27.
[4] *Oil and Gas Conservation Act*, RSA 2000, c. O-6, s. 24.

sufficient security deposit, carrying out abandonment and reclamation work in respect of the company's more poorly producing or nonproducing wells, increasing production or through transferring licensed properties in a manner that brings the ratio above the minimum number. [5] Like any other asset, regulatory licenses only have exigible, market value – and can therefore serve as collateral – to the extent that they are transferable. But before any transfer is approved, the pre- and post-transfer LMR of all parties to the transfer must be calculated. If the pre-transfer LMR of a party is above 1.0, the post-transfer LMR must remain above 1.0; if the pre-transfer LMR is below 1.0, the transfer must not result in it becoming worse.[6]

9. Redwater Energy Corporation was placed under receivership at the instance of its principal secured creditor in May 2015. In November, the receiver Grant Thornton Ltd. was appointed as bankruptcy trustee. The receiver/trustee then purported to renounce any interest in 107 of the Redwater licenses, while asserting an abiding interest in the 20 most valuable licenses,[7] with a view to selling them to another operator. The licenses it decided to keep had a deemed asset value that exceeded their combined deemed liability by some $4.1 million (ratio of 2.85), while the disclaimed licenses had a shortfall of $4.7 million (ratio of 0.3).[8]

10. The Regulator refused to exclude the would-be disclaimed licenses for the purposes of calculating the LMR under Directive 006. The Court of Queen's Bench held that s. 14.06 of the *BIA* rendered s. 24 of the *Oil and Gas Conservation Act* inoperative, and ordered the Regulator to approve the transfers. In a divided judgment, the Alberta Court of Appeal affirmed this order.

11. In their reasons, the courts below did not address whether s. 14.06 of the *BIA* is inapplicable as a result of interjurisdictional immunity.

PART II – CONSTITUTIONAL QUESTION INTERVENED ON

12. The AGBC intervenes on the third constitutional question:

> 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*

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[5] Affidavit of P. Johnston #2, sworn 8 Sep 2015, Ex. A, **Appeal Record, vol IV, pp. 85-115.**
[6] *Directive 006*, Appendix 2, art. 8, Affidavit of P. Johnston #2, sworn 8 Sep 2015, Ex. A, **AR IV, p. 95.**
[7] Affidavit of P. Johnston, sworn 13 August 2015, Ex. E, **AR IV, pp. 40-42.**
[8] Affidavit of P. Johnston, sworn 13 August 2015, para. 19, **AR IV, p. 8.**

such that section 14.06 of the *BIA* is inapplicable by virtue of the doctrine of interjurisdictional immunity?

13. The AGBC submits that the answer to this question is "Yes."

PART III – ARGUMENT

Managing End-of-Life Liabilities of Nonrenewable Resource Extraction is a Core Provincial Competence Protected By Section 92A(1)(b)

14. Subsection 92A(1)*(b)* of the *Constitution Act, 1867*, provides that in each province the legislature may "exclusively" make laws in relation to the "development, conservation and management of non-renewable natural resources… in the province, including laws in relation to the rate of primary production therefrom."

15. The AGBC says the text, history and purpose of s. 92A all point to two conclusions:

a. the Court should reject a theory of s. 92A(1) that gives it no legal effect, relative to the pre-existing constitutional baseline (the "declaratory theory")[9], and embrace one that implies protections against otherwise-valid federal legislation that seriously interferes with provincial development, conservation and management of non-renewable natural resources (the "fortification theory")[10], and

b. the competency set out in s. 92A(1)*(b)* includes provincial regulation of how private access to the pool of oil-and-gas resources should be defined and transferred, so as to ensure that social costs are internalized.

16. In 1982, authority to make laws relating to management, conservation and development of terrestrial natural resources was already provincial under ss. 92(5) (management and sale of public lands), 92(13) (property and civil rights) and 92(16) (matters of merely local or private nature). [11]

17. A provision of the Constitution must be interpreted in a broad and purposive manner, in

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[9] Hogg, Peter W. *Constitutional Law of Canada* (5th ed. Supp.), Toronto: Thomson Reuters, loose-leaf p. 30-19, **AGBC Authorities, TAB 12**.
[10] *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 SCR 327 [*Ontario Hydro*], at p. 376, La Forest J.
[11] Cairns, Robert D., Marsha A. Chandler & William D. Moull, "The Resource Amendment (Section 92A) and the Political Economy of Canadian Federalism" (1985) 23.2, *Osgoode Hall L. J.* 253, at p. 270.

light of its linguistic, philosophic and historical context.[12] The declaratory theory is difficult to square with the text, the importance given to s. 92A(1) by the provincial participants in the 1982 constitutional compromise, or the underlying philosophy of subsidiarity in decisions about each province's critical resources.

Only Fortification Theory Makes Textual Sense

18. Unlike subsections 92A(2) (laws relating to export of non-renewable natural resources, forestry resources and electrical energy) and (4) (indirect taxation), subsection (1), relating to management, conservation and development, uses the word "exclusively." Section 92A was written long after the development of the "double aspect" doctrine in the *Local Prohibition* case.[13] The word "exclusively" stands out as a textual marker that management, conservation and development of non-renewable resources were to remain islands guarded against the flow of the already "dominant tide" of overlap.[14] This is underlined by s. 92A(3), which states that s. 92A(2) does not "derogate" from federal legislative power, implying by the canon of *expressio unius est exclusio alterius* that s. 92A(1) ***does*** derogate. The fortification theory makes sense of why s. 92A(1) would be present in a constitution that already provided for provincial authority over the identified resources.

