COURT OF APPEAL OF ALBERTA

Registrar's Stamp

COURT FILE NUMBER	2101-0085 AC
TRIAL COURT FILE NUMBER	25-2332583 25-2332610 25-2335351
REGISTRY OFFICE	CALGARY
APPLICANT	ALVAREZ & MARSAL CANADA INC. in its capacity as the Court-appointed receiver and manager of MANITOK ENERGY INC.
STATUS ON APPEAL	APPELLANT
RESPONDENTS	PRENTICE CREEK CONTRACTING LTD., RIVERSIDE FUELS LTD. and ALBERTA ENERGY REGULATOR
STATUS ON APPEAL	RESPONDENTS
DOCUMENT	**FACTUM**

Appeal from the Decision of
The Honourable Mr. Justice B. E.C. Romaine
Dated the 24th day of March, 2021
Filed 10th day of June, 2021

FACTUM OF THE INTERVENORS, STETTLER COUNTY and WOODLANDS COUNTY

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1. This is the Factum of the Intervenors, Stettler County and Woodlands County (the "Municipalities"). This intervention is limited to the issue of the extent to which the Supreme Court of Canada's decision in *Orphan Well Association v. Grant Thornton Ltd.*[1] permits a regulatory authority, here the Alberta Energy Regulator ("AER"), to direct that the assets of an insolvent company's estate be used to address regulatory obligations, here abandonment and reclamation obligations ("ARO").

2. In that regard, the Municipalities submit that *Redwater* does not provide that all the assets of an insolvent company must necessarily be used to satisfy regulatory obligations; rather, a regulator's power to compel compliance during insolvency is limited by the scope of regulatory authority delegated to it, and the extent to which assets fall within the scope of that authority. With respect to the AER specifically, its authority is over oil and gas assets. As it does not have the power to exercise regulatory power beyond that, to do so in an insolvency context would represent an overreach that is neither authorized by the Legislature nor sanctioned by the Supreme Court.

I. FACTS

3. The Municipalities take no position on the facts of this appeal, as recounted by the Receiver in its factum.

II. GROUNDS OF APPEAL

4. The Municipalities oppose the Receiver's first ground of appeal,[2] but only to the extent that it posits that all estate resources, regardless of their regulated status, and regardless of the regulator's scope of authority, must be used to comply with a particular regulatory requirement. The Municipalities take no position with respect to other grounds of appeal.

5. The Municipalities do, however, respectfully submit that the ultimate issue in this case – whether the AER is entitled to the lien holdbacks at issue – should be considered based on whether these holdbacks fall within the scope of the AER's regulatory authority. Thus, the appeal should be framed as a question of the scope of the regulatory authority of the AER. If the

[1] 2019 SCC 5 [*Redwater*] [Tab 1].
[2] Appellant's Factum at para 33(a).

outcome of this appeal is that the holdbacks in dispute must be directed to ARO, then this outcome must be based on the existence of a sufficient regulatory nexus between the AER and these funds.

III. STANDARD OF REVIEW

6. The Municipalities take no position on the standard of review.

IV. ARGUMENT

a. What *Redwater* Contemplated

7. The Receiver in this Appeal states that *Redwater*'s "fundamental tenet" is that "a receivership estate must comply with valid regulatory laws, including by using estate resources to satisfy the ARO associated with unsold oil and gas assets."[3] The Municipalities agree that this is a principle articulated by *Redwater*, but disagree with the Receiver's understanding of what this principle requires. The Municipalities dispute that to "comply" with regulatory obligations means that every asset in the insolvent estate must be used to address them, regardless of the nature of the asset and regardless of what those obligations require outside of an insolvency.

8. The Municipalities understand the Receiver's position to be largely based on paragraph 160 of *Redwater*, which reads as follows:

> [160] Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non-monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the *BIA*, notwithstanding the consequences this may have for the bankrupt's secured creditors. The 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. As noted in *Moloney*, the *BIA* is clear that "[t]he ownership of certain assets and the existence of particular liabilities depend upon provincial law" (para. 40). End-of-life obligations are imposed by valid provincial laws which define the contours of the bankrupt estate available for distribution.[4]

[3] Appellant's Factum at para 3.
[4] *Redwater* at para 160 [Tab 1] [emphasis added].

9. While this passage appears on its face to lend support to the Receiver's position, there are important qualifiers and distinguishing factors addressed elsewhere in *Redwater* that narrow these statements. Most significantly, immediately prior to this passage we read:

> [159] Accordingly, the end-of-life obligations binding on GTL are not claims provable in the Redwater bankruptcy, so they do not conflict with the general priority scheme in the *BIA*. This is not a mere matter of form, but of substance. Requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the *BIA*. In crafting the priority scheme set out in 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 (see s. 14.06(7)). 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 s. 14.06(7) 's effect in this case. Furthermore, it is important to note that Redwater's only substantial assets were affected by an environmental condition 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 does not interfere with the aims of the BIA — rather, it facilitates them.[5]

10. Although in this passage, the Supreme Court affirms that the insolvent company must "pay for abandonment before distributing value to creditors", there are important caveats throughout the text that limit this initially broad statement. Taken together, the Supreme Court's statements show no intention of mandating that all assets of an insolvent oil and gas company must be directed towards satisfying outstanding ARO, regardless of their relationship to ARO.

11. The first indication is the Supreme Court's reliance on section 14.06(7) of the *BIA* as a basis for why this result "does not disrupt the priority scheme of the *BIA*." This section grants a priority for environmental remediation over and above the claims of secured creditors, but such security attaches only to real property that is either affected by an environmental condition, or contiguous with real property affected by an environmental condition and related to the activity causing it. It does not grant anything like a floating charge over all assets of the insolvent estate. Rather, as the Supreme Court notes, it provides that environmental regulators "will extract value from the bankrupt's real property if that property is affected by an environmental condition or

[5] *Redwater* at para 159 [Tab 1] [emphasis added].

damage."[6] After setting this out the Supreme Court in *Redwater* then notes that "the Abandonment Orders and the LMR replicate s. 14.06(7)'s effect in this case."[7]

12. This suggests that the Supreme Court is not envisioning the AER receiving a priority substantially greater than environmental regulators covered under section 14.06(7), but something analogous to it, covering a limited subset of AER-regulated assets (which, in *Redwater*, happened to be all of the estate's assets). This reading is also supported by the Supreme Court's descriptions of ARO not as a burden over the whole estate, but as an obligation which "form[s] a fundamental part of the value of the licensed assets"[8] and as a regulatory condition that "depress[es] the value of the licensed assets."[9] In other words, ARO is factored into the value of the AER-regulated assets, and is not simply subtracted from the total value of the insolvent estate regardless of its contents, or counted against the value of unrelated assets.

13. The Supreme Court goes on to state that "it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage"[10] and therefore "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."[11] Given this, the Supreme Court says that recognizing the AER's regulatory requirements as non-provable claims "in this case does not interfere with the aims of the *BIA.*"[12] This is a clear reservation on the part of the Supreme Court about the prospect of the AER's priority for ARO extending to other assets unrelated to ARO. In *Redwater*, the insolvent company's estate consisted of 127 oil and gas assets and their corresponding licences.[13] It did not own any noteworthy assets that were not under the regulatory purview of the AER. By pointing this out as a detail that is "important to note"[14], the Supreme Court has signalled a clear limitation on the principle it describes. This was well understood by the Chambers Judge, who distinguished the facts of *Redwater* on the basis that "[i]n this case, the AER is seeking to require Manitok to fulfill end-of-life obligations with

[6] *Redwater* at para 159 [emphasis added] [Tab 1].
[7] *Redwater* at para 159 [emphasis added] [Tab 1].
[8] *Redwater* at para 157 [emphasis added] [Tab 1].
[9] *Redwater* at para 158 [emphasis added] [Tab 1].
[10] *Redwater* at para 159 [Tab 1].
[11] *Redwater* at para 159 [Tab 1].
[12] *Redwater* at para 159 [emphasis added] [Tab 1].
[13] *Redwater* at para 2 [Tab 1].
[14] *Redwater* at para 159 [Tab 1].

assets unrelated to the environmental condition or damage represented by the abandonment orders it has issued...".[15] The Chambers Judge was correct to recognize that the status of the assets in dispute, and whether the AER's authority applies to them, affects how the principle in *Redwater* is applied.

14. In brief, the most that can be said of *Redwater* is that "in this case" acceding to the AER's priority would "replicate" section 14.06(7)'s effect, and would "in this case" not interfere with the scheme of the *BIA.* In other words, the AER's authority to require that all assets of the estate be directed to addressing ARO was contingent on the fact that all the assets of the estate were *licensed assets*, falling within the AER's regulatory authority.

15. Yet the Receiver and the AER would read *Redwater* as having a much broader effect, setting down a blanket rule requiring the proceeds of all assets of an insolvent oil and gas company to be directed to resolving outstanding ARO. On this interpretation, the AER's authority does far more than "replicate" section 14.06(7)'s effect – it exceeds it considerably, turning a first charge on environmentally impacted real property into a super-priority on every kind of asset within the insolvent estate, regardless of that asset's relationship to the environmental condition. Under this view, ARO depresses not only "the value of licensed assets" as the Supreme Court put it,[16] but the whole of the estate, regardless of its contents, and becomes a *de facto* super-priority over licensed and non-licensed assets alike.

