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-

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

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FACTUM OF THE INTERVENER
THE CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS
(Rule 42 of the Rules of the Supreme Court of Canada)

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PART I – CONCISE OVERVIEW OF ARGUMENT AND STATEMENT OF FACTS

A. Concise overview of argument

1. The Respondents seek to essentially nullify Alberta's regulatory scheme with respect to end of life liabilities of oil and gas wells in an insolvency context, despite the fact that this provincial scheme has co-existed with federal insolvency law for decades. The submissions of the parties in this case thus far have largely concentrated on whether the majority of the Court of Appeal ("**Majority**") erred in its application of the *AbitibiBowater* test,[1] its application of the constitutional doctrine of paramountcy, or its application of the *Bankruptcy and Insolvency Act* ("**BIA**").[2] In the Canadian Association of Petroleum Producers' ("**CAPP**") submission, something vitally important to the industry most affected by the Majority's decision has been given insufficient analysis: the public interest in requiring those that enjoy the benefits of production being held responsible for the burdens inherent in production, specifically, for the costs of abandonment of the wells and reclamation of the land disturbed.

2. CAPP submits that, should licensees and those who step into their shoes in the bankruptcy context be permitted to disregard their obligations under Alberta's regulatory scheme - obligations that are well understood by the oil and gas and lending industries - it will pose an unacceptable environmental and safety risk and impose a disproportionate financial burden on other competitors in the industry, landowners and the Canadian public a whole.

3. In CAPP's submission, this appeal is not about an attempt by the regulator to obtain absolute priority over creditors in the BIA process for remediation claims, as the Respondents suggest. Rather, this appeal is about properly valuing the debtor's assets available for distribution in the first place, taking into account Alberta's long-standing regulatory regime. It is well understood in the industry that the value of the debtor's assets must take into account the end of life obligations associated with the licences from which the debtor has benefitted. Merely because factoring these liabilities into account may make less assets available for distribution to creditors under the BIA scheme does not mean that the BIA scheme is defeated.

4. The Respondents ask this Court to endorse an approach that artificially inflates the value of a debtor's assets to the benefit of secured creditors and to the detriment of other producers in

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[1] *Newfoundland and Labrador v. AbitibiBowater Inc.*, [2012] 3 SCR 443, 2012 SCC 67.
[2] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

the industry, landowners, and the public as a whole. To allow an insolvency proceeding to separate the benefits of production derived from being a licensee from the abandonment and reclamation obligations that go hand in hand with such benefits is contrary to the public interest as it would shift environmental clean-up and safety costs associated with the well sites to true third parties, being the rest of the oil and gas industry that finances the Orphan Well Fund ("**Fund**"), or, if the Fund is insufficient or depleted, landowners and the public. This artificial splitting of assets and liabilities gives rise to a legal fiction disguised as federal paramountcy and provides a windfall to creditors at the expense of the solvent oil and gas industry, landowners and the public. This cannot have been Parliament's intention in enacting the BIA.

5. CAPP's approach is not new to the industry. Licensee responsibility and accountability, established before any development occurs, are the keystones of the comprehensive regulatory framework that grants the privilege of drilling a well. The licensee in accepting the license assumes the inevitable well abandonment and surface reclamation obligations that must occur at the end of a well's life. Lenders to the oil and gas industry know of the obligation to abandon and reclaim that attaches to licences and account for those costs when valuing the security taken. It follows that lenders of an insolvent company who voluntarily engaged in business with that company must continue to accept that risk and Alberta's jurisdiction to manage such risk under its valid regulatory regime when it materializes. Contrary to what the respondents assert, the system is well understood and promotes certainty. The only uncertainty is that introduced by the Respondents themselves through their attempt to upset the *status quo*.

6. The public interest is served by requiring those that enjoy the benefits of production, including creditors, be responsible for the costs of abandonment and reclamation. It is against the purpose of the regulatory regime and contrary to the public interest to allow a receiver or trustee to disclaim certain assets and gain an advantage through insolvency proceedings that a solvent licensee does not possess and an insolvent licensee was never intended to have. The licensee's obligations in relation to non-performing wells must be satisfied by the debtor's estate, in particular its interests in performing wells that are also subject to the Alberta licensing regime, to bring it into compliance with the general law. It is only as a last resort, where the debtor's estate is truly depleted, and the wells are truly orphaned, that the Fund was intended to operate.