History of Section 92A and Impairment by Federal Law

19. As among the original four provinces, the fiscal bargain of Confederation included full provincial ownership of "lands, mines, minerals and royalties" (s. 109). However, with the acquisition of the western lands vested in the Hudson's Bay Company, the Federal Crown became proprietor of those resources, a situation that continued when Manitoba, Alberta and Saskatchewan were constituted as provinces.[15] In British Columbia, s. 109 was subject to the crucial exception of the 40 mile-wide "Railway Belt", which included the most accessible natural

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[12] *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295, at p. 344; *Reference re* Supreme Court Act, ss. 5 and 6, 2014 SCC 21 at para. 19; *Reference re Senate Reform*, 2014 SCC 32, at para. 25.
[13] *Ontario (Attorney General) v. Canada (Attorney General)*, [1896] AC 348 (JCPC) [*Local Prohibition*]
[14] *Ontario (Attorney General) v. OPSEU*, [1987] 2 SCR 2, at para. 27.
[15] La Forest, Gerard V. *Natural Resources and Public Property under the Canadian Constitution.* Toronto: University of Toronto Press, 1969, c. 3, **AGBC Authorities, TAB 13**; *Manitoba Act, 1870*, 33 Vict., c. 3 (Can.), s. 30, **AGBC Authorities, TAB 4**; *Alberta Act, 1905*, 4-5 Edw. VII, c. 3 (Can.), s. 21, **AGBC Authorities, TAB 1**; *Saskatchewan Act, 1905*, 4-5 Edw VII, c. 42 (Can.) s. 21, **AGBC Authorities, TAB 6**.

resources at the time.[16] Transferring these resources to provincial ownership was the critical constitutional demand of the Western provinces in the early twentieth century. This demand was eventually met with the *Constitution Act, 1930*, also known as the Natural Resources Transfer Agreement or NRTA.[17]

20. A major impetus for the NRTA was perceived federal indifference to the wasteful exploitation of the Turner Valley oil and gas field, discovered in 1914. According to historians of the period, Calgarians could sit on their front porches and read their papers at night by the glare of the natural gas flares thirty miles away.[18] One reason for this waste was the application of the common law rule of title-by-capture to oil and gas;[19] another was inadequate provision for capping wells at the end of their productive lives, leading to seepage. [20]

21. But despite the transfer of proprietary ownership, federal paramountcy continued to be an obstacle to provincial conservation measures, as demonstrated by the 1933 *Spooner Oils* case.[21] By making pre-NRTA federal lease terms paramount over subsequent provincial regulation, the decision "put an end to Alberta's first attempt at a comprehensive conservation program."[22] For a number of years, the federal government under Prime Minister William Lyon Mackenzie King refused Alberta's proposal for an alteration to the NRTA. The Aberhart government responded by refusing to agree to a constitutional amendment to give the federal Parliament authority over unemployment insurance – what became s.91(2A) of the *Constitution Act, 1867*. This threat, along with the resolution of other constitutional disputes about monetary policy and the upkeep of the Lieutenant Governor's premises, ultimately led to the King government participating in an amendment to the NRTA.[23] A new provincial conservation board was set up in 1938 and the

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[16] *British Columbia Terms of Union*, Order of Her Majesty in Council admitting British Columbia into the Union, dated the 16th day of May, 1871, article 11, **AGBC Authorities, TAB 2.**
[17] *Constitution Act, 1930*, 20-21 Geo. V, c. 26 (U.K.), **AGBC Authorities, TAB 3.**
[18] Richards, John & Larry Pratt. *Prairie Capitalism: Power and Influence in the New West.* Toronto: McLelland & Stewart, 1979, pp. 46-7, **AGBC Authorities, TAB 16.**
[19] *Borys v. Canadian Pacific Railway*, 1953 CanLII 414 (UK JCPC); Richards & Pratt, *ibid.* at pp. 43-70; Breen, David H. *Alberta's Petroleum Industry and the Conservation Board.* Edmonton: University of Alberta Press, at pp. xl-xlv, **AGBC Authorities, TAB 10**.
[20] Breen, "Casing and Well Abandonment" in *Alberta's Petroleum Industry*, at p. l.
[21] Richards & Pratt, *Prairie Capitalism* at pp. 271-2; *Spooner Oils v. Turner Valley Conservation Board*, [1933] S.C.R. 629.
[22] Breen, *Alberta's Petroleum Industry*, at p. 119.
[23] *Natural Resources Transfer (Amendment) Act, 1938*, S.C. 1938, c. 36, **AGBC Authorities, Tab 5.**

flares were finally controlled.[24]

22. In the 1970s, constitutional tensions around resource policy became a major threat to national unity, second only to the rise of Quebec nationalism.[25] These tensions increased with constitutional decisions of this Court in the 1970s limiting the ability of the provinces to try to influence the market price of provincial resources, and then with the National Energy Policy of the Trudeau government.[26] Alberta and Saskatchewan proposed a first draft of what became section 92A in the Constitution, supported by British Columbia and Manitoba. Western premiers spoke specifically of the need to temper an inexorable rule of federal paramountcy in this respect with reciprocity. In the words of the then-premier of Saskatchewan, "Federalism as we understand it … means that in a case where provincial interest is paramount under our constitution it stands just as high and unassailable as does the federal power in a reverse circumstance."[27]

23. The federal government and the provinces formally discussed a natural resource amendment repeatedly at the First Ministers' Conference on the Constitution in February 1979 and again in September 1980. In neither case were they able to agree. Section 92A in its current form became part of a December 1980 agreement between Prime Minister Trudeau and Edward Broadbent, as leader of the New Democratic Party. The text agreed between Messrs. Trudeau and Broadbent was not specifically discussed during the November 1981 first ministers' meeting, but was included in the text agreed to by the Prime Minister and the English-speaking premiers. [28]

24. Section 92A was as much part of the overall 1982 compromise as patriation, the amending formula, the non-justiciable commitment to addressing regional economic disparities through equalization payments, affirmation of existing aboriginal and treaty rights, and the *Charter of Rights and Freedoms*. Its text was a concession to the pressing concerns of the Western provinces. It is a fundamental principle of Canadian constitutional interpretation to

