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 ATB FINANCIAL (formerly known as ALBERTA TREASURY BRANCHES)

RESPONDENTS
(Respondents)

and

ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF BRITISH COLUMBIA, ECOJUSTICE CANADA SOCIETY, CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS, GREENPEACE CANADA, ACTION SURFACE RIGHTS ASSOCIATION, CANADIAN ASSOCIATION OF INSOLVENCY AND RESTRUCTURING PROFESSIONALS, and CANADIAN BANKERS' ASSOCIATION

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INTERVENER'S FACTUM
THE ACTION SURFACE RIGHTS ASSOCIATION

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

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FACTUM OF THE INTERVENOR ACTION SURFACE RIGHTS ASSOCIATION

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PART I - OVERVIEW AND STATEMENT OF FACTS

1. When a government takes the right to use and occupy land away from its owner, that government should maintain its power to protect that land from harm until it is safely returned.

2. Action Surface Rights Association ("ASRA") agrees with the statement of facts set out in the Joint Factum of the Appellants,[1] and sets out further critical facts below.

3. Sub-surface mineral estates and surface estates in Alberta are frequently severed. Until an oil and gas operator secures rights to access the physical land and place the equipment needed to pump, store, and haul away the resource, there is no oil and gas production.

4. Alberta law requires an oil and gas operator to obtain a right to occupy the surface from the landowner, and the landowner cannot meaningfully refuse.[2] If the landowner does not consent, Alberta law authorizes the Surface Rights Board to issue a right of entry order in favour of the oil and gas operator.[3] This direct taking is a form of expropriation.[4]

5. Upon receivership, Grant Thornton Limited ("Grant Thornton") was appointed receiver of all of the assets of Redwater Energy Corp. ("Redwater"); it was appointed trustee thereafter.[5] Grant Thornton refused to take possession of the bulk of Redwater's licensed wells, facilities and pipelines, [6] In response, the AER issued abandonment orders. Grant Thornton later purported to renounce its obligations through the operation of s. 14.06 of the *Bankruptcy and Insolvency Act*.

6. Abandonment under the *Oil and Gas Conservation Act*[7] requires an operator to permanently repair and plug a well, secure it, and remove its surface equipment: nothing more.

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[1] Joint Factum of the Appellants at paras 8-36.
[2] *Dome Petroleum Ltd. v Richards*, (1985), 66 A.R. 245, 1985 CarswellAlta 270 (WL Can) at 250-252.
[3] *Surface Rights Act*, RSA 2000 c S-24, s. 15-16.
[4] *Murphy Oil Co. Ltd. v Dau*, (ABCA) 7 DLR (3d) 512 (rev'd in part on other grounds), (1970) 73 WWR 269 SCC at paras 7, 12.
[5] Affidavit of Patricia Johnston filed August 18, 2015 at para 3 (Vol IV, Tab 29, page 6 of the Joint Record of the Orphan Well Association and Alberta Energy Regulator [Appellants' Record]); *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] s. 243(1), 71.
[6] *Ibid* para 12-13 (Vol IV, Tab 29, pages 7-8 of the Appellant's Record).
[7] *Oil and Gas Conservation Act*, RSA 2000, c O-6, s. 27(3) [*OGCA*].

7. Reclamation returns land surrounding a well to its former capacity. It takes many years and several steps to complete. When necessary, reclamation includes site-specific remediation through the removal of contaminates from the land. [8] The Alberta Energy Regulator ("AER") oversees reclamation through a permissive certification system, but does not order it.[9]

8. Of Redwater's 127 wells, facilities and pipelines, the record shows only one created an environmental condition in need of remediation. A landowner discovered a well was releasing gas into the air. Grant Thornton fixed the leak, and ultimately did not renounce that well.[10] Nothing on the record shows the assets renounced by Grant Thornton had released substances or otherwise contaminated any of the real property surrounding those assets, or that the AER had issued remediation orders in respect of them.[11]

PART II - POSITION ON INTERVENTION QUESTIONS

9. ASRA intervenes on two questions in this appeal: whether the decision under appeal (the "Majority Decision")[12] interpreted s. 14.06 of the *BIA* correctly, and whether the Majority Decision applied the test set out by *Abitibibowater*[13] (the "Abitibi Test") correctly. Interpreting s. 14.06 and applying the Abitibi Test correctly turn on a solid understanding of a trustee's power. This issue influences the disposition of each question on which ASRA intervenes.