B. Facts

7. CAPP agrees with and adopts the Statement of Facts as set out in the Appellants' factum, and provides the following additional factual background.

8. CAPP members produce about 80% of the crude oil and natural gas in Canada. CAPP, on behalf of oil and gas producers, recognizes and accepts the end of life obligations imposed by the Alberta Energy Regulator ("**AER**") to remediate, abandon and reclaim oil and gas wells that are inherent in the licence to explore for and produce oil and gas resources in Alberta.

9. Through the levies charged to licensees by the AER, producers are the primary source of funding for the Fund.[3] In the absence of an infusion of capital from the public purse, producers will be responsible for maintaining the Fund going forward. Pursuant to s. 70(1) of the *Oil and Gas Conservation Act*[4] ("**OGCA**"), one of the purposes of the Fund is "to pay for suspension costs, abandonment costs and related reclamation costs in respect of orphan wells, facilities, facility sites and well sites where the work is carried out" by the Orphan Well Association ("**OWA**"). Under s. 73(2)(a) of the OGCA, when determining the Fund levy for a fiscal year, "the Regulator shall provide for a total levy that will be sufficient to cover … the costs referred to in section 70(1) for the fiscal year, as estimated by the Regulator" (emphasis added).

10. Accordingly, by operation of statute, where the costs of the Fund increase, the levy imposed on oil and gas producers must necessarily increase as well.

11. The creation of the OWA in 2001, and the Fund that it administers was the result of collaborative efforts between the upstream oil and gas industry and the Alberta government.[5] Its origins lie in the provincial government's concern that orphan wells should not put the public purse at risk. Regulators were concerned about how to ensure this outcome without placing an undue regulatory burden on industry, such as crippling operators by requiring them to set aside a dedicated pool of capital to address inevitable end of life obligations before any revenue is

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[3] Affidavit of David Wolf sworn September 22, 2015 ("**Wolf Affidavit**") at para 9 (Volume IV, Tab 31 of the Appellant's Record).
[4] RSA 2000, c O-6.
[5] Wolf Affidavit, Exhibit B (Volume IV, page 134 of the Appellant's Record). See also J.R. Nichol, "Orphan Wells: Who Is Responsible – For How Long and At What Cost?" (Paper delivered at the CADE/CAODC Spring Drilling Conference, 10-12 April 1991) in the Respondent Grant Thornton Limited's Book of Authorities.

generated from a well. The balance that was achieved in consultation with industry was to adopt an approach, reflected in the OGCA (including the LMR program), that maintains that those who benefit from a well are responsible for its abandonment. The OGCA recognizes end of life liabilities from the outset and ensures that licensees are held responsible for them. Both industry and government recognize, however, that exceptional circumstances can arise in which there is no licensee to take on the liabilities. To address this situation, the Fund was created.

12. The Fund is the collective response of industry, government and the regulator to prevent the cost of abandonment and reclamation falling to the public. The industry agreed to take on the cost of the Fund as part of the regulatory trade-off to minimize the burden of abandonment costs on the public purse without placing an undue burden on industry. The understanding of the balance achieved was always that the AER would exhaust all avenues of enforcement against licensees and working interest participants with a view to ensuring that those who are responsible for abandonment honour their obligations. The industry expectation is that the Fund is premised on the notion that very few wells will become orphans if those who are responsible for the facilities are held to account and fulfill their responsibilities for abandonment and reclamation.

13. It follows that the Fund was never intended to be an insurance fund for the oil and gas industry, the banking industry, or anyone else. It was intended to be a last resort after all other potential sources of funds – including a debtor's estate – are exhausted.[6] It was never intended as a dumping ground for unwanted assets. Simply put, the Orphan Fund is designed to deal with orphans, not children that the parent wishes to disown.

PART II – INTERVENER'S POSITION ON THE APPELLANT'S QUESTIONS

14. CAPP's position on the questions raised by the Appellants is that the integrity of Alberta's regulatory scheme must be maintained and that it can co-exist with the BIA. There is no justification for making Alberta's regulatory scheme subservient to the federal insolvency regime. CAPP agrees with the appellants that the Majority erred in this regard.

[6] Wolf Affidavit, *supra* at para 6.

