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ARTICLE

Redwater Decision

On January 31, 2019, the Supreme Court of Canada released its decision in *Orphan Well Association v. Grant Thornton Ltd*., popularly known as *Redwater*. In a 5-2 split decision, a majority of the Supreme Court allowed the appeal and held that the Alberta Energy Regulator's (AER/Regulator) assertion of its statutory enforcement powers over an insolvent licensee's assets does not create a conflict with the federal *Bankruptcy and Insolvency Act* (BIA) as to trigger the constitutional doctrine of federal paramountcy.

The majority held that Section 14.06(4) of the BIA is concerned with the personal liability of trustees-in-bankruptcy (Trustee) and does not empower a Trustee to walk away from the environmental liabilities of the bankrupt estate it is administering. They found that the AER was not asserting any claims provable in the bankruptcy by its abandonment orders and that the priority scheme in the BIA is not upended. Furthermore, the AER's refusal to approve license transfers unless and until a licensee's Liability Management Rating (LMR) obligations have been satisfied does not give the AER a monetary claim provable in the bankruptcy against the licensee. The majority concluded that Alberta's oil and gas regulatory regime can coexist with and apply alongside the BIA.

This decision is significant as it has implications for the energy industry and extends across the board to other sectors. It also engages a multitude of stakeholders including businesses, directors and officers, lenders, insolvency professionals, environmental groups, land owners, governments, regulators and the public.

Read the reasons for the decision below.

Background

Since the Alberta Court of Queen's Bench decision in *Redwater Energy Corporation (Re)*, 2016 ABQB 278 and Court of Appeal decision in *Orphan Well Association v Grant Thornton Limited, 2017 ABCA 124*, we have followed this case and provided analysis in a series of publications, including Where do we go from here? Alberta Court approves renouncement of AER-licensed assets by Trustees and Receivers to avoid monetary environmental obligations, and (Red)water under the bridge? Court of Appeal upholds right of trustee to disclaim uneconomic assets in the Redwater decision. The background and scope are laid out in these previous publications.

The Supreme Court of Canada's Decision

The issue in the appeal considered whether there is a conflict between the Alberta regulatory scheme and section 14.06 of the federal BIA. Specifically, the question was the applicability to a licensee, during bankruptcy, of two powers of the Regulator pursuant to the provincial *Oil and Gas Conservation Act*[1] (OGCA) and the *Pipeline Act*,[2] designed to ensure that licensees satisfy their end-of-life obligations: (a) the Regulator's power to order a licensee to abandon and reclaim licensed assets and associated statutory powers to enforce such orders; and (b) the Regulator's power to impose conditions upon a licensee's transfer of its licenses.

The majority allowed the appeal and agreed with the AER and the Orphan Well Association (OWA). The minority agreed with Grant Thornton Limited (GTL) and would have dismissed the appeal.

Lessons Learned

Prioritizing the Environment

This landmark decision from the Supreme Court of Canada highlights the generational shift towards environmental protection in every sphere and at every level. The new era of heightened awareness of environmental stewardship was also noted by Martin J.A. (as she then was) in her dissenting reasons at the Alberta Court of Appeal.[3] Five judges of the Supreme Court of Canada were willing to redefine "creditor" in the federal insolvency law to exclude provincial Regulators enforcing provincial environmental laws, and to clarify when environmental protection orders of regulators are "sufficiently certain" to be considered monetary claims provable in bankruptcy. The majority rejected the "intrinsically financial" standard added by the Chambers Judge. According to the majority, considering whether an environmental protection order is intrinsically financial is an erroneous interpretation of the third step of the test in *Newfoundland and Labrador v. Abitibi Bowater Inc*.[4] (*Abitibi*); it is too broad and would result in a provable claim being found even where the existence of a monetary claim in bankruptcy is merely speculative. The message appears clear. Environmental protection should be high in the priority of all business endeavors regardless of whether the undertaking directly or indirectly engages environmental laws. This will likely require changes in business practices, especially for industries that are indirectly engaged, such as the lending industry.