16. But the Supreme Court in *Redwater* did not say this, and did not come close to doing so. Even if it had made such statements, there were no non-licensed assets in the Redwater estate, and so such statements would be mere *obiter dicta*. While it is open to the Receiver to argue that the principles in *Redwater* should be extended further in this case to grant an even greater priority to ARO, it is simply not the case that *Redwater* already does this in itself.

17. To be clear, the Municipalities would strongly caution against extending the *Redwater* decision to grant the AER a super-priority as envisioned by the Receiver. As acknowledged by the Supreme Court, there is risk of interference with the scheme of the *Bankruptcy and*

[15] *Manitok Energy Inc. (Re)*, 2021 ABQB 227 at para 39 [*Manitok*] [Tab 2].
[16] *Redwater* at para 158 [Tab 1].

Insolvency Act.[17] Further, *Redwater* is largely concerned with ensuring that secured creditors cannot profit from the sale of licensed oil and gas assets while ignoring the regulatory requirements for those assets; allowing other, unregulated assets to be sold and diverted to other purposes does not offend this principle, and so eliminating this as an option does little to further the policy goals animating the *Redwater* decision. Finally, any decision to expand the regulatory powers of the AER should, and must, be left to the legislature.

b. *Redwater:* An Administrative Law Case

18. *Redwater* is not just an insolvency case, but an *administrative law* case as well. *Redwater,* at its core, is about whether a regulatory authority can exercise its statutory powers in the context of an insolvency proceeding. The Supreme Court recognized this at the outset of its analysis, writing as follows:

> Alberta legislation grants the Regulator wide-ranging powers to ensure that companies that have been granted licences to operate in the Alberta oil and gas industry will safely and properly abandon oil wells, facilities and pipelines at the end of their productive lives and will reclaim their sites. GTL seeks to avoid being subject to two of those powers: the power to order Redwater to abandon the Renounced Assets and the power to refuse to allow a transfer of the licences for the Retained Assets due to unmet LMR requirements… GTL seeks to avoid their application during bankruptcy by virtue of the doctrine of federal paramountcy...[18]

19. The trustee in *Redwater* had argued that in seeking to employ its powers in enforcing against the trustee, it was attempting "to use its statutory powers to prioritize its environmental claims", thereby creating conflict with the *BIA*.[19] The Supreme Court disagreed. It held that "Licensing requirements continue to exist during bankruptcy, and there is no reason why GTL cannot comply with them."[20] It further noted that the inclusion of trustees within the scope of the definition of "licensees" subject to the AER's regulatory authority was not an oversight, but "an important part of the Alberta regulatory regime", as it "confers on [trustees] the privilege of

[17] See *Redwater* at para 159: "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 does not interfere with the aims of the *BIA* – rather, it facilitates them" [emphasis added] [Tab 1].
[18] *Redwater* at para 63 [emphasis added] [Tab 1].
[19] *Redwater* at para 114 [Tab 1].
[20] *Redwater* at para 158 [Tab 1].

operating the licensed assets of bankrupts while also ensuring that insolvency professionals are regulated during the lengthy periods of time when they manage oil and gas assets."[21]

20. In sum, the central principle of *Redwater* is that the regulatory powers of the AER can operate even in an insolvency context. The decision's focus is accordingly not on *extending* the AER's powers in an insolvency proceeding, but on *preserving* them *despite* insolvency. Consequently, in considering the question of how far the AER can go in requiring the estate to address ARO, the fundamental question is not "What degree of priority does *Redwater* give the AER?" but is rather "What do the regulatory powers of the AER allow it to do?"

21. It is true that the AER's powers delegated to it by statute have a wide scope with respect to licensed assets. As the Supreme Court has recognized, the AER can order abandonment of licensed assets, and upon failure to comply, can suspend operations, refuse to consider licence or licence transfer applications, or impose a requirement for security deposits.[22] The AER can also impose conditions on the transfer of licences, or reject a proposed transfer,[23] which is what allows it to prevent insolvency professionals from selling licensed assets without addressing ARO. But this wide scope of powers is, nevertheless, in respect of licensed assets. If a company refuses to properly abandon licensed assets, the AER's recourse under the legislation is to enforce and impose restrictions in respect of licensed assets, not in respect of other assets to which its regulatory authority does not extend. Under the legislation, the AER does not, for example, have the direct power to require that a licensee liquidate non-regulated assets it owns and preferentially use the proceeds to pay for abandonment and reclamation, nor can it block a sale of non-regulated assets by a licensee who is not planning to apply the proceeds of sale to ARO. Such powers have not been delegated to the AER by the legislature.

22. However, the position of the Receiver – that "all… assets of the Manitok estate" must necessarily be diverted to ARO "unless and until the estate's ARO shortfall is funded in full"[24] – treats the AER as if it does have these expanded powers. Under this view, insolvency triggers the expansion of the AER's statutory authority. But this view is problematic, for several reasons.

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[21] *Redwater* at para 105 [Tab 1].
[22] *Oil and Gas Conservation Act*, RSA 2000, c O-6, s 106(3) [*OGCA*] [Tab 3].
[23] *OGCA*, s 24 [Tab 3].
[24] See Appellant's Factum at para 4.

23. First, it is inconsistent with the rule of law, which provides that "the exercise of all public power must find its ultimate source in a legal rule."[25] Regulatory authorities, as delegates of the legislature, can do nothing unless the requisite authority is delegated to them. As Professor Frank Scott, who represented the plaintiff in the seminal case of *Roncarelli v. Duplessis,*[26] once noted, our public law regime "places the public official… in exactly the opposite situation from the private individual: a public officer can do nothing in his public capacity unless the law permits it. His incapacity is presumed, and authority to act is an exception." [27] There is nothing explicit or implicit in the law suggesting that in an insolvency the AER may enforce against unregulated assets that it had no jurisdiction over or recourse against prior to the insolvency. The existence of such a power should therefore be rejected.

24. Second, the Receiver's view fails to account for other regulatory bodies established under the Province's legislative scheme, and fails to explain how the AER's expanded powers can feasibly coexist with the powers of these other regulators – all of whom can similarly rely on the fundamental principle recognized in *Redwater* allowing for ongoing regulation during an insolvency. For example, municipalities are delegated the power to regulate property development; under section 645 of the *Municipal Government Act,*[28] municipalities can issue a stop order where a development is contrary to a land use bylaw or development permit, requiring the owner to cease or even demolish the development. There is a clear parallel here to the delegation of power through the *OGCA* to the AER. The recourse the *MGA* gives to the municipality in the event of non-compliance is against the asset being regulated – the land (the municipality can complete the work itself, and then add its costs to the parcel's tax roll).[29]

25. If both a municipal stop order *and* an AER abandonment order are outstanding as against an insolvent company, then under the Receiver's view, we would have two non-provable claims by regulatory authorities, each requiring that all estate assets be expended to complete outstanding work, but with no way to fully comply with both, and no mechanism to determine which should take priority. If additional regulators are also imposing compliance requirements, the problem becomes even more complicated. This is why the legislature has given each of its

[25] *Reference re Secession of Quebec,* [1998] 2 SCR 217 at para 71 [Tab 4].
[26] [1959] SCR 121.
[27] W. S. Tarnopolsky, "Frank Scott – Civil Libertarian" (1981) 27 McGill L.J. 14 at 25 [emphasis added] [Tab 5].
[28] RSA 2000, c M-26, s 645 [*MGA*] [Tab 6].
[29] See *MGA*, ss 553(h.1), 646 [Tab 6].

delegates its own carefully crafted spheres of regulatory power: so that inadvertent overlap and problems of dual compliance, while they may still occur, are the exception and not the rule. The boundaries of regulatory power established by the legislature allow the different components of the statutory scheme to function as one, and should not be casually discarded.

26. Third, there is tension between the Receiver's position and an important principle: that "creditors should not gain on bankruptcy any greater access to their debtors' assets than they possessed prior to bankruptcy."[30] While the AER is not a creditor, the principle can still extend here as it is not about creditors' entitlements, but about preventing interested parties from abusing or frustrating the insolvency process in order to improve their rights. In this case, the AER should not enjoy greater rights or regulatory powers through an insolvency process than it is permitted to exercise outside an insolvency.

27. Fourth and finally, the Receiver's view is also inconsistent with the AER's own liability management approach, which presupposes that the AER's recourse against a non-compliant company will be in respect of licensed assets only. This approach, employing the LMR formula for licensees, was summarized in *Redwater*.[31] In essence, to assess the risk that an oil and gas company's ARO will be left unaddressed, the AER weighs the company's total ARO liabilities, not against the value of the company's full asset portfolio, but against the value of its licensed assets. In other words, the regulatory scheme contemplates that only licensed assets within the regulatory purview of the AER will be available to address ARO. The mere fact that the AER's liability management scheme has proven to be grossly insufficient in limiting outstanding, unaddressed ARO does not entitle the AER to an expanded enforcement authority over assets outside its regulatory jurisdiction. The limited scope of the AER's enforcement powers remains, unless and until the legislature expands the AER's authority through legislative amendment.

[30] See *Royal Bank of Canada v. North American Life Assurance Co.*, [1996] 1 SCR 325 at para 16 [Tab 7].
[31] *Redwater* at para 18 [Tab 1].

