S.C.C. File No. 37627

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

BETWEEN:

ORPHAN WELL ASSOCIATION and ALBERTA ENERGY REGULATOR

APPELLANTS
(Appellants)

and

GRANT THORNTON LIMITED and ALBERTA TREASURY BRANCHES

RESPONDENTS
(Respondents)

and

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INTERVENERS

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

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TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF FACTS **1**

PART II – STATEMENT OF ISSUE **4**

PART III – ARGUMENT **4**

A. Interpretation of s. 14.06 of the BIA 4

Exemption from Personal Liability 4

Priority of Claims for Costs of Remedying Environmental Conditions or Damage 6

B. The Current Interpretation of Section 14.06 Meets Regulatory Objectives 7

C. Consequences of Granting the Appeal 9

PART IV – SUBMISSION AS TO COSTS **10**

PART V – ORDER SOUGHT **10**

PART VI – TABLE OF AUTHORITIES **11**

PART I – OVERVIEW AND STATEMENT OF FACTS

1. Section 14.06 of the *Bankruptcy and Insolvency Act* ("**BIA**")[1] was enacted by Parliament to:

   (a) Limit the personal liability of receivers and trustees for environmental claims or conditions;

   (b) Permit receivers and trustees to renounce or disclaim properties affected by environmental conditions or damage; and

   (c) Provide a priority scheme for the costs associated with regulatory and financial orders from provincial regulatory authorities.[2]

2. The protections included in s. 14.06 ensure that a receiver or trustee can take possession of contaminated property for the purpose of making a determination as to whether the property can be cleaned up for the benefit of all stakeholders without fear of personal liability and with the comfort that its fees will be paid from the proceeds of sale. Without these protections, receivers and trustees would be reluctant to take on mandates that involve environmentally affected properties, with the result that properties which would otherwise be cleaned up or sold to well capitalized responsible operators would be left outside of the bankrupt estate or receivership.[3]

3. The purpose of s. 14.06 was specifically stated in testimony before the Standing Committee on Industry:

> The aim is to provide a better definition of the liability of insolvency professionals and practitioners <u>in order to encourage them to accept mandates where there may be problems related to the environment.</u> It is hoped that this will reduce the number of abandoned sites both for the benefit of the environment and the safeguard of businesses and jobs. … First of all, insolvency professionals would no longer be considered personally liable for damage caused to the environment after their appointment unless they are guilty of serious negligence or deliberate misconduct.

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

[2] Canada, Parliament, House of Commons, Standing Committee on Industry, Minutes of Proceedings and Evidence, 35th Parl, 2nd Sess, No 16 (11 June 1996) at 1545-1555, 1625-1630, 1650-1715 [Minutes of Proceedings].

[3] *Ibid.*

> Secondly, if the monitor were to receive an order to remedy environmental damage, he would have four options. … The third option would be for the monitor to apply to the appropriate court for a period of stay to assess the economic viability of complying with the order, <u>whether it is worth the trouble and whether the assets are sufficient to cover the clean up costs.</u> As a fourth option, <u>if he considers that this course has absolutely no economic viability, he may give notification that he has renounced the real property to which the order applies.</u>[4] [emphasis added]

4. In recent years, and prior to the decision of the Court of Queen's Bench of Alberta ("**QB Decision**")[5], the Alberta Energy Regulator ("**AER**") took the position that because receivers and trustees had been designated licencees under both the provisions of the *Oil and Gas Conservation Act* ("**OGCA**")[6] and the *Pipeline Act* ("**PLA**"),[7]: (a) receivers and trustees were required to take possession of and administer all assets of an insolvent oil and gas company; (b) the transfer of licenses was entirely within its discretion; and (c) if the seller was unable to transfer the licensed asset and still comply with the minimum liability management rating ("**LMR**") requirements imposed by the AER, it was entitled to refuse to permit such transfers.[8]

5. In an insolvency situation, the AER's control of the conditions required to be met for the transfer of oil and gas licenses frustrated receivers and trustees in the execution of their duties established under the BIA, and provided the AER with what amounted to a super-priority over all other creditors.[9] It also introduced a significant element of delay into the process. Conditions imposed by the AER were an attempt to require receivers and trustees to fulfill the duties of a licensee under the OGCA and PLA, even where those duties directly conflicted with the duties of receivers and trustees to all stakeholders under the BIA.[10]