PART III – ARGUMENT

A. Abandonment and reclamation obligations are inherent in every license

15. It is fundamental in the analysis of the issues in this case to recognize that it is the obligation of the licensee, from the moment a well or facility is licensed and the first dollar is spent to develop and produce, to properly abandon and reclaim. The geophysical reality is that all wells will eventually run out of oil or gas and must one day be abandoned, no matter the wealth they may have produced. Typically, wells only require abandonment after considerable value has been extracted. In the vast majority of cases, the revenue extracted from a well during its producing life far exceeds the costs of abandonment and reclamation at the end of the well's life. In the ordinary course a producer will have many licenses for many wells and facilities and will have wells and facilities at various stages of life, from those that are new and early in their useful life to those that have low productivity and are reaching or at the end of their life. It is for that reason that Alberta's regulatory regime adopts a lifecycle approach to regulating a well, rather than a point in time approach that artificially treats liability as arising only at the end of a well's life. The result is a comprehensive approach to regulation with detailed requirements for conduct from the time a well is drilled or a facility constructed through to its suspension, abandonment and reclamation, including rules related to transfers of the licences at every stage.

16. It is also fundamental to recognize that these requirements apply whether or not there has been a default in operating the well. Alberta's regulatory regime is not a tool to enforce what is in essence a debt obligation to the Crown where the debt has arisen due to some default of the debtor. The focus of the AER's legislation is on ensuring public safety and protection of the environment and the obligation is established for all licensees at the time a licence is issued. In that regard, the end of life obligation of abandonment and reclamation is simply one element of the obligation of a licensee to conduct operations throughout the life of the well.

17. The keystones in the regulatory framework that manages the very significant risk and liability for abandonment and reclamation are licensee responsibility and accountability, established from the moment the license is accepted by the producer. The producing industry, and CAPP on behalf of its members, looks to the AER to fully enforce the abandonment and reclamation obligations of licensees in accordance with the laws enacted by the Alberta legislature. CAPP believes that it is in the public interest to do so.

18. Given the established statutory framework in which the oil and gas industry operates in Alberta, anyone lending to a licensee, particularly sophisticated major lending institutions can be taken to know of – and acting prudently to account for – the obligation to abandon and reclaim that attaches to licences from the outset. Indeed, the record confirms that to be true in this case.[7] The Majority dismisses this point on the basis that "recognition of the actual and contingent obligations of the potential borrower does not, however, mean that the creditor is prepared to subordinate its interests to those obligations".[8] With respect, the question of whether the creditor is *prepared* to honour those obligations is irrelevant. The only relevant question is whether the creditor should be *permitted* to avoid those obligations through bankruptcy proceedings. In considering this question, it is important to recognize that the economic value in an oil and gas company's reserves resides in the ability to produce and sell the oil and gas. Production cannot lawfully take place without a licence. A licence cannot be obtained unless the obligation to abandon and reclaim, along with all other safety and environmental requirements applicable throughout the life of the well, is accepted as a condition of obtaining a licence to produce.

B. The Respondents' approach fundamentally undermines the balance inherent in Alberta's regulatory regime

19. Some twenty five years ago, the ABCA rejected an attempt to achieve through insolvency what a licensee could not achieve through Alberta's licensing regime. In *Northern Badger*, the ABCA held that the assets in the debtor's estate could not be distributed to creditors while "leaving behind the duties respecting environmental safety, which are liabilities, as a charge to the public".[9] The ABCA reasoned that while compliance with the order would require the estate to spend money, and would thus constitute a form of liability, that liability was not an obligation owed to the AER but rather was an obligation owed to the public at large; an obligation to be satisfied by the receiver spending not her own money but the money in the debtor's estate to perform the required actions to bring it into compliance with the general law.

20. Much has been said in these proceedings about whether amendments to the BIA, passed some 20 years ago, altered the ABCA's decision in *Northern Badger*. It is important to note that the oil and gas industry, and the lending industry that finances it, have played by the rules of the

[7] Majority decision at para 141.
[8] *Ibid*. at para 98.
[9] *PanAmericana de Bienes y Servicios v. Northern Badger Oil & Gas Limited*, 1991 ABCA 181 ("*Northern Badger*") at paras 29, 63.

game established by *Northern Badger* since it was decided in 1991. The OWA was born out of the legal context set out in *Northern Badger*. This understanding has survived and co-existed with amendments to the BIA, and there is no evidence that Parliament intended those amendments to upset the rules that all industry players were given notice of in *Northern Badger*.