Preserving the Orphan Fund as a Reserve

The oil and gas industry had supported the Regulator and OWA, given that the OWA is funded by industry. The oil and gas industry believes that the majority decision restores the balance between environmental obligations and creditor interests to that which existed for many years before the *Redwater* case. The industry's position is that the OWA and the orphan fund should be a last resort and only used after all other sources of funding are exhausted, including any value in the bankrupt's estate. The result of the minority decision is that the bankrupts' liabilities disclaimed by trustees and receivers would have continued to be sent to the already overburdened orphan program, funded solely by the surviving oil and gas companies. The orphan levy increases every year as a result of the number of disclaimed liabilities sent to the OWA. Oil and gas companies unable to pay the levy face enforcement by the AER, which has the potential to put them out of business or into insolvency. This would also increase the number of liabilities sent to the OWA.

Who Wins in the Short-Term?

It appears that, in the long-term, the majority decision may achieve the environmental protection purpose and curb the influx of liabilities into OWA and to the orphan well funds. However, we also consider the effects of an immediate implementation of the decision and whether it will achieve these purposes, at least in the short term, given the current state of the market and the economy.

Caution should be exercised because, upon a closer look, the decision likely has hidden costs. There appears to be no real winners in the short-term, given the Regulator's evidence that it would be a generation or more before the OWA can address its existing inventory of orphans. Should the majority decision be implemented immediately, there may be a reverse effect with more orphans ending up at the OWA's doorstep, including valuable orphans, as opined by the minority. If not properly managed, the majority decision may be a "pyrrhic victory" for the AER and the OWA.

The dilemma was highlighted in the following statement of Côté J.:

There is much to be said in the context of this appeal about which outcome will optimally balance environmental protection and economic development. On the one hand, enforcing the AER's remediation orders would effectively wipe out the estate's remaining value and leave all of its creditors (except the AER) without any recovery. It would also likely discourage insolvency professionals from accepting mandates in cases such as this one — potentially resulting in more orphaned properties across the province. On the other hand, permitting GTL to disclaim the non-producing wells and preventing the AER from enforcing environmental obligations before the estate's value is depleted would leave open the question of who, exactly, should foot the bill for remediating the affected land.

Ultimately, her response was "[w]hatever the merits of these competing positions... decisions on these matters are made ... by legislators, not judges."

The majority also struggled with the same dilemma. Ultimately, their response was:

There is no reason why the Regulator and trustees cannot continue to work together collaboratively, as they have for many years, to ensure that end-of-life obligations are satisfied, while at same time maximizing recovery for creditors.

Cooperation and Changes Necessary for a Win-Win

The lesson is clear. While there may need for legislative and policy amendments, in the meantime all stakeholders must cooperate and work together to achieve all purposes, including environmental protection, curbing the influx of liabilities into OWA and to the orphan well funds maximum recovery for creditors, and non-displacement of insolvency professionals.

Another takeaway is that both the Regulator's and the lending industry's practices must change going forward, in order to balance the competing objectives of environmental protection and economics. The decision is a wake up call for more due diligence at all levels, including while performing borrowing base calculations and at the outset of project approval and licensing. There are various ways to achieve the required balance. It was noted in the decision that the Canadian Bankers' Association commented on the systems of up-front bonding prevalent in American jurisdictions. Lenders may also mandate borrowers to maintain a reserve for environmental obligations equal to or more than the statutory requirements. The AER also has acknowledged that since it embarked on this journey it has been clear that it must manage liability differently in order to continue protecting Albertans, the environment, and the province's many responsible operators. We anticipate the Regulator's new directives and rules in the coming months.

Potential Immediate Impacts

We now turn to the potential impacts on stakeholders of the immediate implementation of the decision. These potential impacts require serious consideration in determining next steps and the way forward by the parties in this litigation and all affected stakeholders.

1. The Lending Industry and Insolvency Professionals

   There are existing situations where a bankrupt estate is overall uneconomic with significant environmental liabilities. In those cases the lenders will likely not be willing to pay a receiver or trustee to complete the bankruptcy proceedings. If these professionals would not be paid, and as a result, the receivers and trustees walk away from their current engagements, there will be more wells heading for the orphan funds, including operating wells. The same may be the result for future insolvencies where the secured creditors simply walk away without putting the debtor licensee into receivership or bankruptcy.

   As Côté J, stated, "Insolvency professionals, knowing in advance that they can be compelled to funnel all of the estate's remaining assets toward those environmental liabilities (either because they cannot disclaim value-negative assets absent a risk of personal liability or because their disclaimer will be ineffective to prevent this), will never accept mandates in the first place. This is sensible business practice: if the estate's entire realizable value must go toward its environmental liabilities, leaving nothing behind to cover administrative costs, insolvency professionals will have nothing to gain — and much to lose — by stepping in to serve as receivers and trustees, irrespective of whether they are protected from personal liability."