6. The QB Decision was upheld by the majority of the Court of Appeal of Alberta ("**Majority Decision**")[11]. Both Courts concluded that: (1) s. 14.06 limits the personal liability of receivers and trustees for environmental claims or conditions; (2) notwithstanding any other

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[4] *Ibid.* at 1545-1550.
[5] *Re Redwater Energy Corporation*, 2016 ABQB 278 [QB Decision].
[6] *Oil and Gas Conservation Act*, RSA 2000, c O-6 [OGCA].
[7] *Pipeline Act*, RSA 2000, c P-15 [PLA].
[8] Second Report of the Receiver, dated October 3, 2015 at paras 12, 19 and Appendix 2 [Second Report] **[Volume I, Tab 3, Page 50, 54 to 55, 78 to 79 of Grant Thornton's Record] [GTL Record]**
[9] *Ibid.* at para 20 **[Volume I, Tab 3, Page 55 to 62 of GTL Record]**
[10] OGCA, *supra* note 6, s. 1(1)(bb); PLA, *supra* note 7, s. 1(1)(n).
[11] *Orphan Well Association v Grant Thornton Limited*, 2017 ABCA 124 [Majority Decision].

provisions in federal or provincial law, receivers and trustees are not required to comply with post-bankruptcy orders, provided that they abandon or renounce any interest in the affected real property with the time frame provided; (3) s. 14.06 provides a specific priority scheme for costs associated with regulatory and financial orders from provincial regulatory authorities; (4) s. 14.06 specifically incorporates environmental claims into the general bankruptcy regime; (5) receivers and trustees cannot comply with both the BIA and OGCA/PLA; and (6) the applicable provisions of the OGCA and PLA are inoperative to the extent that they are incompatible with the BIA.[12]

7. In recognizing the paramountcy of the federal bankruptcy regime and finding that provisions of the OGCA and PLA referenced above conflict with that regime, the Courts below ensured that receivers and trustees could rely solely upon the provisions of the BIA when determining: (1) whether to accept an engagement where there is or could be property with environmental conditions or damage (collectively referred to herein as "**environmental damage**"); (2) whether to abandon or disclaim certain of a debtor's property; and (3) the priority of each creditor's claim to the debtor's assets or proceeds from the sale of those assets.

8. Accordingly, pending the decision of this Honourable Court:

(a) The AER no longer has the ability to refuse to transfer licences of producing assets;

(b) Receivers and trustees are able to abandon or disclaim real property where there is environmental damage, thereby limiting the risk of personal liability and maximizing return on the remaining assets for creditors in the receivership or bankruptcy;

(c) A receiver or trustee is no longer required to sell non-producing assets held by a debtor which are or may be subject to regulatory orders from the AER;

(d) The priority scheme set out in the BIA is not altered by provincial legislation; and

(e) There is predictability for all participants in capital markets across Canada.

9. The AER and the Orphan Well Association ("**OWA**", and together with the AER, the "**Appellants**") seek to overturn the Majority Decision and to re-interpret s, 14.06, which will impact the fundamental purposes of the BIA, and specifically the balancing of creditor and other

[12] QB Decision, *supra* note 5 at paras 180-183; Majority Decision, *ibid.* at para 106.

interests set out therein. If the Appellants are successful on this appeal, the federal priority scheme set out in the BIA will be frustrated by creative and highly technical provincial regulatory regimes that may not engage s. 14.06 in a narrow technical sense, but that entirely undermine its purpose, effect and operation in substance.

PART II – STATEMENT OF ISSUE

10. The Canadian Association of Insolvency and Restructuring Professionals ("**CAIRP**") adopts the statement of issue set out in Part II the Factum of the Respondent, ATB Financial.

PART III – ARGUMENT

11. CAIRP respectfully submits that the interpretation of s. 14.06 of the BIA by the Courts below satisfies the concerns raised by the Appellants without altering the statutory scheme established by the BIA.