V. RELIEF SOUGHT

28. As the Municipalities' intervention is limited to assisting the Court with respect to the interpretation of *Redwater,* the Municipalities take no position as to the outcome of this appeal. The Municipalities request only that whatever decision this Honourable Court reaches will recognize that:

a) *Redwater* does not purport to grant the AER a super-priority over all assets of the estate no matter their contents, but rather affirms that the AER's regulatory authority is preserved – not expanded – in the context of an insolvency; and

b) The issue of whether the AER is entitled to direct the lien holdbacks at issue to ARO depends on whether the AER's regulatory authority, as granted to it by statute, extends to these funds.

29. The Municipalities do not seek costs and ask that there be no order of costs against them.

Estimated time for oral argument: 20 minutes

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27th day of October, 2021.

BROWNLEE LLP

Per: _____

Gregory G. Plester
Solicitors for the Intervenors,
Stettler County and Woodlands County

LIST OF AUTHORITIES

1. *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 https://canlii.ca/t/hx95f
2. *Manitok Energy Inc. (Re)*, 2021 ABQB 227 https://canlii.ca/t/jdwrd
3. *Oil and Gas Conservation Act*, RSA 2000, c O-6 https://canlii.ca/t/55427
4. *Reference re Secession of Quebec*, [1998] 2 SCR 217 https://canlii.ca/t/1fqr3
5. W. S. Tarnopolsky, "Frank Scott – Civil Libertarian" (1981) 27 McGill L.J. 14
6. *Municipal Government Act*, RSA 2000, c M-26 https://canlii.ca/t/55428
7. *Royal Bank of Canada v. North American Life Assurance Co.*, [1996] 1 SCR 325 https://canlii.ca/t/1frcv

TAB 1

Orphan Well Association and Alberta Energy Regulator *Appellants*

v.

Grant Thornton Limited and ATB Financial (formerly known as Alberta Treasury Branches) *Respondents*

and

Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, 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 *Interveners*

Orphan Well Association et Alberta Energy Regulator *Appelants*

c.

Grant Thornton Limited et ATB Financial (auparavant connue sous le nom d'Alberta Treasury Branches) *Intimées*

et

Procureure générale de l'Ontario, procureur général de la Colombie-Britannique, procureur général de la Saskatchewan, procureur général de l'Alberta, Ecojustice Canada Society, Association canadienne des producteurs pétroliers, Greenpeace Canada, Action Surface Rights Association, Association canadienne des professionnels de l'insolvabilité et de la réorganisation et Association des banquiers canadiens *Intervenants*

INDEXED AS: ORPHAN WELL ASSOCIATION *v.* GRANT THORNTON LTD.

2019 SCC 5

File No.: 37627.

2018: February 15; 2019: January 31.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté and Brown JJ.

RÉPERTORIÉ : ORPHAN WELL ASSOCIATION *c.* GRANT THORNTON LTD.

2019 CSC 5

N° du greffe : 37627.

2018 : 15 février; 2019 : 31 janvier.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Gascon, Côté et Brown.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Division of powers — Federal paramountcy — Bankruptcy and insolvency — Environmental law — Oil and gas — Oil and gas companies in Alberta required by provincial comprehensive licensing regime to assume end-of-life responsibilities with respect to oil wells, pipelines, and facilities — Provincial regulator administering licensing regime and enforcing end-of-life obligations pursuant to statutory powers — Trustee in bankruptcy of oil and gas company not taking responsibility for company's unproductive oil and gas assets and seeking to walk away from environmental liabilities

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit constitutionnel — Partage des compétences — Prépondérance fédérale — Faillite et insolvabilité — Droit de l'environnement — Pétrole et gaz — Sociétés pétrolières et gazières de l'Alberta tenues par le régime provincial complet de délivrance de permis d'assumer des responsabilités de fin de vie à l'égard de puits de pétrole, de pipelines et d'installations — Organisme de réglementation provincial administrant le régime d'octroi de permis et assurant le respect des obligations de fin de vie en vertu des pouvoirs que lui confère la loi — Syndic de faillite d'une société pétrolière et gazière refusant d'assumer la

unavoidable environmental costs and consequences. To address them, Alberta has established a comprehensive cradle-to-grave licensing regime that is binding on companies active in the industry. A company will not be granted the licences that it needs to extract, process or transport oil and gas in Alberta unless it assumes end-of-life responsibilities for plugging and capping oil wells to prevent leaks, dismantling surface structures and restoring the surface to its previous condition. These obligations are known as "reclamation" and "abandonment" (*Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 ("*EPEA*"), s. 1(ddd), and *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6 ("*OGCA*"), s. 1(1)(a)).

[2] The question in this appeal is what happens to these obligations when a company is bankrupt and a trustee in bankruptcy is charged with distributing its assets among various creditors according to the rules in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Redwater Energy Corporation ("Redwater") is the bankrupt company at the centre of this appeal. Its principal assets are 127 oil and gas assets — wells, pipelines and facilities — and their corresponding licences. A few of Redwater's licensed wells are still producing and profitable. The majority of the wells are spent and burdened with abandonment and reclamation liabilities that exceed their value.

[3] The Alberta Energy Regulator ("Regulator") and the Orphan Well Association ("OWA") are the appellants in this Court. (For simplicity, I will refer to the Regulator when discussing the appellants' position, unless otherwise noted.) The Regulator administers Alberta's licensing regime and enforces the abandonment and reclamation obligations of licensees. The Regulator has delegated to the OWA, an independent non-profit entity, the authority to abandon and reclaim "orphans", which are oil and gas assets and their sites left behind in an improperly abandoned or unreclaimed state by defunct companies at the close of their insolvency proceedings. The Regulator says that, one way or another, the

également certains coûts et certaines conséquences inévitables pour l'environnement. Pour y faire face, l'Alberta a mis en place un régime complet de délivrance de permis du berceau à la tombe qui lie les sociétés actives dans l'industrie. Une société n'obtiendra pas les permis dont elle a besoin pour extraire, traiter ou transporter du pétrole et du gaz en Alberta, à moins qu'elle n'assume les responsabilités de fin de vie consistant à obturer et à fermer les puits de pétrole afin d'éviter les fuites, à démanteler les structures de surface ainsi qu'à remettre la surface dans son état antérieur. Ces obligations sont appelées la [TRADUCTION] « remise en état » et l'« abandon » (*Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (« *EPEA* »), al. 1(ddd) et *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6 (« *OGCA* »), al. 1(1)(a)).

[2] La question en l'espèce est de savoir ce qu'il advient de ces obligations lorsqu'une société est en faillite et qu'un syndic de faillite est chargé de répartir ses biens entre divers créanciers conformément aux règles prévues dans la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, c. B-3 (« *LFI* »). Redwater Energy Corporation (« Redwater ») est la société en faillite au cœur du présent pourvoi. Son actif est principalement composé de 127 biens pétroliers et gaziers — puits, pipelines et installations — et des permis correspondants. Quelques-uns des puits autorisés de Redwater sont encore productifs et rentables. La majorité est tarie et grevée de responsabilités relatives à l'abandon et à la remise en état qui excèdent leur valeur.

[3] L'Alberta Energy Regulator (« organisme de réglementation ») et l'Orphan Well Association (« OWA ») sont les appelants devant notre Cour (pour simplifier, je les appellerai l'organisme de réglementation au moment d'analyser la position des appelants, sauf indication contraire). L'organisme de réglementation administre le régime de délivrance de permis de l'Alberta et assure le respect, par les titulaires de permis, des obligations relatives à l'abandon et à la remise en état. L'organisme de réglementation a délégué à l'OWA, une entité indépendante sans but lucratif, le pouvoir d'abandonner et de remettre en état les « orphelins » — les biens pétroliers et gaziers ainsi que leurs sites délaissés ou non réclamés sans

binding on those active in the Alberta oil and gas industry is remediation, which arises where a harmful or potentially harmful substance has been released into the environment (*EPEA*, ss. 112 to 122). As the extent of any remediation obligations that may be associated with Redwater assets is unclear, I will not refer to remediation separately from reclamation, unless otherwise noted. As has been done throughout this litigation, I will refer to abandonment and reclamation jointly as end-of-life obligations.

[17] A licensee must abandon a well or facility when ordered to do so by the Regulator or when required by the rules or regulations. The Regulator may order abandonment when "the Regulator considers that it is necessary to do so in order to protect the public or the environment" (*OGCA*, s. 27(3)). Under the rules, a licensee is required to abandon a well or facility, *inter alia*, on the termination of the mineral lease, surface lease or right of entry, where the Regulator cancels or suspends the licence, or where the Regulator notifies the licensee that the well or facility may constitute an environmental or safety hazard (*Oil and Gas Conservation Rules*, Alta. Reg. 151/71, s. 3.012). Section 23 of the *Pipeline Act* requires licensees to abandon pipelines in similar situations. The duty to reclaim is established by s. 137 of the *EPEA*. This duty is binding on an "operator", a broader term which encompasses the holder of a licence issued by the Regulator (*EPEA*, s. 134(b)). Reclamation is governed by the procedural requirements set out in regulations (*Conservation and Reclamation Regulation*, Alta. Reg. 115/93).