   "GTL has stated that it would immediately seek a discharge if it were required to carry out the abandonment work, which would result in the remaining *Redwater* assets being surrendered to the OWA. The result in this circumstance ... would be more orphaned oil wells."

   "Debtors and creditors alike, knowing that this is the case, will have no reason to even petition for bankruptcy. The result is that none of a bankrupt estate's assets will be sold — not even an oil company's valuable wells — and the number of orphaned properties will increase." This "... effectively leaves the valuable and producing wells in limbo, creating a real risk that they, too, will become 'orphans' — assets that are unable to be sold to another company and are left entirely unrealized."

   Further, smaller and midsize lenders with exposure to assets subject to environmental liabilities will take a massive hit potentially leading to insolvencies in that industry as well.

2. The Energy Industry

   The majority decision impacts the ability of the oil and gas industry to raise money to operate. The industry is starved of capital and credit and this decision will likely worsen the situation. It is obvious that lenders will be unwilling to extend capital and credit if they cannot realize on their security. This will negatively impact existing and future investments in the energy industries.

   Smaller oil and gas companies that require financing may have significant trouble obtaining some from private lenders. Further, there will likely be an immediate effect on borrowing bases of upstream companies as lenders will have to take abandonment liabilities into account.

   In addition, should secured creditors and insolvency professionals walk away, there will likely be more wells ending up in the already over-burdened orphan well program funded by the surviving oil and gas companies through the orphan levy that increases significantly every year. Oil and gas companies unable to pay the levy face enforcement by the AER and potential insolvency with more liabilities to the OWA. It will be a catch-22 situation.

3. Principals of Bankrupts (Directors and Officers) and Parent Companies

   While the BIA protects insolvency professionals from personal liability, neither the federal nor the provincial legislation protects directors and officers. There will likely be entities with abandonment and reclamation liabilities that will go out of business but will not go through insolvency proceedings. In such cases, the directors and officers may be personally exposed for the cleanup or to the Regulator's shaming declaration, depending on the Regulator's choice of applicable legislation. There also remains a risk of corporate group liability or exposure of parent companies through loan guarantees.

4. The Regulator and the Public

   The risk of more orphans at the public's expense is real. Further, the Regulator may need to expend taxpayers' funds, including human resources, to administer insolvent estates where secured creditors walk away and no insolvency professionals are appointed to administer the insolvent estates.

Potential Opportunities

On the bright side, there may be opportunities for smaller investors to acquire abandoned operating assets from the Regulator. We will just have to wait and see how this unfolds.

We suggest that the Regulator provide a clear and easy process for interested oil and gas companies for acquiring distressed assets from the Regulator and the OWA. While the Regulator Directed Transfer (RDT) exists, the process is not cheap and also fraught with obstacles. RDT requires obtaining surface rights first, a requirement not imposed on an applicant for a new well license. The Regulator has not been willing to issue mineral surface lease (MSL) on public lands, even with proof of ownership of mineral lease for the same land, if there is an existing MSL. The applicant for RDT will not be able to obtain a Right of Entry Order from the Surface Rights Board (SRB) without a well license from the Regulator. The RDT applicant will not be able to obtain the well license required by the SRB because the Regulator requires surface rights before it can transfer the well license to the RDT applicant. This chicken and egg situation created by the Regulator leaves the RDT applicant no other option than to drill a new well to access its mineral rights. Meanwhile the well at the site remains in the queue for the OWA to abandon the orphan fund. It makes absolutely no sense, for the economy and for the environment, for interested oil and gas companies to be required to drill new wells when there are available wells that the OWA will spend industry or public money to abandon.

One way to facilitate the RDT process would be to: (a) remove or substantially reduce the application fees, given that what is being transferred was considered a liability; and (b) remove the surface rights requirement and let the applicant sort out surface rights after the well license has been transferred. This will make the OWA wells accessible for use by industry and potentially reduce the amount of the annual orphan levy payable by industry. It will potentially encourage smaller investors and stimulate activities and growth in the industry in a minor but valuable way.

BLG will continue to monitor the developments as they unfold and provide updates and strategic advice where necessary.