A. Interpretation of s. 14.06 of the BIA

12. Section 14.06 of the BIA was enacted to provide an opportunity for a receiver or trustee to take possession of potentially contaminated property in order to determine whether the property can be cleaned up and sold for the benefit of all stakeholders without fear of personal liability and with the comfort that its fees and disbursements will be paid from the proceeds of sale of assets with net positive market value.

Exemption from Personal Liability

13. Subsection 14.06(1.2) exempts receivers and trustees from personal liability for liabilities that existed before the receiver or trustee was appointed or that are calculated by reference to a period before the appointment. Pursuant to s. 14.06(2), receivers and trustees are specifically exempt from personal liability for environmental conditions that arose or environmental damage that occurred on the property of the bankrupt prior to the appointment, or that arises or occurs after the appointment, provided that the receiver or trustee has not been grossly negligent or engaged in wilful misconduct. In a case where a provincial authority has issued an order requiring a receiver or trustee to remedy environmental damage, s. 14.06(4) exempts the receiver or trustee from personal liability for the failure to comply with such an order, and also exempts

the receiver or trustee from personal liability for any costs arising from carrying out the terms of the order.[13]

14. Subsections 14.06(4) and (5), read in tandem, provide that a receiver or trustee may abandon, dispose of or otherwise release an interest in any real property affected by environmental damage after completing an assessment of the economic viability of complying with an order[14] [emphasis added]. The reference to "economic viability" goes beyond an assessment of potential personal liability of the receiver or trustee, and encompasses the duty of the receiver or trustee to maximize the value of the debtor's estate for the benefit of all creditors. Where a receiver or trustee is not permitted to renounce an environmentally damaged property and is required to comply with an order to remedy that damage, even where there would be a net loss to the estate, the receiver or trustee cannot comply with its duty.

15. When a receiver or trustee takes possession of the property of a debtor, it is required to assess what environmental damage may exist and how best to deal with such damage. Without the clarity provided by s. 14.06 of the BIA, a receiver or trustee will not be able to properly determine how to deal with environmental damage. Without an opportunity to make a proper assessment, receivers and trustees will not be able to determine whether a property may be cleaned up and sold for a price that will, at minimum, cover the receiver's or trustee's costs for undertaking the work. Absent that certainty, receivers and trustees will in many instances refrain from accepting engagements involving potentially contaminated properties or unremediated lands that might have otherwise been cleaned up.

16. Put simply, if s. 14.06 is interpreted as the Appellants have argued, insolvency professionals are unlikely to accept mandates for insolvent corporations in the oil and gas industry (or in other industries where there are significant environmental liabilities), the foreseeable result of which would be a significant increase in the number of properties with environmental damage left to the public purse. There will be no receiver or trustee overseeing the transition of environmentally affected properties to the OWA, and even properties that may otherwise be cleaned up and sold to well capitalized responsible operators will be left to the OWA.

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[13] BIA, *supra* note 1, s. 14.06(4).
[14] BIA, *supra* note 1, s. 14.06(4),(5).

17. The AER states that no personal liability is imposed on a receiver or trustee because the AER does not in practice enforce orders against receivers or trustees.[15] However, administrative practice does not erase the real legal conflict between the provisions of the OGCA/PLA and section 14.06 of the BIA, and cannot alter the interpretation of s. 14.06 of the BIA or its proper application.

Priority of Claims for Costs of Remedying Environmental Conditions or Damage

18. The law is clear that the order of priority amongst unsecured claims is set out under the BIA and overrides provincial legislation.[16] Section 141 provides that all proven claims in a bankruptcy shall be paid rateably, and s. 136 of the BIA sets out the priorities granted generally to creditors.[17] Proceeds realized from the sale of the debtor's assets are first paid to secured creditors and then applied to preferred claims, including costs of administration, with the balance distributed rateably to other unsecured creditors. "Costs of administration" refers to the fees and expenses of insolvency professionals who are engaged to administer the assets of the debtor. Section 136 provides for priority for costs of administration over almost all other unsecured claims to ensure that trustees will take engagements and therefore provide debtors access to Canada's insolvency system.