Trustees and receivers may not renounce their legal obligations unless an environmental condition or damage affects real property owned by the debtor

10. The Majority Decision erred by interpreting s. 14.06 to provide a trustee with overly broad power to renounce any real property interest of the debtor and renounce all environmental obligations associated with such property. Section 14.06 applies when an environmental condition arises or damage occurs. It does not apply to all obligations related to the environment.

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[8] Affidavit of David Wolf filed September 23, 2015 at para 10 (Vol IV, Tab 31, page 118-119, 140, 143-145 of the Appellants' Record).
[9] *Environmental Protection and Enhancement Act* [*EPEA*], RSA 2000, c E-12 s.138.
[10] Affidavit of Patricia Johnston filed August 18, 2015 at para 11 and Exhibit E (Vol IV, Tab 29, pages 7, 36 and 42 of the Appellants' Record).
[11] *EPEA* s.140, 141; Questioning of Patricia Johnston held September 29, 2015 (Vol II, Tab 4A pages 94, 103-105 of the Record of Grant Thornton Limited).
[12] *Orphan Well Association v Grant Thornton Limited*, 2017 ABCA 124 [Majority Decision] at para 63.
[13] *Newfoundland and Labrador v. AbitibiBowater Inc.*, [2012] 3 SCR 443, 2012 SCC 67 at para 26.

11. Consistent with the polluter pays principle, Parliament limited the power of a trustee to renounce its obligation to comply with certain regulatory orders to a specific circumstance: when real property owned by the debtor is affected by an environmental condition or damage. Interpreted literally and contextually, 14.06(4) requires the real property at issue to a) be owned by the debtor; b) be capable of being affected by an environmental condition or damage; and c) actually be affected by a demonstrable environmental condition or damage.

12. Abandonment orders are not orders to remedy an environmental condition or damage. They are orders that prevent such condition or damage from arising in the first place. In this case, and in the oil and gas context generally, landowners or the Crown hold the only real property capable of being affected by an environmental condition or damage. ASRA takes the position that s. 14.06 does not apply to Grant Thornton's purported renouncement.

A regulatory order may be monetary in nature, but an entire regulatory regime cannot be monetized to suit the exigencies of the bankruptcy process

13. The Majority Decision erred by failing to separate its interpretation of s. 14.06 from its application of the Abitibi Test and its application of the paramountcy doctrine.[14] Statutory interpretation is distinct from applying a test for provable claims. Sound reasoning would address whether s. 14.06 applies to the facts and orders at issue before it addresses the Abitibi Test.

14. The Majority Decision erred by collapsing an entire statutory framework into a provable claim, rather than referencing the framework applicable to an order to determine whether that order constitutes a provable claim. Arriving at a monetary value for the entire scope of a debtor's environmental obligations requires detailed consideration of what series of facts and contingent events would apply to make determining a monetary value foreseeable or even appropriate. It is a highly speculative exercise, and beyond the reach of a court that shows proper restraint.

15. This Court rendered the Abitibi Test, and understands it best. ASRA takes the position that AER's abandonment orders are not provable claims. ASRA will not expand upon this position herein, and will provide written argument below only on the application of s. 14.06.

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[14] *Majority Decision, supra* note 10 at paras 47, 58, 73.

PART III - STATEMENT OF ARGUMENT

A. Trustees have no general power to ignore regulatory orders

16. The Majority Decision erred by inferring trustees had a general power to ignore regulatory orders or a general ability to renounce legal interest in the assets of the debtor in order to avoid complying with regulatory orders:

> … the trustee can simply ignore valueless assets in the estate and turn them back to the bankrupt at the end of the insolvency process.
> . . .
>
> It is commonplace for trustees and receivers to disclaim or "abandon" assets. Whether they formally abandon the assets, or merely leave them unrealized at the end of the bankruptcy process makes little difference. A trustee must transfer unrealized assets to the bankrupt at the end of the process: s. 40. If a trustee decides that an oil and gas well has no net realizable value, either because it is depleted or because it has attached to it liabilities in excess of its value, the trustee can effectively ignore the asset.[15]

17. With respect, disclaimer of contract and divestment of interests in real property are long-known to bankruptcy law,[16] but renouncing an interest in property specifically to avoid compliance with an otherwise enforceable regulatory order is recent and novel.