<u>The Reasons for the Decision</u>

The Majority Reasons

The reasons of Wagner C.J., writing for the majority, is summarized as follows:

No operational conflict between Alberta regulatory scheme and s. 14.06 of the BIA

1. The AER's Abandonment Orders and the LMR requirements are based on valid provincial laws of general application, exactly the kind of valid provincial laws upon which the BIA is built. Alberta has chosen a licensing regime which makes environmental costs an inherent part of the value of the licensed assets. It is a licensing regime that depresses the value of key industry assets to reflect environmental costs, backstopped by a levy on industry in the form of the orphan fund. Alberta intended that apparatus to continue to operate when an oil and gas company is subject to insolvency proceedings. This regime has the advantage of aligning with the polluter-pays principle, a well-recognized tenet of Canadian environmental law. This principle assigns polluters the responsibility for remedying environmental damage for which they are responsible, thereby incentivizing companies to pay attention to the environment in the course of their economic activities.
2. The BIA as a whole is intended to further two purposes, namely, the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation. The second purpose is not engaged in this case.
3. The Trustee's power to disclaim is limited: a proper interpretation of s. 14.06(4) BIA is that a trustee's disclaimer of real property when there is an order to remedy any environmental condition or damage affecting that property simply protects the trustee from personal liability, while the ongoing liability of the bankrupt estate remains unaffected. This interpretation is supported by the plain language of the section, the Hansard evidence, a previous decision of the Supreme Court of Canada and the French version of the section. The same concept is also found in both s. 14.06(1.2) and s. 14.06(2), which also specifically state that the trustee is not personally liable — it is impossible to coherently read s. 14.06(2) as referring to personal liability and yet read s. 14.06(4) as somehow referring to the liability of the bankrupt estate.
4. Given the restraint with which the doctrine of paramountcy must be applied, and given that the Regulator has not attempted to hold the trustee personally liable as a licensee for the costs of abandonment, no conflict with s. 14.06(2) or s. 14.06(4) of the BIA is caused by the mere theoretical possibility of personal liability under the OGCA or the Pipeline Act.
5. In crafting the priority scheme of the BIA, parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation. Thus, the BIA explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage. Although the nature of property ownership in the Alberta oil and gas industry meant that s. 14.06(7) was unavailable to the Regulator, the Abandonment Orders and the LMR replicate the effect of s. 14.06(7) in this case.
6. Even assuming that a trustee had successfully disclaimed in this case, no conflict would result from the fact that the Regulator requires the trustee, as a licensee, to expend estate assets on abandoning the Renounced Assets. Furthermore, no conflict would be caused by continuing to include the Renounced Assets in the calculation of the bankrupt's LMR.

   No frustration of purpose of the BIA

7. The Abandonment Orders and the LMR requirements are not claims provable in bankruptcy. Not all environmental obligations enforced by a regulator will be claims provable in bankruptcy. The test set out by the Court in *Abitibi*, must be applied to determine whether a particular regulatory obligation amounts to a claim provable in bankruptcy: (1) there must be a debt, a liability or an obligation to a creditor; (2) the debt, liability or obligation must be incurred before the debtor becomes bankrupt; and (3) it must be possible to attach a monetary value to the debt, liability or obligation.
8. The scope of *Abitibi* "Creditor" requires restriction: with respect to the first part of the test, Abitibi should not be taken as standing for the proposition that a regulator is always a creditor when it exercises its statutory enforcement powers against a debtor. A regulator exercising a power to enforce a public duty is not a creditor of the individual or corporation subject to that duty. In seeking to enforce the bankrupt's end-of-life obligations, the Regulator is acting in a bona fide regulatory capacity and does not stand to benefit financially. The Regulator acted in the public interest and for the public good in issuing the Abandonment Orders and enforcing the LMR requirements. The public is the beneficiary of those environmental obligations; the province does not stand to gain financially from them.
9. Abitibi did not overrule *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*5 (*Northern Badger*) but instead "emphasized the need to consider the substance of provincial regulation in assessing whether it creates a claim provable in bankruptcy." The amendments to the BIA dealing with environmental matters in the years following *Northern Badger* cannot be interpreted as having overturned the reasoning in that case. The reasoning in Northern Badger continues to be relevant since *Abitibi* and the amendments to insolvency legislation. Based on the analysis in *Northern Badger*, it is clear that the Regulator is not a creditor of the Redwater estate. The end-of-life obligations the Regulator seeks to enforce against Redwater are public duties.
10. The *Abitibi* "monetary value"/"sufficient certainty" test for non-monetary obligations was not met: before the third step of the Abitibi test can even be reached, a regulator must already have been shown to be a creditor. With respect to the third part of the test, a court must determine whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to a regulator. In determining whether a non-monetary regulatory obligation of a bankrupt is too remote or too speculative to be included in the bankruptcy proceeding, the court must apply the general rules that apply to future or contingent claims. It must be sufficiently certain that the contingency will come to pass. In other words, that the regulator will enforce the obligation by performing the environmental work and seeking reimbursement.
11. The Abandonment Orders and the LMR requirements fail to satisfy this part of the test. It is not established by the evidence that it is sufficiently certain that the Regulator will perform the abandonments and advance a claim for reimbursement. The Regulator submits that it will be a generation or more before the OWA can address its existing inventory of orphans. This lengthy timeline means that, should it ultimately perform the work, the OWA will not advance a claim for reimbursement. The reality is that, by the time the OWA got around to abandoning any of Redwater's wells, the estate would be finalized and GTL long since discharged. Advancement of a claim is an element of the test that is just as essential as performance of the work. This claim is too remote and speculative to be included in the bankruptcy process. Furthermore, the Regulator's refusal to approve license transfers unless and until the LMR requirements have been satisfied does not give it a monetary claim