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[24] Breen, *ibid*, at pp. 129-131. Richards & Pratt, *Prairie Capitalism*, at p. 47.
[25] Cairns, Robert D. et al. "The Resource Amendment (Section 92A)"
[26] *Canadian Industrial Gas & Oil Ltd. v. Saskatchewan*, [1978] 2 SCR 545; *Central Canada Potash Co. Ltd. v. Saskatchewan*, [1979] 1 SCR 42.
[27] Blakeney, Hon. Allan. "Speech" in ed. Meekison, J. Peter. *Canadian Federalism: Myth or Reality, 3d ed.* Toronto: Methuen, 1977, pp. 179-188, **AGBC Authorities, Tab 8**, at p. 184.
[28] Meekison, Peter J. & Roy J. Romanow "Western Advocacy and Section 92A of the Constitution" in Meekison, Peter J. et al. *Origins and Meaning of Section 92A: The 1982 Constitutional Amendment on Resources.* Montreal: Institute for Research on Public Policy, 1985, pp. 3-32, **AGBC Authorities, Tab 14.**

respect the processes of "compromise, negotiation and deliberation," however imperfect, on which our constitutional order has been built.[29]

25. In the *Supreme Court Act Reference,* this Court unanimously rejected the declaratory or "empty vessels" theory of ss. 41*(d)* and 42(1)*(d)* of the *Constitution Act, 1982*. It rejected an interpretation of ss. 41*(d)* and 42(1)*(d)* that would have left the federal Parliament with the unilateral power to change the Supreme Court as it wished, noting that these provisions originally came from language agreed to in April 1981 by the eight provinces *opposed* to the federal approach to constitutional reform. Such an interpretation would have been unacceptable to the provinces, especially Quebec in light of the importance of preserving its distinct legal tradition to Canada's entire constitutional history.[30] The same logic applies to any interpretation of s. 92A(1) that would render *it* an empty vessel, providing nothing to the regions that had placed their trust in that language. A declaratory or "empty vessel" theory of s. 92A(1), like the declaratory theory of ss. 41*(d)* and 42(1)*(d)* advanced in the *Supreme Court Act Reference,* would undermine the integrity of the historic compromise reached in 1982. It would fly in the face of Canada's constitutional history. Section 92A(1) is one of the thousand threads of accommodation that have made the fabric of the nation, and it must be given meaning.[31]

26. In *Ontario Hydro*[32] – the only decision of this Court to consider the *content*, as opposed to the scope[33] of s. 92A – all members of the Court rejected the declaratory or empty-vessel theory of s. 92A(1). Justice La Forest, writing for three of seven judges, adopted the narrowest view, and yet he agreed the provision at minimum "fortifies" pre-existing provincial powers in the competences within its scope.[34] Justice Iacobucci relied on s. 92A(1)*(c)* for his conclusion that the federal declaratory power did not reach labour relations in a nuclear-electric generation station.[35] Chief Justice Lamer gave s. 92A(1)*(c)* sufficient weight to conclude that it resulted in preservation of provincial labour relations over some, but not all, of the facility.[36]

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[29] *Reference re Secession of Quebec*, [1998] 2 SCR 217, at para. 68. Grammond, Sébastien. ""Compact is Back: The Supreme Court of Canada's Revival of the Compact Theory of Confederation." (2016) 53: 3 *Osgoode Hall L. J.* 799.
[30] Supreme Court Act *Reference* , at para. 99-100.
[31] *Secession Reference* at para. 96.
[32] *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 SCR 327 [*Ontario Hydro*].
[33] *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 SCR 322.
[34] *Ontario Hydro*, at pp. 375-8.
[35] *Ontario Hydro*, at p. 417.
[36] *Ontario Hydro*, at pp. 355-6.

Philosophy of Natural Resources in Canada: Subsidiarity

27. The fortification theory of s. 92A is consistent with the overall "philosophy" of natural resources found in the Constitution. The basic principle is subsidiarity. Local people are closest to the resources and to the potential benefits and negative effects that their production and development may bring. The government most accountable to those people should be responsible for policy in that area and should manage the resources for their benefit.

28. The countervailing principle of solidarity (the need for regions of the country with more fortunate resource endowments to help others) is addressed in the Canadian constitution through equalization payments and shared-cost public services.[37] But the residents of each province are the residual beneficiaries of the resources located within their boundaries, and provincial governments and legislatures make the difficult decisions about their management, conservation and development.

29. A balance between subsidiarity and solidarity was embodied for the originally confederating provinces in Part VIII of the *Constitution Act, 1867*, which included both s. 109 and an early system of fiscal transfers to provinces. The Western provinces were initially excluded from this compromise, but it was gradually extended to them, between 1930 and 1982. During the intermediate half century, conflicts continued because of what was, from the Western perspective, overzealous use of federal authority that was not sensitive to the impacts on the ground. The contemporary compromise between subsidiarity and solidarity is embodied in the *Constitution Act, 1982* with the addition of s. 92A to the 1867 document, as well as s. 36 of the *Constitution Act, 1982*. Along with forestry resources and electricity generation, non-renewable natural resources were singled out for special protection because these three categories of resources were of special importance to various regions of the country.

30. Section 92A was a response to divisive exercises of federal constitutional authority that had exacerbated regional tensions and created a perception that the underlying philosophy of local control over resources was being selectively eroded. Section 92A(1)*(b)*, in particular, endorses the proposition that whether non-renewable resources are a curse or a blessing depends on whether local people get to make the rules about how they will be managed, developed and

[37] Cyr, Hugo. "Autonomy, Subsidiarity, Solidarity: Foundations of Cooperative Federalism" (2014) 23:4 *Constitutional Forum constitutionnel* 20.

conserved. Its work is not yet done.

Reciprocal Interjurisdictional Immunity and Section 92A(1)

31. In Canadian division-of-powers jurisprudence, the constitutional *applicability* of an enactment – as opposed to its validity or operability – is governed by the doctrine of "interjurisdictional immunity." Interjurisdictional immunity recognizes that laws that are perfectly constitutional in most of their applications may be too intrusive on the sovereignty of the other level of government in particular contexts or circumstances. This Court has confirmed that this doctrine is, in principle, reciprocal: it is equally available for the protection of provincial heads of power from encroachment by (otherwise applicable) federal legislation and for the corresponding protection of federal competence from encroachment by provincial legislation. [38] This conclusion has been widely supported by constitutional scholars.[39] Professor Hogg has observed that reciprocal or pro-provincial interjurisdictional immunity is particularly important in light of the effective concurrency created by the double aspect doctrine and federal paramountcy.[40]

32. The doctrine of interjurisdictional immunity provides a legal framework within which the fortification theory of subsection 92A(1) can be realized. It provides a framework within which the applicability of an otherwise valid federal law can be restricted when it seriously impairs a core, protected provincial competence, even though it would be paramount over less core applications of provincial authority.