[18] The Licensee Liability Rating Program, which was, at the time of Redwater's insolvency, set out in *Directive 006: Licensee Liability Rating (LLR) Program and License Transfer Process* (March 12,

la « stabilisation, l'établissement des courbes de niveau, l'entretien, le conditionnement ou la reconstruction de la surface du terrain » (*EPEA*, al. 1(ddd)). Une autre obligation qui incombe à ceux qui œuvrent dans l'industrie pétrolière et gazière de l'Alberta est celle de la décontamination, qui prend naissance lorsqu'une substance nocive ou potentiellement nocive a été rejetée dans l'environnement (*EPEA*, art. 112 à 122). Puisque l'on ne connaît pas l'étendue des obligations de décontamination, s'il en est, qui peuvent être associées aux biens de Redwater, je ne traiterai pas la décontamination séparément de la remise en état, sauf indication contraire. Comme cela a été fait tout au long du présent litige, je qualifierai conjointement l'abandon et la remise en état d'obligations de fin de vie.

[17] Le titulaire de permis doit abandonner un puits ou une installation lorsque l'organisme de réglementation le lui ordonne, ou lorsque les règles ou les règlements l'exigent. L'organisme de réglementation peut ordonner l'abandon lorsqu'il [TRADUCTION] « l'estime nécessaire pour protéger le public ou l'environnement » (*OGCA*, par. 27(3)). Selon les règles, le titulaire de permis est tenu d'abandonner un puits ou une installation, notamment, à la résiliation du bail d'exploitation minière, du bail de surface ou de l'accès aux terres, lorsque l'organisme de réglementation annule ou suspend le permis, ou lorsqu'il avise le titulaire de permis que le puits ou l'installation peut constituer un danger pour l'environnement ou la sécurité (*Oil and Gas Conservation Rules*, Alta. Reg. 151/71, art. 3.012). L'article 23 de la *Pipeline Act* oblige les titulaires de permis à abandonner des pipelines dans des situations semblables. L'obligation de remise en état est prévue par l'art. 137 de l'*EPEA*. Cette obligation s'impose à un « exploitant », terme plus large qui englobe le titulaire d'un permis délivré par l'organisme de réglementation (*EPEA*, al. 134(b)). La remise en état est régie par les exigences procédurales fixées dans le règlement (*Conservation and Reclamation Regulation*, Alta. Reg. 115/93).

[18] Le Programme d'évaluation de la responsabilité du titulaire de permis, qui était, au moment de l'insolvabilité de Redwater, établi dans la *Directive 006 : Licensee Liability Rating (LLR) Program and*

2013) ("Directive 006") is one means by which the Regulator seeks to ensure that end-of-life obligations will be satisfied by licensees rather than being offloaded onto the Alberta public. As part of this program, the Regulator assigns each company a Liability Management Rating ("LMR"), which is the ratio between the aggregate value attributed by the Regulator to a company's licensed assets and the aggregate liability attributed by the Regulator to the eventual cost of abandoning and reclaiming those assets. For the purpose of calculating the LMR, all the licences held by a given company are treated as a package, without any segregation or parcelling of assets. A licensee's LMR is calculated on a monthly basis and, where it dips below the prescribed ratio (1.0 at the time of Redwater's insolvency), the licensee is required to pay a security deposit. The security deposit is added to the licensee's "deemed assets" and must bring its LMR back up to the ratio prescribed by the Regulator. If the required security deposit is not paid, the Regulator may cancel or suspend the company's licences (*OGCA*, s. 25). As an alternative to posting security, the licensee can perform end-of-life obligations or transfer licences (with approval) in order to bring its LMR back up to the prescribed level.

License Transfer Process (12 mars 2013) (« Directive 006 ») constitue un moyen par lequel l'organisme de réglementation vise à s'assurer que les titulaires de permis rempliront les obligations de fin de vie, au lieu que celles-ci soient en fin de compte assumées par le public albertain. Dans le cadre de ce programme, l'organisme de réglementation attribue à chaque société une cote de gestion de la responsabilité (« CGR »), qui représente le rapport entre la valeur totale attribuée par l'organisme de réglementation aux biens d'une société qui sont visés par des permis et la responsabilité totale que l'organisme de réglementation attribue aux coûts éventuels de l'abandon et de la remise en état de ces biens. Pour les besoins du calcul de la CGR, tous les permis détenus par une société donnée sont traités comme un tout, sans isolement ou morcellement des biens. La CGR d'un titulaire de permis est calculée sur une base mensuelle et, lorsqu'elle tombe sous le ratio prescrit (1,0 à l'époque de l'insolvabilité de Redwater), le titulaire de permis est tenu de verser un dépôt de garantie. Le dépôt de garantie est ajouté aux [TRADUCTION] « biens réputés » du titulaire de permis, qui doit ramener sa CGR au ratio prescrit par l'organisme de réglementation. Si le dépôt de garantie requis n'est pas payé, l'organisme de réglementation peut annuler ou suspendre les permis de la société (*OGCA*, art. 25). Comme solution de rechange au versement d'une garantie, le titulaire de permis peut exécuter les obligations de fin de vie ou transférer des permis (avec approbation), afin de ramener sa CGR au niveau prescrit.

[19] Licences can be transferred only with the Regulator's approval. The Regulator uses the Licensee Liability Rating Program to ensure that end-of-life obligations will not be negatively affected by licence transfers. Upon receipt of an application to transfer one or more licences, the Regulator assesses how the transfer, if approved, would affect the LMR of both the transferor and the transferee. At the time of Redwater's insolvency, if both the transferor and the transferee would have a post-transfer LMR equal to or exceeding 1.0, the Regulator would approve the transfer, absent other concerns. Following the chambers judge's decision in this case, the Regulator implemented changes to its policies, including the requirement that transferees have an LMR of 2.0 or

[19] Les permis ne peuvent être transférés qu'avec l'approbation de l'organisme de réglementation. Ce dernier utilise le Programme d'évaluation de la responsabilité du titulaire de permis pour éviter que les transferts de permis aient un effet néfaste sur les obligations de fin de vie. À la réception d'une demande de transfert d'un ou de plusieurs permis, l'organisme de réglementation évalue la façon dont le transfert, s'il est approuvé, influerait sur la CGR du cédant et du cessionnaire. À l'époque de l'insolvabilité de Redwater, si le cédant et le cessionnaire devaient avoir, après le transfert, des CGR égales ou supérieures à 1,0, l'organisme de réglementation approuverait le transfert en l'absence d'autres préoccupations. Après la décision du juge siégeant en cabinet dans

III. Analysis

A. *The Doctrine of Paramountcy*

[63] As I have explained, Alberta legislation grants the Regulator wide-ranging powers to ensure that companies that have been granted licences to operate in the Alberta oil and gas industry will safely and properly abandon oil wells, facilities and pipelines at the end of their productive lives and will reclaim their sites. GTL seeks to avoid being subject to two of those powers: the power to order Redwater to abandon the Renounced Assets and the power to refuse to allow a transfer of the licences for the Retained Assets due to unmet LMR requirements. There is no doubt that these are valid regulatory powers granted to the Regulator by valid Alberta legislation. GTL seeks to avoid their application during bankruptcy by virtue of the doctrine of federal paramountcy, which dictates that the Alberta legislation empowering the Regulator to use the powers in dispute in this appeal will be inoperative to the extent that its use of these powers during bankruptcy conflicts with the *BIA*.

[64] The issues in this appeal arise from what has been termed the "untidy intersection" of provincial environmental legislation and federal insolvency legislation (*Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111, at para. 8). Paramountcy issues frequently arise in the insolvency context. Given the procedural nature of the *BIA*, the bankruptcy regime relies heavily on the continued operation of provincial laws. However, s. 72(1) of the *BIA* confirms that, where there is a genuine conflict between provincial laws concerning property and civil rights and federal bankruptcy legislation, the *BIA* prevails (see *Moloney*, at para. 40). In other words, bankruptcy is carved out from property and civil rights but remains conceptually part of it. Valid provincial legislation of general application continues to apply in bankruptcy until Parliament legislates pursuant to its exclusive jurisdiction in relation to bankruptcy and insolvency. At that point,

III. Analyse

A. *La doctrine de la prépondérance fédérale*

[63] Comme je l'ai expliqué, la législation albertaine accorde à l'organisme de réglementation des pouvoirs étendus pour s'assurer que les sociétés qui ont obtenu des permis d'exploitation dans l'industrie pétrolière et gazière de l'Alberta abandonneront, de façon appropriée et sécuritaire, les puits de pétrole, installations et pipelines à la fin de leur vie productive, et remettront en état leurs sites. GTL cherche à éviter d'être assujetti à deux de ces pouvoirs : celui d'ordonner à Redwater d'abandonner les biens faisant l'objet de la renonciation et celui de refuser de permettre le transfert des permis relatifs aux biens conservés à cause du non-respect des exigences relatives à la CGR. Il s'agit là sans aucun doute de pouvoirs réglementaires valables accordés à l'organisme de réglementation par une loi albertaine valide. GTL cherche à éviter leur application au cours de la faillite en invoquant la doctrine de la prépondérance fédérale, selon laquelle la loi de l'Alberta habilitant l'organisme de réglementation à utiliser les pouvoirs qui sont en litige dans le cadre du présent pourvoi est inopérante dans la mesure où son exercice de ces pouvoirs pendant la faillite entre en conflit avec la *LFI*.