against Redwater. The fact that regulatory requirements may cost money does not transform them into debt collection schemes. Licensing requirements predate bankruptcy and apply to all licensees regardless of solvency.

12. Redwater's only substantial assets were affected by environmental conditions or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case as they do not interfere with the aims of the BIA, rather it facilitates them. Bankruptcy is not a license to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy.

The Minority Reasons

The reasons of Côté J., writing for the minority, is summarized as follows:

Unavoidable operational conflict exist between federal and provincial law

1. The Trustee has power to disclaim liabilities for creditors: the natural meaning which appears when s. 14.06(4) BIA is simply read through is that it assumes and incorporates a pre-existing common law right to disclaim property in the context of bankruptcy and insolvency. Section 14.06(4) expresses the disclaimer right in unqualified terms and emphasizes that a trustee may not be held liable whenever that right is exercised. Parliament did not intend to condition the right to disclaim property on the actual existence of a risk of personal liability. Although the opening words of s. 14.06(4) refer to the personal liability of the trustee, when the words of the provision are read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament, their meaning becomes apparent. Avoiding personal liability is not the only effect of the appropriate exercise of this power. By properly disclaiming certain properties, the trustee is relieved of any liabilities associated with the disclaimed property and loses the ability to sell it for the benefit of the estate. The disclaimer right allows the trustee not to realize assets that would provide no value to the estate's creditors and whose realization would therefore undermine the trustee's objective of maximizing recovery. Parliament is presumed to craft sections and subsections of legislation as parts of a coherent whole. The immediate statutory context surrounding s. 14.06(4), specifically, ss. 14.06(2), (5), (6) and (7), as well as the Hansard evidence, confirms that a trustee's right to disclaim property is not limited to protecting itself from personal liability. Reliance on cooperative federalism must not result in an interpretation of s. 14.06(4) of the BIA that is inconsistent with its language, context and purpose.
2. The power to disclaim assets provided to trustees by s. 14.06(4) of the BIA was available to GTL on the facts of this case. The statutory conditions to the exercise of this power were met: the Abandonment Orders clearly relate to the remediation of an environmental condition. Additionally, the right of disclaimer is applicable in the context of the statutory regime governing the oil and gas industry. In delineating what interests may be disclaimed by a trustee under s. 14.06(4), Parliament used exceptionally broad language: the trustee is permitted to disclaim "any interest" in "any real property". GTL sought to disclaim *profits à prendre* and surface leases, which can be characterized as real property interests.
3. However, s. 14.06(4) does not relieve the estate of its liabilities or environmental obligations once a trustee exercises the disclaimer power. The disclaimed property ultimately reverts to the estate at the conclusion of the bankruptcy proceedings, as is the case with unrealized assets. Whether the estate has sufficient assets capable of satisfying those liabilities at that point in time is a separate question that is unrelated to the underlying fact of ongoing liability.