19. Subsections 14.06(6) and 14.06(7) establish the relative priorities of claims for remediation of environmental damage and other claims. Neither liabilities from which a receiver or trustee is exempt pursuant to s. 14.06, nor costs incurred to remedy environmental damage, rank as costs of administration when determining priority.[18]

20. While provincial regulatory bodies may have claims against particular pieces of property in a debtor's estate, such claims do not enjoy the same priority status granted to the costs of administration. A claim for the costs of remedying environmental damage affecting real property is instead given a super-priority pursuant section 14.06(7) of the BIA, which represents a statutory exception to the general priority scheme under the BIA.

21. Under section 14.06(7) of the BIA, a claim for the costs of remedying environmental damage affecting real property is secured by a charge against the real property affected by the

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[15] Second Report, *supra* note 8 at para 20(k) **[Volume I, Tab 3, Page 61 of GTL Record]**
[16] *Husky Oil Operations Ltd. v Minister of National Revenue,* [1995] 3 SCR 453 at paras 33-39 [*Husky*]
[17] BIA, *supra* note 1, ss. 136, 141.
[18] BIA, *supra* note 1, s. 14.06(6).

environmental damage, as well as against any other real property of the debtor that is contiguous with that real property and that is related to the activity that caused the environmental damage. The charge ranks senior to any other claim, right, charge or security against such property. However, the charge attaches only to the real property affected by the environmental damage and contiguous property and does not extend to the balance of the debtor's assets or estate. In the event that the contaminated property (and contiguous property) does not have sufficient value to satisfy such claims, the balance is treated as an unsecured claim, which must be proved in the receivership or bankruptcy with the same priority as other unsecured claims not entitled to preferred status under s. 136 of the BIA.[19]

22. There is no super-priority for these costs outside of what has been provided for in s. 14.06(7), and none should be read in.

23. Allowing the AER to utilize its regulatory authority to recover the costs of environmental remediation against the assets other than the contaminated real property (or contiguous property) would significantly change the priority scheme set out in the BIA, and would permit the AER to do indirectly what it is prohibited from doing directly.[20]

B. The Current Interpretation of Section 14.06 Meets Regulatory Objectives

24. Contrary to the assertions of the Appellants, the QB Decision and the Majority Decision preserve the statutory priority scheme established by the BIA, while meeting the regulatory objectives raised by the Appellants. Specifically:

(a) Economically viable properties can be sold for the benefit of all stakeholders and the number of wells transferred to the OWA will be reduced;

(b) Proceeds received by the receiver or trustee from sales of properties will be distributed to creditors in accordance with the priority scheme established by the BIA;

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[19] BIA, *supra* note 1, s. 136; see also Minutes of Proceedings, *supra* note 2 at 1550-1555, where it was stated that "… [C]laims for costs of remedying any environmental condition shall rank in priority above any other claim … against the property to which the order applies, as well as to any other real property contiguous to the contaminated sites and affected by the contamination. … Lastly, if in spite of the exercise of this first claim there remains money owing to the Department of Environment for work done to clean up the sites if there still is an unsettled claim, then the claim will be recognized as an ordinary claim against the assets of the bankrupt business."

[20] *Husky*, *supra* note 16 at para. 39.

(c) The public benefits from ensuring that environmental damage to real property owned by an insolvent corporation is assessed and remediated on a timely basis where possible; and

(d) The provincial Crown will receive royalties payable on production from wells sold to and operated by the purchaser.

25. To interpret s. 14.06 otherwise would be to permit the purpose and operation of s. 14.06 to be circumvented by provinces that enact creative and highly technical regulatory regimes that may not engage s. 14.06 in a narrow technical sense, but that entirely undermine its purpose, effect and operation in every real sense that matters. The combined effect of the Appellants' interpretation of s. 14.06 and Alberta's engineered regulatory scheme is to dramatically expand the scope of the Crown's super-priority for remediation costs and to frustrate the carefully considered, nuanced and balanced framework established by Parliament to promote cleanup activities and facilitate productive economic activity for the benefit of Canadians.