33. In practice, courts have long found federal laws to be valid in general, but not applicable in circumstances where they interfered with provincial competence.[41] In the landmark *Canadian*

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[38] *Canadian Western Bank v. Alberta*, 2007 SCC 22 [*Canadian Western Bank*], at para. 35.

[39] Elliot, Robin. "Interjurisdictional Immunity after *Canadian Western Bank* and *Lafarge Canada Inc.*: The Supreme Court Muddies the Doctrinal Waters - Again" (2008) 43 *Sup Ct Rev* 433; Newman, Dwight. "Canada's re-emerging division of powers and the unrealized force of reciprocal interjurisdictional immunity" (2011), 20 *Constitutional Forum constitutionnel* 1; Penner, Jonathan. "The Curious History of Interjurisdictional Immunity and its (Lack of) Application to Federal Legislation" (2011), 90: 1 *Canadian Bar Review/ La Revue du Barreau Canadien* 1, **AGBC Authorities Tab 15**; Biddulph, Michelle. "Shifting the Tide of Canadian Federalism: The Operation of Provincial Interjurisdictional Immunity in the Post-*Canadian Western Bank* Era" (2014) 77 *Saskatchewan Law Review* 46, **AGBC Authorities Tab 9**.

[40] Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. (supp.) Toronto: Thomson Reuters, looseleaf, c. 15.8(f), **AGBC Authorities Tab 11.**

[41] *Reference re Industrial Disputes Investigation Act*, [1955] SCR 529; *R. v. Dominion Stores Ltd.*, [1980] 1 SCR 844; *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 SCR 307; *Clark. v. CNR*, [1988] 2.

Western Bank decision, this Court made the reciprocal availability of interjurisdictional immunity explicit.

34. *Canadian Western Bank* undoubtedly expressed reservations about a broad role for interjurisdictional immunity, whether pro-federal or pro-provincial, in contemporary federalism. It is important to note the context: federally-regulated entities (banks) were claiming total exemption from provincial regulation when they entered into an area long accepted to be a core provincial competence (insurance contracts). The banks were asking to disrupt existing competencies and expectations to pursue a new line of business free from protections for the consumer legislated by the level of government closest to that consumer – namely, the provinces. It is also important to note that a key argument for a restrained approach to pro-federal interjurisdictional immunity was the availability of paramountcy when Parliament considers the ordinary operation of provincial law to be a problem. Of course that does not apply in the reciprocal situation. *Canadian Western Bank* did not address the situation where a novel application of a relatively broad federal power has a serious impact on a narrowly-defined provincial core competence.

35. *Canadian Western Bank* confirmed that the existence of the constitutional doctrine of interjurisdictional immunity, albeit of limited application, is supported both textually and by the principles of federalism.[42] The AGBC says interjurisdictional immunity cannot be abandoned and must instead be developed flexibly to preserve the federal nature of the country. Co-operative federalism, as well as the reality of modern governance, supports a large degree of overlap between the competences of federal and provincial government. The classical view of "watertight compartments" has given way to the "dominant tide" of the double aspect doctrine. This development has rightly emphasized that federally and provincially-regulated persons, things and places are not legal enclaves, but are subject to the laws of general application of the other level of government. Pushed too far, however, overlap could undermine the principle of co-ordinate sovereignty, as well as subsidiarity. This is because, in areas of overlap, federal laws get the asymmetrical advantage of the paramountcy doctrine. The more that matters of governance are subject to overlapping competence, the more that provincial authority is at the sufferance of the

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SCR 680; *Singbeil v. Hansen*, [1985] 5 WWR 237 (BCCA); *Early Recovered Resources Inc. v. British Columbia*, 2005 FC 995.

[42] *Canadian Western Bank*, at para. 33.

federal Parliament – the defining feature of a legislative union, like the United Kingdom, not a federal union like Canada.

36. A restrained approach to paramountcy may *mitigate* this problem with concurrency, but leaves it unsolved at a more fundamental level. Courts should certainly be slow to find an operational conflict between the legislation of the two levels of government or that provincial legislation "frustrates" the purpose of federal legislation. But restraint in the application of the paramountcy doctrine is not enough to avoid what would amount to a legislative union, since such restraint could always be displaced by clearer language on the part of Parliament. Without some measure of exclusivity, provinces are only as a sovereign as the federal Parliament decides they should be, which is to say, not sovereign at all. [43]

37. "Pith and substance" cannot be the *only* tool to protect provincial competence. There is no more reason to throw out a federal law that is valid in most cases in order to protect core provincial jurisdiction than there is to invalidate a provincial law in the converse circumstances. Indeed, the difference between a provision that is constitutionally invalid and one that is constitutionally inapplicable may just turn on drafting choices by the encroaching legislature.

38. In *COPA*, this Court made it clear that "interjurisdictional immunity" remains a vital part of Canadian constitutional law when the operation of the otherwise-valid law of one level of government impairs a core competence of the other. Despite the suggestions of some post-*Canadian Western Bank* commentary, it has "not been removed from the federalism analysis," but, like all other constitutional doctrines, is confined by precedent and principle. [44]

39. In *PHS Community Services Society*,[45] the Court reaffirmed the availability of interjurisdictional immunity to protect core provincial competence. At the same time, it added the caution that a core of provincial competence must be strictly delineated. It rejected "health" as a core provincial competence that would render federal criminal law in relation to controlled substances inapplicable. "Health" is too broad, and too long an area of overlapping jurisdiction.[46]

40. The Court's most recent word on interjurisdictional immunity is the *COPA* decision, in

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[43] *Moloney*, at para. 16; *Bell Canada v. Quebec (Comm. de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749, at para. 45-6.
[44] *COPA*, at para. 58.
[45] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44.
[46] *PHS Community Services Society*, at para. 68; *Carter v. Canada (Attorney General)*, 2015 SCC 5, at para. 49-53.