21. Nor has there been any indication by the courts that *Northern Badger* no longer represents the state of the law in Alberta. Because CAPP believes that Alberta's regulatory regime and the BIA can continue to co-exist just as they have for decades, CAPP does not believe that the question of whether *AbitibiBowater* has overruled *Northern Badger* is central to this case, but it nevertheless offers the perspective that industry does not conceive of the AER as a "creditor", either in the common sense of that term or the way it is used in the BIA. Rather, industry conceives of and accepts the AER as the regulator that permits production to take place in a safe, orderly and efficient manner and enforces the remediation, abandonment and reclamation obligations inherent in a license, all as set out in the general purposes of the OGCA.

22. After the benefits of production have been enjoyed, the Respondents ask this Court to shift liability for abandonment costs from the bankrupt licensees onto the competitors of those bankrupt licensees, and in so doing increase assets available to secured creditors. This would not only upset the balancing inherent in Alberta's regulatory regime, whereby industry agreed to take on a limited obligation to abandon wells that were truly orphaned, but it would abandon any notion of balance entirely. The Respondents' position is not sustainable in a competitive market, and could rapidly deplete the Fund. Adopting the Respondents' position would fundamentally alter the rules of the game that are well understood by all players in the industry, in the absence of any indication from the Legislature or Parliament that they intended to change those rules.

23. CAPP says this as representing parties implicated on both sides of the ledger: CAPP's members enjoy the benefits realized by the ability to access capital from lenders, but CAPP's members may also experience bankruptcy and accept the rules established for the orderly arrangement of a licensee's affairs in times of financial distress. Stakeholders in the oil and gas industry, including lenders, receivers and land owners on whose land oil and gas activities occur (and with whom good relationships are fundamental),[10] have accepted these arrangements

[10] For a consideration of the impact of the Majority's decision on landowners, see dissent at paras. 130 and 223: "The diminution in value of that party's land will be the result of the debtor's failure to fulfill

against the background of the regulatory balance, described above, that has been reached between industry and government with respect to well abandonment obligations. Contrary to the Respondents' assertions, there is no uncertainty in the way the regime has operated for decades. It is the Respondents' new interpretation of the established rules that upsets the balance.

24. With the greatest of respect, in CAPP's submission, the Majority failed to appreciate this balance and its decision proceeded on a false understanding of how the oil and gas industry operates. This is particularly evident in the following quote from the Majority's decision under the heading "Regulation of the Oil and Gas Industry":[11]

> [20] If the calculations are correct, and the true cost of remediating the non-producing wells exceeds the value of all the assets, there would be no net value in Redwater's estate … if lenders (even secured lenders) are faced with this kind of contingent risk, the amount of financing available to the oil and gas industry can only decline substantially.

25. The rules of the game have been well understood by the oil and gas industry and its lenders since at least *Northern Badger* and there is no evidence that the amount of financing available to the oil and gas industry has declined in the quarter century since *Northern Badger*. To the contrary, lending activity in the oil and gas industry has flourished. Lenders have always been faced with the contingent risk at issue in this case. Similarly, receivers have always been able and willing to accept mandates in times of bankruptcy knowing of that contingent risk. There can be no reason for lenders to curtail the financing they currently make available, or for receivers to refuse to accept the mandates they currently engage in, if the rules that have been established for decades were to be affirmed by this Court.

26. In the same vein, CAPP is concerned that licensees will game the bankruptcy system if this Court changes the rules of the game, to the benefit of creditors or unscrupulous licensees, and to the detriment of the oil gas industry as a whole. As stated by Justice Martin in dissent:

> [244] … 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.

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obligations that were statutorily imposed when the licence was issued, and the lender, who knew of the obligations when funds were advanced, will benefit."

[11] See also para 96 of the decision regarding the Majority's speculation that enforcing end of life obligations against creditors would deprive the oil and gas industry of financing.

27. In CAPP's submission, this concern is well-founded and has inevitably manifested itself in the aftermath of the Majority's decision.