26. Moreover, if the Appellants' interpretation of s. 14.06 is correct – that their claims cannot be reduced to a monetary claim within the receivership or bankruptcy – then receivers and trustees will not be able to dispose of assets or determine how proceeds from any sale of assets will be distributed. In many cases, creditors will not have any incentive to take, support or fund insolvency proceedings where there is a risk that they will not recover any value from the sale of assets. All producing and non-producing assets, whether or not they have value or could be cleaned up and sold to the benefit of the estate, would be left to be dealt with by the OWA.

27. If a provincial legislature or regulator is allowed to alter the specific priorities set out in the BIA, the core purpose of Canada's bankruptcy system will be frustrated. There will be no predictability for any creditor as to how its claim might rank, and there will be no clarity for trustees with respect to the discharge of their duties. Receivers and trustees will be required to determine, on a case by case basis, whether provincial regulatory legislation and the regulator's current policies provide a super-priority status to an environmental or other claim, or somehow change the priority scheme set out in the BIA. This will certainly introduce additional delay, cost, and uncertainty into the overall federal bankruptcy regime.

C. Consequences of Granting the Appeal

28. If this Honourable Court grants the appeal and overturns the Majority Decision:

(a) The unsatisfactory and uncertain state created by the AER's policies and exercise of discretion that existed prior to the QB Decision will be re-established;

(b) Receiverships and bankruptcy proceedings across Canada involving any similar provincial regulatory scheme will be put at risk;

(c) Receivers and trustees will be exposed to the same personal liabilities that s. 14.06 was enacted to avoid;

(d) Receivers and trustees will no longer be able to renounce properties affected by environmental damage;

(e) The AER will obtain a super-priority over all other claims, providing it with a full payout of its claim prior to any other amounts being paid from the debtor's estate; and

(f) Creditors will be placed in the untenable position of not knowing whether or not they stand to benefit from funding proceedings.

29. The risks associated with protracted proceedings due to having to anticipate and deal with regulators claiming priority over the estate of a debtor could seriously challenge the orderly and efficient process, if not the viability, of receiverships and bankruptcies in Canada.[21]

30. In addition, giving precedence to provincial regulatory legislation over the BIA would create an asymmetry in the federal bankruptcy regime. Certain provincial regulators, like the AER, would have a super-priority claim over the claims of all other stakeholders, despite the clear language and intent of the BIA with respect to environmental claims and the priority given to the claims of various creditors. It would not be surprising to see other provincial legislatures enact similar regulatory frameworks to ensure that their claims are also given a super-priority over the claims of other creditors.

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[21] See *Re Sydco Energy Inc.*, 2018 ABQB 75 at paras 23-26, 83-88, where the AER granted an application made a prospective purchaser for a BA Code with conditions, including that the prospective purchaser "must post full security for all liabilities associated with any AER licenses it acquires regardless of [the prospective purchaser's] post transaction liability management rating." (para 23). The AER stated in its decision letter that "the conditions imposed were directly related to the fact that the principals of [prospective purchaser] and [debtor company] were virtually the same and to [debtor company's] outstanding non-compliances" (para 24). The Court found that the AER had attempted to enforce the debt owed by the insolvent debtor with this condition on the prospective purchaser's BA Code (para 78).

31. Priorities would vary from province to province, depending on the language used in the provincial legislation. This would place an unreasonable burden on receivers and trustees and would create an untenable situation. This should be avoided for the sake of fairness, uniformity and predictability in receiverships and bankruptcy proceedings throughout Canada. This would result in chaos for the federal bankruptcy regime and would frustrate both the intention of the federal bankruptcy regime and how it is administered by receivers and trustees.

32. In summary, CAIRP respectfully submits that the Majority Decision should be upheld.

PART IV – SUBMISSION AS TO COSTS

33. CAIRP requests that no costs be awarded to or against CAIRP.

PART V – ORDER SOUGHT

34. CAIRP respectfully requests that the appeal be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 5th day of February, 2018.

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PART I – TABLE OF AUTHORITIES

Cases	**Para**
Husky Oil Operations Ltd. v Minister of National Revenue, 1995 Can LII 69, [1995] 3 SCR 453	18, 23
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