which the Court introduced a two-part test. At the first stage, the question is whether the provincial law "trenches" on a "core" of federal competence.[47] The key issue at this stage is whether a competence is merely within the scope of a head of power, or at its core, its "basic, minimum and unassailable content". The ultimate test for this basic content is what is absolutely necessary to achieve the purpose for which the exclusive legislative jurisdiction was conferred by the Constitution. [48]

41. For federal authority, there is a long line of precedent about what is "core" content as opposed to merely legitimate federal jurisdiction. For provincial authority, by contrast, it is necessary to make inferences from the provisions of the Constitution based on their text, history and philosophic context. A test for pro-provincial interjurisdictional immunity must ensure that the provincial core competence is delineated precisely and narrowly. Since what is at stake is a federal law that is presumptively valid over most of its application, the provincial core competence must be defined in such a way that the federal law is one of "general application" in comparison. If this is done, and if there is something in the constitutional text, history of basic principles of federalism that identifies the provincial competence as truly necessary, the difficulty of a "vast" protected core that arose in *PHS Community Services Society* and *Carter* will be avoided. For example, "property and civil rights" *in general* is, like "health" *in general*, too broad and too subject to longstanding overlaps to constitute in its entirety a core protected provincial competence. On the other hand, certain aspects of provincial competence under s. 92(13) – for example, Quebec's ability to ensure the civilian nature of its private law – may well be core, protected competences as a result of Canada's constitutional text, jurisprudence and history. The test is one of necessity in pursuing the purpose of the head of power.

42. On the reinforcement theory, section 92A(1) embodies a textual commitment to take an already-existing aspect of s. 92(13) – the ability to legislate in relation to how natural resources in the province might be developed, managed and conserved – and to affirm its core nature when applied to non-renewable natural resources, forestry resources and electricity generation. If such textual specificity cannot establish a core competence subject to special protection, it is difficult to see what could. There is no other plausible legal meaning to s. 92A(1).

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[47] *COPA*, at para. 27-40.
[48] *COPA*, at para. 35.

43. The second part of the interjurisdictional immunity test is whether the interference is "sufficiently serious" to constitute "impairment."[49] Incidental effects do not give rise to interjurisdictional immunity. If the relationship between the laws of the two levels of governments is cooperative, or if there is a conflict, but it is incidental, the doctrines of double aspect and paramountcy hold sway. But if the effects on a narrowly-defined core of provincial competence are negative and significant, then interjurisdictional immunity is engaged. As *COPA* makes clear, while the effect must be serious, it need not sterilize the core competence of the other level of government.

44. Because the Court has not had occasion to set out the test for "reciprocal" pro-provincial interjurisdictional immunity, it has not had to address the situation in which core competences of both levels of government are involved. The AGBC submits that it is not necessary, in this case, to address this issue, since the impact of holding s. 14.06 inapplicable in the circumstances on the federal bankruptcy and insolvency power is merely incidental and because s.14.06 lies far from any core of federal jurisdiction. However, if a test is necessary, the AGBC proposes the following, based on the "ancillary power" analysis in relation to validity:[50]

a. If the impact of the trenching enactment on the core competence of the other level of government is either co-operative or merely incidental, it is not serious and does not constitute impairment.

b. If the impact of the trenching enactment is negative and more than merely incidental, but still modest, the objective of the trenching government need only be legitimate and the means need only be functionally related to that objective.

c. If, on the other hand, the impact of the trenching enactment is serious, to remain applicable, the trenching provision(s) must pursue an objective that is itself part of the core competence of the enacting level of government and the impairment must be necessary, in the sense that no measure less intrusive on the other government's core competence is available.

45. Since predictability and certainty are of great importance in the division-of-powers, an

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[49] *COPA*, at para. 42-45.
[50] *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at pp. 667-70.

important factor in assessing the significance of an impact is whether the applicability or non-applicability of the impugned law will unsettle long-standing competencies and expectations. Judicial precedent and long-standing practice will both be relevant to this inquiry.

46. Although the majority decision in *Canadian Western Bank* proposes "generally" deciding the paramountcy analysis before turning to interjurisdictional immunity (while acknowledging that "theoretically" applicability is prior to operability),[51] this has not been followed in practice and clearly cannot work when it is a province that is claiming interjurisdictional immunity.[52] In the context of reciprocal interjurisdictional immunity, a paramountcy analysis will be necessary if the provincial competence is not core, the effect is not serious, or interjurisdictional immunity is defeated by the core nature of the federal objective and the necessity of the chosen means.

47. Reciprocal interjurisdictional immunity applies to the federal bankruptcy and insolvency power as much as any other. With the substitution of the now-anachronistic word "sterilize" with the contemporary "impair," the AGBC endorses the conclusion of Alain Bohémier's study prepared for the Civil Division of the Department of Justice that "subsection 91(21) of the *Constitution Act, 1867* is intended to allow the Parliament of Canada to regulate situations of insolvency, but not to sterilize legitimate provincial action within its sphere of jurisdiction." [53]

Application to the Present Case

48. Applying the proposed interjurisdictional immunity test to the current case, section 14.06, as interpreted below, is constitutionally inapplicable to the authority of the Regulator to control transfers of the productive well licenses for the following reasons:

a. Section 92A(1)(b) of the *Constitution Act, 1867* affirms that provincial jurisdiction over the development, conservation and management of non-renewable natural resources – already under provincial authority at the time s. 92A was added to the Constitution – is a core provincial competence;

b. As interpreted by the Court of Appeal, s. 14.06 has an extremely serious and significant impact on the ability of the province to conserve and manage its non-renewable resources, and disturbs settled expectations and competences;

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[51] *Canadian Western Bank*, a para. 77-8.
[52] *COPA*. Biddulph, "Shifting the Tide".
[53] Bohémier, Alain (1999) *Bankruptcy and Insolvency*, prepared for the Department of Justice.

c. The application of s. 14.06 in these circumstances is far from the core of the bankruptcy and insolvency power under s. 91(21) of the *Constitution Act, 1867*. Even assuming that protecting bankruptcy professionals from personal liability for end-of-life costs is a core objective of s. 91(21), there are less intrusive means to accomplish this objective.