28. Competitors are not in the business of paying their competitor's bills. The Fund is a last resort safety net to shield the Alberta public from the liability of abandonment and reclamation. The name 'Orphan Fund' is itself telling. It is a fund for wells and facilities that have been orphaned: not facilities that licensees or those that step into the shoes of the licensee choose to disclaim. The Fund is not a scheme for lenders to deposit disclaimed assets into when their loans to oil and gas companies go unpaid. Nor was it ever intended as such.

29. Under the Respondents' position, competitors or the public would be left to pick up the cost of abandonment and reclamation of disclaimed wells and facilities through higher and higher Fund levies. Industry support for the Fund, not to mention the social acceptance afforded to industry and the integrity of Alberta's regulatory regime and federal bankruptcy laws, would be imperilled if insolvency became a path to freely avoiding responsibility for abandonment and reclamation, all under the guise of federal paramountcy.

C. It is contrary to the public interest to allow Alberta's regulatory regime to be defeated by the BIA

30. The public interest is served by requiring those that enjoy the benefits of production and the benefits of the statutory licensing regime that enables such production to take place to be responsible for the costs of abandonment and reclamation. It is manifestly not in the public interest to allow oil and gas companies and those that step into their shoes to shirk their abandonment and reclamation obligations as licensees of oil and gas interests in Alberta.

31. To allow insolvency proceedings to separate the benefits of production derived from being a licensee from the abandonment and reclamation obligations that are attached to the licence is contrary to the public interest as it would shift environmental clean-up and safety costs from licensees to other oil and gas companies, landowners or the public. Unlike creditors, who profit from the debtor's enterprise and are aware of end of life obligations upon extending credit, other oil and gas companies are "true" third parties in that they have no financial interest in the outcome of the debtor's enterprise. Under any articulation of the public interest, it cannot be that imposing the cost of one party's bankruptcy on strangers achieves a just result.

32. The respondents in this case seek to avoid Alberta's statutory framework and decades of cooperation between industry and the regulator under the guise of a constitutional conflict. It is difficult to see how the public interest could be served by extinguishing an insolvent company's regulatory obligations, thereby granting a receiver greater rights in bankruptcy than the solvent debtor company had as a licensee. That is an undesirable result that is contrary to the basic tenets of bankruptcy law. It is the very opposite of what the ABCA held in *Northern Badger*, that the duty to comply with the general law is a duty that is owed to the public. [12] It is in the public interest to enforce that duty. Further, in CAPP's submission, such a result would create perverse incentives and permit a manipulation of the BIA for a purpose that was never intended, to the benefit of a few at the expense of a great many. The burden of a misuse of the Fund will fall on the oil and gas industry or possibly landowners and the general public and distort competition, with the result that the Alberta public as a whole will suffer.

33. In CAPP's submission, under a proper application of constitutional principles, the public interest is far better served by upholding the integrity of Alberta's regulatory regime than by rendering it subservient to a federal regime pursuant to an interpretation that needlessly frames the Alberta regulatory framework as interfering with the scheme of priorities created by the BIA, rather than allowing them to co-exist, as they have since *Northern Badger*.

PART IV – SUBMISSIONS CONCERNING COSTS

34. CAPP does not seek any costs and asks that it not be subject to any costs orders.

PART V - ORAL ARGUMENT

35. In accordance with the Order of Brown J. dated January 18, 2018, CAPP will present oral argument not exceeding five minutes at the hearing of this appeal.

[12] *Northern Badger*, at para 63.

Calgary, Alberta
February 5, 2018

ALL OF WHICH IS RESPECTFULLY SUBMITTED

CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS

Per: Sylvie Labbé, for:

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Lewis L. Manning and Toby Kruger
Lawson Lundell LLP
Counsel for the Intervener, Canadian Association of Petroleum Producers

PART VI: TABLE OF AUTHORITIES

	Case Law	Para # of Factum
1.	*Newfoundland and Labrador v. AbitibiBowater Inc.*, [2012] 3 SCR 443, 2012 SCC 67.	1, 21
2.	*PanAmericana de Bienes y Servicios v. Northern Badger Oil & Gas Limited*, 1991 ABCA 181	19, 20, 21, 25, 32, 33
	Legislation	**Para # of Factum**
3.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3.	1, 3, 4, 14, 20, 21, 32, 33
4.	*Oil and Gas Conservation Act,* RSA 2000, c O-6.	9, 11, 21