[64] Les questions en litige dans le présent pourvoi découlent de ce qu'on a appelé [TRADUCTION] l'« intersection désordonnée » de la législation provinciale sur l'environnement et de la législation fédérale sur l'insolvabilité (*Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111, par. 8). Les questions de prépondérance se posent souvent dans le contexte de l'insolvabilité. Étant donné la nature procédurale de la *LFI*, le régime de faillite repose en grande partie sur l'application continue des lois provinciales. Toutefois, le par. 72(1) de la *LFI* confirme qu'en cas de conflit véritable entre les lois provinciales concernant la propriété et les droits civils et la législation fédérale sur la faillite, la *LFI* l'emporte (voir *Moloney*, par. 40). En d'autres termes, la faillite est issue de la propriété et des droits civils, mais elle en fait toujours partie conceptuellement. Les lois provinciales valides d'application générale continuent de s'appliquer dans le domaine de la faillite jusqu'à ce

be held personally liable for abandonment under the Alberta legislation creates an operational conflict with the protection from personal liability provided by s. 14.06(2) of the *BIA*.

[104] There is no possibility of trustees facing personal liability for reclamation or remediation — they are specifically protected from such liability by the *EPEA*, absent wilful misconduct or gross negligence. GTL is correct that its potential personal liability for abandonment as a "licensee" is not similarly capped at estate assets under the *OGCA* and the *Pipeline Act*. The Regulator submits that "[w]hile the definition of a licensee does not explicitly provide that the receiver's liability is limited to assets in the insolvency estate, such federal requirements are obviously read in to the provision and [are] explicitly included in other legislation administered by the [Regulator], namely the [*EPEA*]" (A.F., at para. 104 (footnote omitted)). For its part, GTL says that it is no answer that the Regulator's practice is to impose liability only up to the value of the estate because, as ATB argues, without a specific statutory provision, "[p]ractices can change without notice" (ATB's factum, at para. 106).

[105] I reject the proposition that the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act* should be rendered inoperative by the mere theoretical possibility of a conflict with s. 14.06(2). Such an outcome would be inconsistent with the principle of restraint which underlies paramountcy, as well as with the principles of cooperative federalism. The inclusion of trustees in the definition of "licensee" is an important part of the Alberta regulatory regime. It confers on them the privilege of operating the licensed assets of bankrupts while also ensuring that insolvency professionals are regulated during the lengthy periods of time when they manage oil and gas assets.

des ordonnances d'abandon. Toujours selon GTL, la simple possibilité que la législation albertaine l'oblige à effectuer l'abandon crée un conflit d'application avec l'exonération de responsabilité personnelle qu'accorde le par. 14.06(2) de la *LFI*.

[104] Les syndics ne peuvent être personnellement tenus de remplir des obligations de remise en état ou de décontamination — ils sont expressément exonérés de cette responsabilité par l'*EPEA* en l'absence d'inconduite délibérée ou de négligence grave de leur part. GTL a raison de dire que son éventuelle obligation, en tant que « titulaire de permis », de procéder à l'abandon n'est pas, de façon similaire, limitée aux éléments de l'actif en application de l'*OGCA* et de la *Pipeline Act.* L'organisme de réglementation fait valoir que, [TRADUCTION] « [b]ien que la définition de "titulaire de permis" ne prévoit pas explicitement que la responsabilité du séquestre se limite aux éléments de l'actif du failli, cette exigence fédérale figure manifestement par interprétation dans la disposition et est explicitement prévue dans une autre loi, à savoir [l'*EPEA*], qu'applique [l'organisme de réglementation] » (m.a., par. 104 (note en bas de page omise)). Pour sa part, GTL affirme que la pratique de l'organisme de réglementation de n'imposer une responsabilité que jusqu'à concurrence de la valeur de l'actif ne constitue pas une réponse valable, étant donné que, comme le prétend ATB, faute d'une disposition légale expresse, [TRADUCTION] « [l]es pratiques peuvent changer sans préavis » (mémoire d'ATB, par. 106).

[105] Je rejette la proposition selon laquelle l'ajout des syndics à la définition de « titulaire de permis » dans l'*OGCA* et la *Pipeline Act* devrait être déclaré inopérant en raison de la simple possibilité théorique de conflit avec le par. 14.06(2). Une telle issue serait incompatible avec le principe de la retenue qui sous-tend celui de la prépondérance fédérale, ainsi qu'avec le principe du fédéralisme coopératif. L'ajout des syndics à la définition de « titulaire de permis » constitue un aspect important du régime de réglementation albertain. Il leur confère le privilège d'exploiter les biens des faillis qui sont visés par des permis, tout en s'assurant que les professionnels de l'insolvabilité sont encadrés au cours des longues périodes pendant lesquelles ils gèrent les biens pétroliers et gaziers.

Northern Badger that certain ongoing environmental obligations in the oil and gas industry continue to be binding on bankrupt estates must be weighed against this bald allegation. It was also well established that the Regulator would never attempt to hold insolvency professionals personally liable for such obligations. As noted by the Canadian Association of Petroleum Producers, there is nothing to suggest that this well-established state of affairs has led insolvency professionals to refuse to accept appointments or has increased the number of orphaned sites. 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.

(3) Conclusion on Section 14.06 of the *BIA*

[114] There is no conflict between the Alberta legislation and s. 14.06 of the *BIA* that makes the definition of "licensee" in the former inapplicable insofar as it includes GTL. GTL continues to have the responsibilities and duties of a "licensee" to the extent that assets remain in the Redwater estate. Nonetheless, GTL submits that, even if it cannot walk away from the Renounced Assets by invoking s. 14.06(4), the environmental obligations associated with those assets are unsecured claims of the Regulator for the purposes of the *BIA*. GTL says that the order of priorities in the *BIA* requires it to satisfy the claims of Redwater's secured creditors before the Regulator's claims, which rank equally with the claims of other unsecured creditors. According to GTL, the Regulator's attempts to use its statutory powers to prioritize its environmental claims conflict with the *BIA*. I will now consider this alleged conflict, which turns on the *Abitibi* test.

sommaire il faut opposer le fait qu'avant le présent litige, il était établi en Alberta, depuis au moins l'arrêt *Northern Badger*, que certaines obligations environnementales continues dans l'industrie pétrolière et gazière liaient toujours l'actif du failli. Il était aussi bien établi que l'organisme de réglementation n'aurait jamais essayé de tenir les professionnels de l'insolvabilité personnellement responsables de telles obligations. Comme l'a fait remarquer l'Association canadienne des producteurs pétroliers, rien n'indique que cet état de fait bien établi a conduit les professionnels de l'insolvabilité à refuser la nomination ou augmenté le nombre de sites orphelins. Il n'y a aucune raison pour laquelle l'organisme de réglementation et les syndics ne peuvent pas poursuivre leur collaboration, comme ils le font depuis de nombreuses années, pour assurer le respect des obligations de fin de vie tout en maximisant le recouvrement au profit des créanciers.

(3) Conclusion sur l'art. 14.06 de la *LFI*

[114] Il n'y a aucun conflit entre la législation albertaine et l'art. 14.06 de la *LFI* par suite duquel la définition de « titulaire de permis » dans la première est inapplicable dans la mesure où elle vise GTL. Ce dernier conserve les responsabilités et obligations d'un « titulaire de permis » tant qu'il reste des éléments dans l'actif de Redwater. GTL plaide néanmoins que, même s'il ne peut délaisser les biens faisant l'objet de la renonciation en invoquant le par. 14.06(4), les obligations environnementales qui y sont associés sont des réclamations non garanties de l'organisme de réglementation pour l'application de la *LFI*. GTL affirme que l'ordre de priorités fixé dans la *LFI* l'oblige à acquitter les réclamations des créanciers garantis de Redwater avant celles de l'organisme de réglementation, lesquelles occupent le même rang que les réclamations des autres créanciers ordinaires. D'après GTL, les tentatives de l'organisme de réglementation d'utiliser les pouvoirs que lui accorde la loi pour faire primer ses réclamations environnementales entrent en conflit avec la *LFI*. Je vais maintenant me pencher sur ce conflit allégué, qui fait intervenir le critère d'*Abitibi*.

there is no such scheme for the LMR requirements. The Regulator's refusal to approve licence transfers unless and until the LMR requirements have been satisfied does not give it a monetary claim against Redwater. It is true that compliance with the LMR requirements results in a reduction in the value of the bankrupt estate. However, as discussed earlier, not every obligation that diminishes the value of the bankrupt estate, and therefore the amount available to secured creditors, satisfies the "sufficient certainty" step. The question is not whether an obligation is intrinsically financial.

[157] Compliance with the LMR conditions prior to the transfer of licences reflects the inherent value of the assets held by the bankrupt estate. Without licences, Redwater's *profits à prendre* are of limited value at best. All licences held by Redwater were received by it subject to the end-of-life obligations that would one day arise. These end-of-life obligations form a fundamental part of the value of the licensed assets, the same as if the associated costs had been paid up front. Having received the benefit of the Renounced Assets during the productive period of their life cycles, Redwater cannot now avoid the associated liabilities. This understanding is consistent with *Daishowa-Marubeni International Ltd. v. Canada*, 2013 SCC 29, [2013] 2 S.C.R. 336, which dealt with the statutory reforestation obligations of holders of forest tenures in Alberta. This Court unanimously held that the reforestation obligations were "a future cost embedded in the forest tenure that serves to depress the tenure's value at the time of sale" (para. 29).