18. A trustee is a creature of statute; it holds only those powers that statute provides.[17] As an officer of the court,[18] a trustee cannot strategically ignore legal obligations in order to improve the position of secured creditors unless the *BIA* explicitly grants it the power to do so.[19]

19. In addition, if a trustee had a general power to renounce interests in real property of the debtor to avoid liability for not complying with the law, s. 14.06 would be superfluous.

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[15] *Majority Decision* at paras 47, 70.
[16] *BIA* s. 20.
[17] *Toyota Canada Inc. v. Imperial Richmond Holdings Ltd.*, 1997 CanLII 14850, [1997] 10 WWR 335 at para 20.
[18] *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.*, [2006] 2 SCR 123, 2006 SCC 35 (per Deschamps J., in dissent); *Re Beetown Honey Products Inc.* 2003 CarswellOnt 3755, [2003] OJ No. 3853, [2003] OTC 866 at paras 21-23.
[19] *PanAmericana de Bienes y Servicios v. Northern Badger Oil & Gas Limited,* 1991 ABCA 181 at para 40.

No legislative provision should be interpreted to render it mere surplusage.[20] Courts should presume Parliament knows the existing law and does not speak in vain.[21]

20. A trustee cannot normally choose to ignore an order. On these facts, the only way a trustee could avoid compliance with an abandonment order is for a trustee to a) have a court deem the order to be a provable claim, thereby subjecting it to the bankruptcy process, or b) renounce its interest in real property affected by an environmental condition or damage in accordance with s. 14.06.

B. Trustees have no general and discretionary power to stay environmental orders

21. The Majority Decision includes the erroneous conclusion that the only condition governing renouncement —whether generally or under s. 14.06— is a trustee's assessment of whether an asset is valuable enough to creditors for a trustee to keep it.[22] In effect, this gives trustees a pre-emptive and discretionary ability to stay any order issued under statutory or regulatory provisions related to the environment.

22. The receivership order appointing Grant Thornton explicitly states that a general stay of proceedings does not exempt it or Redwater from compliance with statutory or regulatory provisions relating to health, safety, or the environment.[23] Grant Thornton concedes that if it cannot renounce Redwater's assets, it must hold them in compliance with environmental laws.[24]

23. The principle *expressio unius est exclusio alterius*[25] gives meaning to the deliberate choice by Parliament not to stay all orders relating to environmental obligations in a general stay of proceedings in bankruptcy. The *BIA* provides a general stay of proceedings, and allows for stays of regulatory actions only during proposals.[26] If the economic viability of an asset is the

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[20] *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 SCR 471, 2011 SCC 53 at para 38.
[21] Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ontario: LexisNexis 2014 at 211.
[22] *Majority Decision* at para 68.
[23] Receivership Order, filed May 12, 2015 at para 15 (Vol II, Tab 11, page 27 of the Appellant's Record).
[24] Grant Thornton Ltd's response to application for leave to appeal Vol I at para 48, citing *Abitibibowater*, *supra* note 11 at para 41; see also the Factum of the Respondent ATB Financial, at para 127.
[25] *Sullivan on the Construction of Statutes*, *supra* note 21 at 248-254.
[26] *BIA*, *supra* note 5 s. 69.3, s.69.6.

only factor governing trustee renouncement under s. 14.06, environmental provisions explicitly exempted from a general stay can, in effect, be stayed permanently and at will by a trustee.

24. Section 14.06 should not be read so broadly that Grant Thornton can use it, in its sole discretion, to effectively stay any order relating to health, safety, or the environment.[27] This contradicts the express terms of Grant Thornton's Receivership Order, confuses the process set out in s. 69.3 and s. 69.6 of the *BIA*, erases the public interest consideration explicitly provided for by ss. 69.6(3)(b), and violates *expressio unius*. Section 14.06 self-evidently provides for express treatment of certain environmental orders which, as set out below, are not at issue here.

C. Trustees have no power to use s. 14.06 to stay an order to abandon oil and gas wells

Section 14.06 is limited in its application

25. Contamination from oil and gas activity, when it occurs, affects the lives and long-term farming and ranching operations of landowners. Contamination affects the food landowners produce, affects the re-sale value of their land, and limits the uses landowners can make of their land. Contaminants released from a well, facility, or pipeline contaminate the land surrounding that asset. This is real property owned by a landowner or the Crown.