Regulatory Power to Restrict Transfer of Productive Well Licenses Essential to Managing End-of-Life Liabilities

49. While any activity can create costs that persist after the activity ceases to generate revenue, "non-renewable resources" are distinctive in that this problem is a *necessary* component of their production and management. A non-renewable resource is, by definition, one whose valuable life comes to an end. Inevitably, further costly activity has to occur once this happens. While a renewable resource, such as farmland, will have cycles of investment and yield, at least in principle these cycles can go on indefinitely. Today's investment can be paid out of tomorrow's yield. In contrast, a non-renewable resource necessarily adds a distinct phase of end-of-life cost, where there is no longer any yield to pay for it. (Forestry resources, also covered by s. 92A(1) are similar to non-renewable resources because of the long lag between reforestation and yield.)

50. A key task in making laws in relation to the production, conservation and management of non-renewable resources is to address the incentive structure this distinctive fact creates. In its broadest sense "property law" is about tying private claims on streams of pecuniary and non-pecuniary benefits onto pecuniary and non-pecuniary costs, such that the link persists when the asset/liability is transferred. In general, bankruptcy/insolvency law takes these links between the benefits and burdens of profit as it finds them. Blackstone's justification of fee simple in land follows the logic of an agricultural economy, in which an initial investment ("sowing") leads ultimately to yield ("reaping").[54] The costs of sowing and the benefits of reaping can be internalized by giving the person presently seized of land an enduring interest. This solution does not work for end-of-life costs for non-renewable resources since a disproportionate amount of the "sowing" must come *after* the "reaping." The LMR system is a response to this problem, which is endemic to non-renewable resources. It has the effect of linking the anticipated end-of-life costs

[54] Blackstone, Sir William. *Commentaries on the Laws of England, vol. 2: Of the Rights of Things, c. 1* Philadelphia: Rees Welsh & Company, 1900, **AGBC Authorities, Tab 7**.

of already-exploited wells to the present potential value of new productive wells.

51. Ordinary corporate law allows a corporation to be as leveraged (have as high a ratio of liabilities to equity) as the market for credit will bear. The ability of a corporation to add debt at an ordinary interest rate is constrained fundamentally by the value of its collateral. If significant end-of-life costs are not reflected in the net value of that collateral, both equity holders and secured creditors will have an incentive to over-leverage the enterprise. On the other hand, if restrictions on transferability of collateral are properly taken into consideration when lending/borrowing, the internalization of end-of-life costs will be an expected and uncontroversial aspect of the liquidation, insolvency or departure from the industry of any particular operator.

52. As interpreted by the Court of Appeal, s. 14.06 allows secured creditors to take as their collateral not the net value of all the licensed wells, but the value of that subset of wells with a positive asset/liability ratio. This is contrary to the actual or reasonable expectations of all parties, including the secured creditors. It therefore creates a windfall for secured creditors who priced their interest rate based on the risks as assessed under the *Northern Badger* rule.[55] Going forward, it means that secured creditors have no interest in evaluating the liabilities of a borrower's post-production wells. This in turn would give operators the incentive to accumulate much more debt than is socially optimal.

53. It can hardly be disputed that the Court of Appeal's interpretation of s. 14.06 would have a profound effect on the management of non-renewable oil and gas resources in Alberta and throughout the country.[56] A respected legal commentator has referred to it as making a "crisis" in orphan wells much worse.[57] The majority below did not deny these consequences, but considered them irrelevant to the legal analysis under paramountcy.[58] By contrast, they are clearly relevant to the seriousness of the impact of the federal law under the *COPA* interjurisdictional immunity test.

54. Some argue that a province could avoid the resource curse by insisting that anyone who wishes to engage in non-renewable resource production must post security for the full potential

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[55] *PanAmericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181.
[56] Affidavit of David Wolf #1, sworn September 22, 2015, **AR IV, pp. 116-184.**
[57] Stewart, Fenner L. "How the Redwater Case Makes the Orphan Well Crisis Much Worse for Alberta".
[58] *Reasons for Judgment of Court of Appeal of Alberta, April 24, 2017*, Majority Reasons, para. 93, **AR I, pp. 112-3.**

cost of abandonment and reclamation before drilling or operating a well. But requiring greater security upfront has its own implications. It would mean that only well-financed entities could enter into the primary production of oil and gas. This would greatly limit opportunities and change the structure of the industry, in ways that provinces exercising their authority under s. 92A have evidently decided is undesirable or unworkable. In any event, the constitutional question is not whether the decisions of regulatory design were the optimal ones. That is a matter for democratic accountability to the provincial electorate. The constitutional question is whether s. 92A(1)*(b)* gives the provinces the constitutionally protected authority to make these choices for themselves.

Not a Core Use of Bankruptcy and Insolvency Power

55. So far, the Court has not found it necessary to decide what limits are imposed on interjurisdictional immunity by the importance of the impugned measure to the *enacting* level of government. The AGBC has proposed a test that looks both at how core the objective is to the enacting government's head of power and how narrowly tailored is the means. But whether this Court embraces the AGBC's test or any other, there is nothing about s. 14.06, as interpreted by the majority below, that would mean it should defeat the core objectives of s. 92A(1)*(b).*

56. The "core" of any head of power is what is "absolutely necessary" for Parliament or the legislature to be able to pursue the objectives that were the reason for giving it that power in the first place.[59] The core of the bankruptcy and insolvency power is the establishment of a procedure for the orderly and equitable distribution of an insolvent debtor's assets among its creditors (the "equitable distribution purpose") and to enable the debtor's subsequent rehabilitation (the "rehabilitation purpose").[60]

57. The rehabilitation purpose is irrelevant in a corporate bankruptcy since a corporation can only obtain a discharge by payment or compromise of all claims. The equitable distribution purpose is also irrelevant here. Equitable distribution is, at its core, about ensuring unsecured creditors get a fair share of the insolvent person's patrimony when they cannot all be paid in full. It is about *distribution* of assets, not *enhancement* of assets: the value of the assets of the estate and of the assets over which security is taken is typically governed by applicable provincial

[59] *COPA*, at para. 35.
[60] *Moloney,* at para. 32.

law.[61] It is outside the core of the equitable distribution purpose to enable trustees or receivers to improve the transferability or saleability, and thereby increase the value, of particular property beyond what it could sell for in provincially-regulated markets.