[158] The fact that regulatory requirements may cost money does not transform them into debt collection schemes. As noted by Martin J.A., licensing requirements predate bankruptcy and apply to all licensees regardless of solvency. GTL does not dispute the fact that Redwater's licences can be transferred only to other licensees nor that the Regulator retains the authority in appropriate situations to

de créances en matière d'abandon, mais il n'existe aucun régime de ce genre pour les exigences liées à la CGR. Le refus de l'organisme de réglementation d'approuver les transferts de permis jusqu'à ce que ces exigences aient été satisfaites ne lui donne pas une réclamation pécuniaire contre Redwater. Certes, le respect des exigences relatives à la CGR entraîne une diminution de la valeur de l'actif du failli. Toutefois, comme nous l'avons vu plus tôt, toute obligation qui diminue la valeur de l'actif du failli, et donc la somme que peuvent recouvrer les créanciers garantis, ne franchit pas nécessairement l'étape de la « certitude suffisante ». Il ne s'agit pas de savoir si une obligation est intrinsèquement financière.

[157] Le respect des conditions liées à la CGR avant le transfert des permis reflète la valeur inhérente des biens détenus par l'actif du failli. Sans les permis, les profits à prendre appartenant à Redwater ont, au mieux, peu de valeur. Tous les permis détenus par Redwater ont été reçus par elle, sous réserve d'obligations de fin de vie qui prendraient naissance un jour. Ces obligations constituent une part fondamentale de la valeur des biens visés par des permis, comme si les frais connexes avaient été payés d'emblée. Ayant reçu le bénéfice des biens faisant l'objet de la renonciation pendant la période productive de leur cycle de vie, Redwater ne peut plus éviter les engagements connexes. Cette interprétation concorde avec l'arrêt *Daishowa-Marubeni International Ltd. c. Canada*, 2013 CSC 29, [2013] 2 R.C.S. 336, qui portait sur les obligations légales de reboisement des détenteurs de tenures forestières en Alberta. Notre Cour a conclu à l'unanimité que les obligations relatives au reboisement constituaient « un coût futur inhérent à la tenure forestière qui a pour effet d'en diminuer la valeur au moment de la vente » (par. 29).

[158] La possibilité que des exigences réglementaires coûtent de l'argent ne les transforme pas en régimes de recouvrement de créances. Comme l'a fait remarquer la juge Martin, les exigences en matière de permis précèdent la faillite et s'appliquent à tous les titulaires de permis, peu importe leur solvabilité. GTL ne conteste pas le fait que les permis de Redwater ne peuvent être transférés qu'à

reject proposed transfers due to safety or compliance concerns. There is no difference between such conditions and the condition that the Regulator will not approve transfers where they would leave the requirement to satisfy end-of-life obligations unaddressed. All these regulatory conditions depress the value of the licensed assets. None of them creates a monetary claim in the Regulator's favour. Licensing requirements continue to exist during bankruptcy, and there is no reason why GTL cannot comply with them.

(3) Conclusion on the *Abitibi* test

[159] Accordingly, the end-of-life obligations binding on GTL are not claims provable in the Redwater bankruptcy, so they do not conflict with the general priority scheme in the *BIA*. This is not a mere matter of form, but of substance. Requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the *BIA*. In crafting the priority scheme set out in 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 (see s. 14.06(7)). 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 s. 14.06(7)'s effect in this case. Furthermore, it is important to note that Redwater's only substantial assets were affected by an environmental condition 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

d'autres titulaires de permis, ni le fait que l'organisme de réglementation conserve le pouvoir, dans les situations qui s'y prêtent, de rejeter les transferts proposés en raison de préoccupations relatives à la sécurité ou à la conformité. Il n'y a aucune différence entre ces conditions et celle voulant que l'organisme de réglementation n'approuve pas les transferts qui laisseraient en suspens l'exigence de satisfaire aux obligations de fin de vie. Toutes ces conditions réglementaires font baisser la valeur des biens visés par des permis. Aucune ne donne naissance à une réclamation pécuniaire en faveur de l'organisme de réglementation. Les exigences en matière de permis subsistent pendant la faillite, et il n'y a aucune raison pour laquelle GTL ne peut s'y conformer.

(3) Conclusion sur le critère d'*Abitibi*

[159] En conséquence, les obligations de fin de vie incombant à GTL ne sont pas des réclamations prouvables dans la faillite de Redwater et n'entrent donc pas en conflit avec le régime de priorité général instauré dans la *LFI*. Ce n'est pas une simple question de forme, mais de fond. Obliger Redwater à payer l'abandon avant de répartir la valeur entre les créanciers ne perturbe pas le régime de priorité établi dans la *LFI*. Au moment d'élaborer ce régime, le Parlement voulait permettre aux organismes de réglementation d'imposer une charge prioritaire sur le bien réel du failli touché par un fait ou dommage lié à l'environnement en vue de financer la décontamination (voir le par. 14.06(7)). Ainsi, la *LFI* envisage explicitement la possibilité que des organismes de réglementation tire une valeur des biens réels du failli touchés par un fait ou dommage lié à l'environnement. Bien que l'organisme de réglementation n'ait pu se prévaloir du par. 14.06(7), compte tenu de la nature de la propriété des biens dans l'industrie pétrolière et gazière de l'Alberta, les ordonnances d'abandon et la CGR reproduisent l'effet du par. 14.06(7) en l'espèce. De plus, il importe de souligner que les seuls biens de valeur de Redwater étaient touchés par un fait ou dommage lié à l'environnement. Les ordonnances d'abandon et exigences relatives à la CGR n'avaient donc pas pour objet de forcer Redwater à s'acquitter des obligations de fin de vie avec des biens étrangers au fait

in this case does not interfere with the aims of the *BIA* — rather, it facilitates them.

[160] Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non-monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the *BIA*, notwithstanding the consequences this may have for the bankrupt's secured creditors. The 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. As noted in *Moloney*, the *BIA* is clear that "[t]he ownership of certain assets and the existence of particular liabilities depend upon provincial law" (para. 40). End-of-life obligations are imposed by valid provincial laws which define the contours of the bankrupt estate available for distribution.

[161] Finally, as noted earlier, the *BIA*'s general purpose of facilitating financial rehabilitation is not relevant for a corporation such as Redwater. Corporations with insufficient assets to satisfy their creditors will never be discharged from bankruptcy because they cannot satisfy all their creditors' claims in full (*BIA*, s. 169(4)). Thus, no conflict with this purpose is caused by the conclusion that the end-of-life obligations binding Redwater are not provable claims.

IV. Conclusion

[162] There is no conflict between Alberta's regulatory regime and the *BIA* requiring portions of the former to be rendered inoperative in the context of bankruptcy. Although GTL remains fully protected from personal liability by federal law, it cannot walk away from the environmental liabilities of the bankrupt estate by invoking s. 14.06(4). On a

ou dommage lié à l'environnement. Autrement dit, la reconnaissance que les ordonnances d'abandon et exigences relatives à la CGR ne sont pas des réclamations prouvables en l'espèce facilite l'atteinte des objets de la *LFI* au lieu de la contrecarrer.

[160] La faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite. À titre d'exemple, ils doivent respecter les obligations non pécuniaires liant l'actif du failli qui ne peuvent être réduites à des réclamations prouvables et dont les effets n'entrent pas en conflit avec la *LFI*, sans égard aux répercussions que cela peut avoir sur les créanciers garantis du failli. Les ordonnances d'abandon et exigences relatives à la CGR reposent sur des lois provinciales valides d'application générale et elles représentent exactement le genre de loi provinciale valide sur lequel se fonde la *LFI*. Tel qu'il est signalé dans *Moloney*, la *LFI* indique clairement que « [l]a propriété de certains biens et l'existence de dettes particulières relèvent du droit provincial » (par. 40). Les obligations de fin de vie sont imposées par des lois provinciales valides qui définissent les contours de l'actif du failli susceptible d'être partagé.

[161] Enfin, rappelons que l'objet général de la *LFI* de favoriser la réhabilitation financière ne concerne pas une société comme Redwater. Les sociétés n'ayant pas assez de biens pour satisfaire leurs créanciers ne seront jamais libérées de leur faillite puisqu'elles ne peuvent acquitter entièrement toutes les réclamations de leurs créanciers (*LFI*, par. 169(4)). Ainsi, la conclusion selon laquelle les obligations de fin de vie incombant à Redwater ne sont pas des réclamations prouvables n'est à l'origine d'aucun conflit avec cet objet.

IV. Conclusion

[162] Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la *LFI* en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite. Bien que GTL demeure entièrement dégagé de toute responsabilité personnelle par le droit fédéral, il ne peut se soustraire aux engagements environnementaux qui lient l'actif du

TAB 2

Court of Queen's Bench of Alberta

Citation: Manitok Energy Inc (Re), 2021 ABQB 227

Date:
Docket: B201 332583, B201 332610, B201 335351
Registry: Calgary

In the Matter of the Notice of Intention to Make a Proposal of Manitok Energy Inc.

In the Matter of the Notice of Intention to Make a Proposal of Raimount Energy Corp.

In the Matter of the Notice of Intention to Make a Proposal of Corinthian Oil Corp.

Between:

Alvarez & Marsal Canada Inc. in its capacity as the Court-appointed receiver and manager of Manitok Energy Inc.

Applicant

- and -

Prentice Creek Contracting Ltd. and Riverside Fuels Ltd.