26. The Majority Decision did not fully consider a) what constitutes contamination in the oil and gas context (*i.e.* salt water or hydrocarbon release); b) how those contaminants could affect the property interests at issue; c) how a party would actually conduct remediation of that property; or d) how a party would realize on the security interest created by ss. 14.06(7).

27. A literal reading of the plain wording of s. 14.06(4) allows a trustee to avoid personal liability for remedying contamination if it renounces its interest in contaminated real property of the debtor. The timing of a remedial order is not as important as the actual existence of an environmental condition or damage. In context, and to maintain the internal coherence of s. 14.06, a condition or damage must exist in s. 14.06(2), and must both exist and affect real property of the debtor in ss. 14.06(4), 14.6(6). 14.06(7), and 14.06(8).[28]

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[27] *Supra*, note 22.
[28] *BIA*, s. 14.06; Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed.

Section 14.06 does not apply to all real property; it applies to affected real property

28. The real property affected by contamination in the context of oil and gas development is either the surface title owned by a landowner, or public land owned by the Crown.

29. Other parties will ably argue why the property interests at issue are either not owned by the operator, or not real property.[29] We agree. In addition, the interests of Redwater that vested in Grant Thornton, as is the case in the oil and gas context generally, cannot by their nature be "affected" by an environmental condition or damage.

30. A release of oil does not contaminate the incorporeal right to take that oil, and minerals do not contaminate themselves. Mineral leases are real property interests, but they cannot by their nature be "affected" by an environmental condition or damage.

31. A release of oil onto land does not affect the debtor's right to use or occupy that land. To the extent surface lease interests are real property held by the debtor, they cannot by their nature be "affected" by an environmental condition or damage. In the alternative, landowners' surface interests are reversionary fee simple interests. They are not property of the debtor, and s. 14.06 does not apply to them. [30]

Section 14.06 does not apply to wells or orders to abandon those wells

32. Given the risk that an environmental condition may arise or damage may occur, whether a regulator can enforce an order to prevent that condition or damage from occurring or arising in the first place is a matter of critical importance to landowners.

Scarborough, Ontario: Carswell 2000.
[29] Joint Factum of the Appellants at paras 66-69; *See also* Factum of Ecojustice Canada Society.
[30] *Ibid.*, Factum of Ecojustice Canada Society.

33. A literal reading of s. 14.06 demonstrates Parliament did not intend ss. 14.06(4) to apply to any and every order notionally related to the environment. Had Parliament intended such, it would have said so clearly and straightforwardly. [31] Instead, ss. 14.06(4) specifically applies only to an "order to remedy an environmental condition or damage affecting real property of the debtor." As Parliament indicates in the subsection's title, this is a *certain* order, not *any* order.

34. A contextual reading of, ss. 14.06(4) demonstrates s. 14.06 plainly does not apply to all environmental obligations or environmental orders as the respondents repeatedly suggest. Subsection 14.06(2) applies when environmental conditions arise or damage occurs. Subsection 14.06(4) specifically applies when a public body issues an order to remedy that environmental condition or damage.

35. Regulatory orders to prevent contamination are substantively different from orders to remedy contamination. The bare existence of a well in need of abandonment is not an environmental condition any more than a truck full of radioactive waste parked in a lawfully designated location is an environmental condition. Neither the well nor the truck constitute contamination, but leaving them unsecured could lead to contamination.

36. Abandonment is an obligation to permanently shut and secure a piece of regulated industrial equipment.[32] Sealing a well does not remedy an environmental condition or damage. It simply reduces the risk a condition or damage will arise. It follows that an abandonment order does not constitute an order to remedy an environmental condition or damage.

Section 14.06 is consistent with the polluter pays principle when correctly interpreted

37. The Majority Decision erred by interpreting s. 14.06 in a manner that would allow a trustee, at will and without constraint, to shift the costs and responsibility for preventing and remedying contamination from the polluter to a landowner or public at large. This is not consistent with the polluter pays principle, and Parliament did not intend s. 14.06 to be read as such.

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[31] *Sullivan on the Construction of Statutes*, *supra* note 21 at 208.
[32] Affidavit of David Wolf filed September 23, 2015 at para 10 (Vol IV, Tab 31, page 118-119 of the Appellants' Record).