The effect of the provincial legislation or provisions frustrate the purpose of the BIA

4. The requirement by the Regulator that GTL satisfies Redwater's environmental liabilities ahead of the estate's other debts contravenes the BIA's priority scheme. The province's licensing scheme therefore should be held inoperative under the second prong of the paramountcy test, frustration of purpose. The focus of the analysis is on the effect of the provincial legislation or provision, not its purpose. In the instant case, if the environmental claims asserted by the Regulator (*i.e.*, the Abandonment Orders) are provable in bankruptcy, the Regulator will not be permitted to assert those claims outside the bankruptcy process and ahead of Redwater's secured creditors because this would frustrate the purpose of the federal priority scheme.
5. Redefining the scope of Abitibi "Creditor" is inappropriate and unnecessary: the language of the first prong of the Abitibi test admits of no ambiguity, uncertainty or doubt: the only determination that has to be made is whether the regulatory body has exercised its enforcement power against a debtor. Most environmental regulatory bodies can be creditors, and government entities cannot systematically evade the priority requirements of federal bankruptcy legislation under the guise of enforcing public duties. In this case, the first prong is satisfied. There is no doubt that the Regulator exercised its enforcement power against a debtor when it issued orders requiring Redwater to perform the environmental work on the non-producing properties. It is neither appropriate nor necessary in this case to attempt to redefine the first prong of the Abitibi test by narrowing the broad definition of "creditor" as the majority does. *Abitibi* overturned the reasoning in *Northern Badger*. The Supreme Court of Canada in *Abitibi* was well aware of *Northern Badger*, cited directly, and yet when formulating the first prong of the test, made no distinction between regulators acting in the public interest and regulators acting for their own benefit. Suggesting that a regulator is not acting as a creditor where its environmental enforcement activities are aimed at the public good and are for the benefit of the public effectively overrules the first prong of the Abitibi test. Provincial regulators, in exercising their statutory environmental powers, will, in some sense, virtually always be acting in some public interest or for the benefit of some segment of the public. It will be nearly impossible to find that regulators acting to protect environmental interests are ever creditors, outside the facts of *Abitibi* itself.
6. The *Abitibi* "sufficient certainty" test was met: the third prong of the test asks whether it is sufficiently certain that the regulator will perform the work and make a claim for reimbursement. In this case, it is sufficiently certain that either the Regulator or its delegate, the OWA, will ultimately perform the abandonment and reclamation work and assert a monetary claim for reimbursement. The majority elevates form over substance in concluding that the sufficient certainty standard is not satisfied when a regulatory body's delegate, as opposed to the regulatory body itself, performs the work. The OWA and the Regulator are inextricably intertwined, given that: (i) the OWA's board of directors is not independent from the AER, as the AER appoints the OWA's board members; (ii) the OWA must always act in accordance with the requirements, guidelines, directions and orders of the AER; and (iii) the OWA has in the past received funding from the Province, and is not exclusively funded by industry. As a result, there is no meaningful difference from abandonment activities carried out by the AER or the OWA. The majority enables regulators to evade the Abitibi test by drawing artificial distinctions between themselves and their delegates.
7. The majority's analysis disregards federal bankruptcy law, by creating a "lender-pays" regime, in which responsibility for the bankrupt's environmental liabilities is given a super-priority over all other claims. The majority's analysis of s. 14.06(7) of the BIA, as showing that parliament contemplated a super-priority for environmental claims, is misguided. Section 14.06(7) gives a regulator/government a super-priority only in the limited instance. Parliament specifically envisioned that the government could obtain a super-priority and leapfrog other creditors, but only where the government/ regulator itself has already taken action to remedy the condition or damage.
8. GTL and Alberta Treasury Bank have satisfied their burden of demonstrating a genuine inconsistency between federal and provincial law under both branches of the paramountcy test, namely operational conflict and frustration of purpose. Because Alberta's statutory regime does not recognize the disclaimers by trustees of assets encumbered by environmental liabilities as lawful by virtue of the fact that receivers and trustees are regulated as licensees who cannot disclaim assets, there is an unavoidable conflict between federal and provincial law. Alberta's legislation governing the oil and gas sector should therefore be held inoperative to the extent that it does not recognize the legal effect of GTL's disclaimers.

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1 RSA 2000, c O-6.

2 RSA 2000, c P-15.

3 *Orphan Well Association v Grant Thornton Limited*, 2017 ABCA 124, para. 107.

4 2012 SCC 67, [2012] 3 S.C.R. 443.

5 1991 ABCA 181.

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