Respondents

Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine

I. Introduction

[1] The sole issue in this application is whether end-of-life obligations associated with the abandonment and reclamation of unsold oil and gas properties must be satisfied by the Receiver from Manitok's estate in preference to satisfying what may otherwise be first-ranking builders' lien claims based on services provided by the lien claimants before the receivership date.

> In crafting the priority scheme set out in 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 (see s. 14.06(7)). 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 Order and the LMR replicate s.14.06(7)'s effect in this case. Furthermore, it is important to note that Redwater's only substantial assets were affected by an environmental condition 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 does not interfere with the aims of the *BIA* - rather, it facilitates them. (emphasis added)

[39] It is here that the distinction between the facts of Redwater and the facts in this case becomes apparent. In this case, the AER is seeking to require Manitok to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage represented by the abandonment orders it has issued, assets over which Manitok no longer has ownership or control. This change in ownership occurred prior to any action by the AER, so that the orders a) do not apply to property over which the respondents claim a lien, and b) do not apply to contiguously owned property at the time.

[40] The Supreme Court in paragraph 159 finds support for the conclusion that requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the *BIA* by referring to section 14.06(7), which allows a regulator to place a charge on the real property of the debtor that is contaminated or affected by an environmental condition, but only on that property or contiguous property.

[41] The Court notes that abandonment orders "replicate s.14.06(7)'s effect". Clearly, the decision of the Court in ***Redwater*** expands the limited scope of section 14.06(7), but it does not appear to expand it to cover trust funds relating to the proceeds of sale of property to which the debtors no longer have the status of "owner, party in control, or licensee" at the time the orders were issued.

[42] Thus, the findings in ***Redwater*** do not extend to a situation, such as in this case, where property unrelated to property that is affected by an environmental condition is sold to a new licensee before any abandonment or reclamation orders are made, and where the new licensee assumes the inherent end-of-life obligations for that property. In this case, the AER is not at risk for any current costs of reclamation of the transferred property.

[43] The lien claimants were protected by the purchase agreement terms that were approved by court order. As the funds have been held in trust in accordance with the order and the purchase and sale agreement pending resolution of the claims, they are not property of the estate, and would not become part of the estate unless the claims are denied. As the Court in ***Redwater*** comments at para 114, a trustee, or Receiver/trustee in this case, has the responsibilities and duties of a licensee "to the extent that assets remain in the ... estate".

TAB 3

Province of Alberta

OIL AND GAS CONSERVATION ACT

Revised Statutes of Alberta 2000
Chapter O-6

Current as of June 17, 2021

Office Consolidation

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

shall undertake operations with respect to that well or facility until that person applies for and obtains a licence or approval.

(2) The provisions of this Act and the regulations or rules regarding an application for a licence or approval apply to an application under subsection (1) unless the Regulator otherwise directs.

(3) On the granting of a licence or approval on an application under subsection (1), the holder of the former licence or approval for the well or facility is relieved from all obligations under this Act with respect to the well or facility except as to outstanding debts to the Regulator or to the account of the orphan fund in respect of suspension or abandonment costs.

RSA 2000 cO-6 s23;2012 cR-17.3 s97(31),(33)

Captured carbon dioxide wells, facilities and schemes

23.1 Where the Regulator receives notice under Part 9 of the *Mines and Minerals Act* that the Crown has assumed the obligations of an owner and licensee with respect to a well or facility or the obligations of an approval holder with respect to a scheme,

(a) the Regulator shall amend the licence or approval to reflect that the Crown is the holder of the licence for that well or facility or the approval holder for that scheme, and

(b) the former holder of the licence for the well or facility or approval for the scheme is relieved from all obligations under this Act with respect to the well or facility or scheme, as the case may be, except as to outstanding debts to the Regulator.

2010 c14 s3;2012 cR-17.3 s97(31)

Transfer of licence

24(1) A licence shall not be transferred without the consent in writing of the Regulator.

(2) The Regulator may consent to the transfer of a licence subject to any conditions, restrictions and stipulations that the Regulator may prescribe, or the Regulator may refuse to consent to the transfer of a licence.

(3) The transfer shall be in the form prescribed and shall have endorsed on or attached to it proof of execution satisfactory to the Regulator.

(4) The applicant shall submit the transfer to the Regulator together with the prescribed fee.

(ii) all costs and expenses of carrying out investigations and conservation measures that the Regulator considers necessary in connection with the well or facility,

(b) second, if any money remains after complying with clause (a), to payment of any outstanding debt owing to the Regulator from the licensee or approval holder, and

(c) third, if any money remains after complying with clauses (a) and (b), by forwarding the remainder to the Minister for payment out to persons who file a claim with the Minister within 6 months after the date of the sale and establish their entitlement to the money.

(6) Section 100(3) applies with respect to the recovery from a licensee, approval holder or other person of costs and expenses that are the subject of a direction under subsection (4) of this section.

RSA 2000 cO-6 s105;2006 c23 s60;2012 cR-17.3 s97(31),(32)

Actions re principals

106(1) Where a licensee, approval holder or working interest participant

(a) contravenes or fails to comply with an order of the Regulator, or

(b) has an outstanding debt to the Regulator, or to the Regulator to the account of the orphan fund, in respect of suspension, abandonment, remediation or reclamation costs,

and where the Regulator considers it in the public interest to do so, the Regulator may make a declaration setting out the nature of the contravention, failure to comply or debt and naming one or more directors, officers, agents or other persons who, in the Regulator's opinion, were directly or indirectly in control of the licensee, approval holder or working interest participant at the time of the contravention, failure to comply or failure to pay.

(2) The Regulator may not make a declaration under subsection (1) unless it first gives written notice of its intention to do so to the affected directors, officers, agents or other persons and gives them at least 10 days to show cause as to why the declaration should not be made.

(3) Where the Regulator makes a declaration under subsection (1), the Regulator may, subject to any terms and conditions it considers appropriate,

(a) suspend any operations of a licensee or approval holder under this Act or a licensee under the *Pipeline Act*,

(b) refuse to consider an application for an identification code, licence or approval from an applicant under this Act or the *Pipeline Act*,

(c) refuse to consider an application to transfer a licence or approval under this Act or a licence under the *Pipeline Act*,

(d) require the submission of deposits or other forms of security for the purposes of abandonment, remediation and reclamation in an amount determined by the Regulator prior to granting any licence, approval or transfer to an applicant, transferor or transferee under this Act, or

(e) require the submission of deposits or other forms of security for the purposes of abandonment, remediation and reclamation in an amount determined by the Regulator for any wells or facilities of any licensee or approval holder,

where the person named in the declaration is the licensee, approval holder, applicant, transferor or transferee referred to in clauses (a) to (e) or is a director, officer, agent or other person who, in the Regulator's opinion, is directly or indirectly in control of the licensee, approval holder, applicant, transferor or transferee referred to in clauses (a) to (e).

(4) This section applies in respect of a contravention, failure to comply or debt whether the contravention, failure to comply or debt arose before or after the coming into force of this section.

RSA 2000 cO-6 s106;2012 cR-17.3 s97(31),(32);2020 c4 s1(19)

Appointment of receiver, receiver-manager, trustee, liquidator

106.1 The Regulator may, subject to the regulations, apply to the Court of Queen's Bench for the appointment of a receiver, receiver-manager, trustee or liquidator of the property of a licensee.

2020 c4 s1(20)

Offences and Penalties

Waste prohibited

107(1) Waste is prohibited and any person who commits waste is guilty of an offence.

(2) No prosecution may be instituted under subsection (1) without the consent in writing of the Regulator.

TAB 4

1998 CarswellNat 1299
Supreme Court of Canada

Reference re Secession of Quebec

1998 CarswellNat 1299, 1998 CarswellNat 1300, [1998] 2 S.C.R. 217, [1998] S.C.J. No. 61,
161 D.L.R. (4th) 385, 228 N.R. 203, 55 C.R.R. (2d) 1, 81 A.C.W.S. (3d) 798, J.E. 98-1716

In the matter of section 53 of the Supreme Court Act, R.S.C., 1985, c. S-26

In the matter of a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, as set out in Order in Council P.C. 1996-1497, dated the 30th day of September, 1996

Lamer C.J.C., L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache, Binnie JJ.

Heard: February 16, 17, 18 and 19, 1998
Judgment: August 20, 1998 *
Docket: 25506

Counsel: *L. Yves Fortier, Q.C.*, *Pierre Bienvenu*, *Warren J. Newman*, *Jean-Marc Aubry, Q.C.*, and *Mary Dawson, Q.C.*, for the Attorney General of Canada.
André Joli-Coeur, *Michel Paradis*, *Louis Masson*, *André Binette*, *Clément Samson*, *Martin Bédard* and *Martin St-Amant*, for the *amicus curiae*.
Donna J. Miller, Q.C., and *Deborah L. Carlson*, for the intervener the Attorney General of Manitoba.
Graeme G. Mitchell and *John D. Whyte, Q.C.*, for the intervener the Attorney General for Saskatchewan.
Bernard W. Funston, for the intervener the Minister of Justice of the Northwest Territories.
Stuart J. Whitley, Q.C., and *Howard L. Kushner*, for the intervener the Minister of Justice for the Government of the Yukon Territory.
Agnès Laporte and *Richard Gaudreau*, for the intervener Kitigan Zibi Anishinabeg.
Claude-Armand Sheppard, *Paul Joffe* and *Andrew Orkin*, for the intervener the Grand Council of the Crees (Eeyou Estchee).
Peter W. Hutchins and *Carol Hilling*, for the intervener the Makivik Corporation.
Michael Sherry, for the intervener the Chiefs of Ontario.
Raj Anand and *M. Kate Stephenson*, for the intervener the Minority Advocacy and Rights Council.
Mary Eberts and *Anne Bayefsky*, for the intervener the *Ad Hoc* Committee of Canadian Women on the Constitution.
Guy Bertrand and *Patrick Monahan*, for the intervener Guy Bertrand.
Stephen A. Scott, for the interveners Roopnarine Singh, Keith Owen Henderson, Claude Leclerc, Kenneth O'Donnell and Van Hoven Petteway.
Vincent Pouliot on his own behalf.