58. Protecting insolvency professionals from personal liability in the event that end-of-life liabilities relating to an estate exceed the total sale value of that property is not itself a core purpose of s. 91(21), but it is a legitimate ancillary purpose because otherwise trustees would not accept appointments and receivers would require full indemnification from the secured creditors seeking their services. But as interpreted below, s. 14.06 goes beyond what can be said to be necessary for that purpose, since it extends well beyond freeing trustees/receivers from *personal* liability in the absence of gross negligence in order to free the *estate* from restrictions on alienability.

59. Section 121 of the *BIA* extends the concept of a "provable claim" in bankruptcy legislation beyond that of the common law or civil law by encompassing future and contingent claims.[62] Assuming that this extension is within the core of s. 91(21), the same cannot be said for what the majority below heralded as yet a further expansion of that already broad definition by s. 14.06(8), which it perceived as designed to extensively displace the effectiveness of provincial environmental rules.[63]

60. The Court of Appeal insisted that "trustees do not have to 'step into the regulatory shoes' of the bankrupt, and do not have to take assets with 'warts'", but the equitable distribution of assets (the core purpose) must be distinguished from the substantive enhancement of the value of assets.[64] If a federal law invites creditors to step into a finer pair of shoes than that belonging to the debtor, it is, at best, at the periphery of federal power under s. 91(21) of the *Constitution Act, 1867*. On any test, it does not defeat the case for a recognition of reciprocal interjurisdictional immunity here.

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[61] *Giffen (Re)*, [1998] 1 SCR 91.
[62] *Bankruptcy and Insolvency Act*, s. 121; *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, at para. 34.
[63] *Reasons for Judgment of Court of Appeal of Alberta, April 24, 2017,* Majority Reasons, para. 57 (d), **AR I, p. 101.**
[64] *Reasons for Judgment of Court of Appeal of Alberta, April 24, 2017,* Majority Reasons, para. 57 (b), 81, 82, **AR I, pp. 101, 109, 110.**

Conclusion

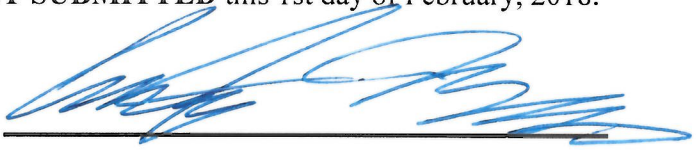
61. Section 92A(1) and the reciprocal interjurisdictional immunity doctrine fit well together. Without pro-provincial interjurisdictional immunity, s. 92A(1) would have no legal effect, a result impossible to reconcile with its text, Canada's constitutional history or basic constitutional principle. On the other hand, the specificity of s. 92A(1) avoids the problem of an excessively broadly defined "provincial core competence" that would have a drastic effect on large areas of federal legislation. This case provides an ideal opportunity to fulfill the vision of *Canadian Western Bank* and explicitly give effect to the reciprocal nature of the interjurisdictional immunity doctrine and its centrality to the fundamental federal principle of co-ordinate sovereignty.

62. The judgment below states that "[i]t is not open to the provinces to decide when their policy concerns outweigh those of the federal government."[65] But it was open to the framers of the Constitution to do so. And that is what they did with s. 92A(1) when those policy concerns are about the production, conservation and management of non-renewable natural resources to provinces. To the extent a federal law impairs this core competence – as the Court of Appeal's interpretation of s. 14.06 of the *BIA* surely does – it should be considered constitutionally inapplicable. The third question should be answered in the affirmative.

PART V – REQUEST FOR PERMISSION TO PRESENT ORAL ARGUMENT

63. The AGBC will present five minutes of oral argument at the hearing of the appeal in accordance with the order of Justice Brown, dated 18 January 2018.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of February, 2018.



J. Gareth Morley, Aaron Welch and Barbara Thomson, Counsel for the Attorney General of British Columbia

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[65] *Reasons for Judgment of Court of Appeal of Alberta, April 24, 2017,* Majority Reasons, para.94, **AR I, p. 113.**

PART VI: TABLE OF AUTHORITIES

	Case Law	Para # of Factum
1.	*Alberta (Attorney General) v. Moloney*, 2015 SCC 51	4, 36, 56
2.	*Bell Canada v. Quebec (Comm. de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749, at para. 45-6	36
3.	*Borys v. Canadian Pacific Railway*, 1953 CanLII 414 (UK JCPC)	20
4.	*Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 SCR 307	33
5.	*Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44	39, 41
6.	*Canadian Industrial Gas & Oil Ltd. v. Saskatchewan*, [1978] 2 SCR 545	22
7.	*Canadian Western Bank v. Alberta*, 2007 SCC 22 [*Canadian Western Bank*]	31, 33. 47
8.	*Carter v. Canada (Attorney General)*, 2015 SCC 5	39, 41
9.	*Central Canada Potash Co. Ltd. v. Saskatchewan*, [1979] 1 SCR 42	22
10.	*Clark. v. CNR*, [1988] 2 SCR 680	33
11.	*Early Recovered Resources Inc. v. British Columbia*, 2005 FC 995	33
12.	*General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at pp. 667-70	44
13.	*Giffen (Re)*, [1998] 1 SCR 91	57
14.	*Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67	59
15.	*Ontario (Attorney General) v. Canada (Attorney General)*,	18