38. As a principle of international environmental law,[33] the polluter pays principle may serve as a contextual aide to statutory interpretation.[34] Parliament expressly adopts the polluter pays principle in the preamble to the *Canadian Environmental Protection Act*.[35] This Court has recognized the principle is firmly entrenched in Canadian law,[36] and has reflected on the notion that the principle "assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution."[37]

39. The application of the polluter pays principle as an external aide to interpretation of the *BIA* results in a narrower reading than the one found in the Majority Decision. When an order is directed at preventing contamination of real property held by those other than the debtor (such as an abandonment order), a reading of s. 14.06 that requires a trustee to comply with that order is consistent with the polluter pays principle, and supports the literal and contextual reading of s. 14.06 advanced herein.

40. By ignoring a firmly entrenched principle of Canadian law, the Majority Decision misinterpreted Parliament's intent. Parliament intended to encourage early disclosure of contamination and limit trustee liability while incentivizing governments to actually perform remediation. When a trustee uses its power under s. 14.06 to renounce polluted land owned by the debtor, ss. 14.06(7) awards a superpriority on land that could be marketed if Canada or a province cleans it up. This reading is consistent with the polluter pays principle, because the improved net asset value for land that is remediated promptly and before the end of the bankruptcy process is not recaptured by the estate of the debtor.

41. A reading that allows a trustee to renounce any uneconomic asset, or real property that is not truly contaminated (such as a mineral lease) is inconsistent with the polluter pays principle.

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[33] Rio Declaration on Environment and Development, UN Doc. A/Conf. 151/5/Rev. 1 (1992) Article 16.
[34] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town),* [2001] 2 SCR 241, 2001 SCC 40 at paras 30-32; *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para 70.
[35] *Canadian Environmental Protection Act*, 1999, SC 1999, c 33, Preamble.
[36] *Imperial Oil Ltd. v Quebec (Minister of the Environment),* 2003 SCC 58 at para 23.
[37] *Ibid* at para 24.

D. The underlying equities overwhelmingly support a different approach

43. Under the Majority Decision, all obligations of a defunct oil and gas company in any way related to the environment are subject to the discretion of a receiver or trustee acting lawfully and only to serve the interest of that company's stakeholders.

44. This creates a cloud of uncertainty for every individual whose real property is burdened by oil and gas activity. Those clouds will gather the moment a company obtains the right to occupy that individual's land, darken upon every downturn in the economy, and thicken into a dense, unknowable fog at the very prospect of insolvency. A landowner will have no certainty about the safe and timely return of the use of their land until a receiver or trustee chooses to renounce whatever assets it needs to renounce in order avoid compliance with the law.

45. Law requiring abandonment is in place to protect land and the individuals who live on it. That land that does not belong to any of a debtor's stakeholders. Law requiring remediation and reclamation of land is there to serve the interest of individual landowners, and its application should not be subject to the whims of a receiver or trustee.

46. The Majority Decision yields a patently unjust result that Parliament did not intend.

PART IV - SUBMISSIONS CONCERNING COSTS

47. ASRA asks for no costs, and respectfully requests this Court award no costs against it.

PART V- ORAL ARGUMENT

48. ASRA will present oral argument at the hearing of the appeal on the terms granted.

All of which is respectfully submitted, this 1st day of February, 2018.

Christine Laing

Shaun Fluker

Counsel for Action Surface Rights Association

PART VI - TABLE OF AUTHORITIES

Case Law	**Paragraph(s)**
114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 SCR 241, 2001 SCC 40	38
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Secondary Sources	**Paragraph(s) Referenced**
Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ontario: LexisNexis 2014 (Sullivan on the Construction of Statutes)	19, 23, 33
Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3rd ed. Scarborough, Ontario: Carswell 2000	27

PART VII - STATUTORY PROVISIONS

Statute	**Paragraph(s) Referenced**
Bankruptcy and Insolvency Act, RSC 1985, c B-3 ("BIA") s. 14, 69.3, 69.6, 71, 243.	5, 17, 23, 27
Canadian Environmental Protection Act, 1999, SC 1999, c 33, Preamble.	38
Environmental Protection and Enhancement Act, RSA 2000, c E-12, s. 138, 140, 141.	7, 8
Oil and Gas Conservation Act, RSA 2000, c O-6, s. 27.3.	7
Rio Declaration on Environment and Development, UN Doc. A/Conf. 151/5/Rev. 1 (1992) Principle 16.	38
Surface Rights Act, RSA 2000 c S-24, s. 15, 16.	4