	[1896] AC 348 (JCPC) [*Local Prohibition*]	
16.	*Ontario (Attorney General) v. OPSEU*, [1987] 2 SCR 2, par. 27	18
17.	*Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 SCR 327 [*Ontario Hydro*],	26
18.	*PanAmericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181	52
19.	*Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 [*COPA*]	5, 38, 40, 46, 53, 56
20.	*R. v. Dominion Stores Ltd.*, [1980] 1 SCR 844	33
21.	*R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295, at p. 344	17
22.	*Reference re Industrial Disputes Investigation Act*, [1955] SCR 529	33
23.	*Reference re Secession of Quebec*, [1998] 2 SCR 217, at para. 68, 96	24, 25
24.	*Reference re Senate Reform*, 2014 SCC 32, at para. 25	17
25.	*Reference re* Supreme Court Act, ss. 5 and 6, 2014 SCC 21	17, 25
26.	*Singbeil v. Hansen*, [1985] 5 WWR 237 (BCCA);	33
27.	*Spooner Oils v. Turner Valley Conservation Board*, [1933] S.C.R. 629	21
28.	*Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 SCR 322.	26
	Legislation	**Para # of Factum**
29.	*Alberta Act, 1905*, 4-5 Edw. VII, c. 3 (Can.), s. 21, **AGBC Authorities, Tab 1**;	19
30.	*Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, s. 14.06	3-5, 48, 52, 53, 58, 59
31.	*Bankruptcy and Insolvency Act*, s. 121	59
32.	*British Columbia Terms of Union*, Order of Her Majesty in Council admitting British Columbia into the Union, dated the 16th day of May, 1871, article 11, **AGBC Authorities, Tab 2.**	19

33.	*Constitution Act, 1867*, s. 91(21)	4, 47, 48, 57-60
34.	*Constitution Act, 1867*, s. 91(2A)	21
35.	*Constitution Act, 1867*, s. 92	16, 42
36.	*Constitution Act, 1867*, s. 92A	1, 2, 4, 5, 14- 19, 22-31, 33, 43, 48, 54, 61
37.	*Constitution Act, 1867*, Part VII.	19, 29
38.	*Constitution Act, 1930*, 20-21 Geo. V., c. 26 (U.K.) **AGBC Authorities, Tab 3.**	19
39.	*Constitution Act, 1982*, s. 36	29
40.	*Manitoba Act, 1870*, 33 Vict., c. 3 (Can.), s. 30, **AGBC Authorities, Tab 4**	19
41.	*Natural Resources Transfer (Amendment) Act, 1938*, S.C. 1938, c. 36, **AGBC Authorities, Tab 5**.	21
42.	*Oil and Gas Conservation Act*, RSA 2000, c. O-6.	5, 7
43.	*Saskatchewan Act, 1905*, 4-5 Edw VII, c. 42 (Can.) s. 21, **AGBC Authorities, Tab 6**	19
	Learned Authors	**Para # of Factum**
44.	Blackstone, Sir William. *Commentaries on the Laws of England, vol. 2: Of the Rights of Things, c. 1* Philadelphia: Rees Welsh & Company, 1900, **AGBC Authorities, Tab 7**	50
45.	Blakeney, Hon. Allan. "Speech" in ed. Meekison, J. Peter. *Canadian Federalism: Myth or Reality, 3d ed.* Toronto: Methuen, 1977, pp. 179-188, **AGBC Authorities, Tab 8**.	22
46.	Bohémier, Alain (1999) *Bankruptcy and Insolvency*, prepared for the Department of Justice	47
47.	Biddulph, Michelle. "Shifting the Tide of Canadian Federalism: The Operation of Provincial Interjurisdictional Immunity in the Post-*Canadian Western Bank* Era" (2014) 77 *Sask. Law Review* 46, **AGBC Authorities Tab 9**.	31, 46
48.	Breen, David H. *Alberta's Petroleum Industry and the Conservation Board.* Edmonton: University of Alberta Press, at pp. xl-xlv, **AGBC Authorities, Tab 10.**	20, 21

49.	Cairns, Robert D., Marsha A. Chandler & William D. Moull, "The Resource Amendment (Section 92A) and the Political Economy of Canadian Federalism" (1985) 23 *Osgoode Hall L.* J. 253, at p. 270	16, 22
50.	Cyr, Hugo. "Autonomy, Subsidiarity, Solidarity: Foundations of Cooperative Federalism" (2014) 23:4 *Constitutional Forum constitutionnel* 20.	28
51.	Elliot, Robin. "Interjurisdictional Immunity after *Canadian Western Bank* and *Lafarge Canada Inc.*: The Supreme Court Muddies the Doctrinal Waters - Again" (2008) 43 *Sup Ct Rev* 433	31
52.	Grammond, Sébastien. "Compact is Back: The Supreme Court of Canada's Revival of the Compact Theory of Confederation." (2016) 53:3 *Osgoode Hall L. J.* 799	25
53.	Hogg, Peter W. *Constitutional Law of Canada*, 5th ed. (supp.) Toronto: Thomson Reuters, looseleaf, c. 15.8(f), **AGBC Authorities Tab 11.**	31
54.	Hogg, Peter W. *Constitutional Law of Canada* (5th ed. Supp.), Toronto: Thomson Reuters, looseleaf p. 30-19, **AGBC Authorities, Tab 12**	16
55.	La Forest, Gerard V. *Natural Resources and Public Property under the Canadian Constitution.* Toronto: University of Toronto Press, 1969, c.3, **AGBC Authorities, Tab 13**	19
56.	Meekison, Peter J. & Roy J. Romanow "Western Advocacy and Section 92A of the Constitution" in Meekison, Peter J. et al. *Origins and Meaning of Section 92A: The 1982 Constitutional Amendment on Resources.* Montreal: Institute for Research on Public Policy, 1985, pp. 3-32, **AGBC Authorities, Tab 14**	24
57.	Newman, Dwight. "Canada's re-emerging division of powers and the unrealized force of reciprocal interjurisdictional immunity" (2011), 20 *Constitutional Forum constitutionnel* 1	31
58.	Penner, Jonathan. "The Curious History of Interjurisdictional Immunity and its (Lack of) Application to Federal Legislation" (2011), 90: 1 *Canadian Bar Review/ La Revue du Barreau Canadien* 1, **AGBC Authorities Tab 15**	31

59.	Richards, John & Larry Pratt. *Prairie Capitalism: Power and Influence in the New West.* Toronto: McLelland & Stewart, 1979, pp. 46-7, **AGBC Authorities, Tab 16**	20, 21
60.	Stewart, Fenner L. "How the Redwater Case Makes the Orphan Well Crisis Much Worse for Alberta"	53