Headnote
Constitutional law --- Distribution of legislative powers — Nature of general provincial powers — Rights outside province
Unilateral secession of Quebec and principled negotiations — Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, s. 101 — Supreme Court Act, R.S.C. 1985, c. S-26, s. 53, 53(1)(a), 53(1)(d), 53(2).
Droit constitutionnel --- Distribution des pouvoirs législatifs — Nature des pouvoirs généraux des provinces — Droits à l'extérieur de la province
Sécession unilatérale du Québec et négociations fondées sur des principes — Loi constitutionnelle de 1867 (R.-U.), 30 & 31 Vict., c. 3, art. 101 — Loi sur la Cour suprême, L.R.C. 1985, ch. S-26, art. 53, 53(1)a), 53(1)d), 53(2).
Constitutional law --- General principles of interpretation of constitutional statutes

and territories and at the federal level. No one majority is more or less" legitimate"than the others as an expression of democratic opinion, although, of course, the consequences will vary with the subject matter. A federal system of government enables different provinces to pursue policies responsive to the particular concerns and interests of people in that province. At the same time, Canada as a whole is also a democratic community in which citizens construct and achieve goals on a national scale through a federal government acting within the limits of its jurisdiction. The function of federalism is to enable citizens to participate concurrently in different collectivities and to pursue goals at both a provincial and a federal level.

67 The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign will"is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will"or majority rule alone, to the exclusion of other constitutional values.

68 Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas" (*Saumur v. Quebec (City), supra*, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.

69 The *Constitution Act, 1982* gives expression to this principle, by conferring a right to initiate constitutional change on each participant in Confederation. In our view, the existence of this right imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces. This duty is inherent in the democratic principle which is a fundamental predicate of our system of governance.

(d) Constitutionalism and the Rule of Law

70 The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in *Roncarelli v. Duplessis*, [1959] S.C.R. 121 (S.C.C.), at p. 142, is "a fundamental postulate of our constitutional structure." As we noted in the *Patriation Reference, supra*, at pp. 805-6, "[t]he 'rule of law' is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority". At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.

71 In the *Manitoba Language Rights Reference, supra*, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order". It was this second aspect of the rule of law that was primarily at issue in the *Manitoba Language Rights Reference* itself. A third aspect of the rule of law is, as recently confirmed in the *Provincial Judges Reference, supra*, at para. 10, that" the exercise of all public power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.

TAB 5

Frank Scott — Civil Libertarian*

W. S. Tarnopolsky**

Introduction

It is difficult to discuss the attainments of Frank Scott in a short lecture, even with respect to civil liberties alone, because he has been so much a Renaissance man — constitutional lawyer, law teacher, man of letters, political activist and, above all, in a combination of all of the previously mentioned manifestations, a civil libertarian. I want to concentrate on Frank Scott as advocate of civil liberties and architect of modern Canadian thought on human rights and fundamental freedoms.

In speaking of Frank Scott's career, I want to speak of irony, because it is ironic that rebellion should be acknowledged. Despite impeccable family background and education, Frank Scott has been a "rebel without pause" and just as Bertrand Russell was perhaps best described as "the passionate sceptic", so Frank Scott could perhaps be best characterized as "the compassionate rebel". For over half a century, he has consistently presented a minority view, as well as a view of minorities, not only with incomparable perspicacity, wit and literary style, but with courage, insight and compassion as well.

I hope to illustrate my characterizations of him by reference to the following specific propositions, determining our appreciation of human rights and fundamental freedoms in Canada, for which he can claim credit:

A. The topic of human rights and fundamental freedoms is not only a legitimate, but an indispensable component of Canadian constitutional law.

B. Within our federal state, there is an important role for the central government in the field of human rights and fundamental freedoms, despite provincial jurisdiction over "Property and Civil Rights" under s. 92.13 of the *British North America Act,* 1867.[1]

C. The Rule of Law is as important a part of our "Constitution similar in Principle to that of the United Kingdom"[1a] as is Parliamentary supremacy.

D. Although traditionally, in Anglo-Canadian constitutional practice, our human rights and fundamental freedoms were realized by restraining governments from interference with matters not within their jurisdiction, we have recognized that some of our human rights can only be realized through the assumption of government responsibility.

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* Paper delivered at the Conference on the Achievements of F.R. Scott at Simon Fraser University, Vancouver, British Columbia, 21 February 1981.

**Professor, Faculty of Law (Common Law Section), University of Ottawa.

[1] 30 & 31 Vict., c. 3 (U.K.) (as am.) (R.S.C. 1970, App. II No. 5).

[1a] Preamble to the *British North America Act*, 1867.

the Rule of Law — *Roncarelli* v. *Duplessis,*[50] *Chaput* v. *Romain*[51] and *Lamb* v. *Benoit.*[52] In a lecture to the Ontario Branch of the Canadian Bar Association in February 1960, Scott summarized these three cases in the following terms:

> You remember the proud boast of Dicey when he said: 'With us every official, from a Prime Minister down to a constable or a collector of taxes [below which, apparently, his imagination could not sink], is under the same responsibility for every act done without legal justification as any other citizen.' The *Roncarelli* case involved the liability of a Prime Minister, and the *Chaput* and *Lamb* cases involved the liability of constables, and all the officials sued were held liable for acts done without legal justification. Only the tax collector was missing to make Dicey's picture complete. So the great principle of the supremacy of the law was re-affirmed, and in situations, be it noted, involving liability under the Civil Code of Quebec.[53]

Almost a decade later, during the dinner address at the official opening of the University of Windsor law building, Frank Scott defined the essence of the Rule of Law in terms of "two basic rules underlying our constitutional structure, which entitle us to say that we live in a free society":

> The first is that the individual may do anything he pleases, in any circumstances anywhere, unless there is some provision of law prohibiting him. Freedom is thus presumed, and is the general rule. All restrictions are exceptions. The second rule defines the authority of the state, and places the public official (including the policemen) in exactly the opposite situation from the private individual: a public officer can do nothing in his public capacity unless the law permits it. His incapacity is presumed, and authority to act is an exception. Duplessis, for instance, could not find any legal authority to justify his order to cancel Roncarelli's liquor licence: so he paid personally.[54]

D. *Although the traditional civil liberties were realized by restraining governments from interference with matters not within their jurisdiction, some of the new human rights can be realized only through the assumption of government responsibility*

At the same time that Scott explained how the fundamental protections of our traditional civil liberties resulted from the application of the Rule of Law, *i.e.,* that the private individual is free to do anything which is not forbidden, while the government official may not do anything to restrict that freedom unless specific authority can be found in law, he also recognized that this approach did not apply to the realization of all forms of human rights. During the 1930s, Frank Scott spoke out frequently on the need for economic reform in Canada. I would like to quote briefly from one of his

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[50] *Supra,* note 45.

[51] [1955] S.C.R. 834.

[52] [1959] S.C.R. 321.

[53] F.R. Scott, "Expanding Concepts of Human Rights", *Essays,* 353, 354; 1960 3 Can. Bar J. 199.

[54] Unpublished paper.

TAB 6

Province of Alberta

MUNICIPAL GOVERNMENT ACT

Revised Statutes of Alberta 2000
Chapter M-26

Current as of June 17, 2021

Office Consolidation

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
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(4) Any person who provides labour, services, equipment or materials under this section who did not cause the emergency is entitled to reasonable remuneration from the municipality.

(5) The expenses and costs of the actions or measures, including the remuneration referred to in subsection (4), are an amount owing to the municipality by the person who caused the emergency.

1994 cM-26.1 s551

Recovery of amounts owing by civil action

552 Except as provided in this or any other enactment, an amount owing to a municipality may be collected by civil action for debt in a court of competent jurisdiction.

1994 cM-26.1 s552

Adding amounts owing to tax roll

553(1) A council may add the following amounts to the tax roll of a parcel of land:

(a) unpaid costs referred to in section 35(4) or 39(2) relating to service connections of a municipal public utility that are owing by the owner of the parcel;

(b) unpaid charges referred to in section 42 for a municipal utility service provided to the parcel by a municipal public utility that are owing by the owner of the parcel;

(c) unpaid expenses and costs referred to in section 549(3), if the parcel's owner contravened the enactment or bylaw and the contravention occurred on all or a part of the parcel;

(d), (e) repealed 1999 c11 s35;

(f) costs associated with tax recovery proceedings related to the parcel;

(g) if the municipality has passed a bylaw making the owner of a parcel liable for expenses and costs related to the municipality extinguishing fires on the parcel, unpaid costs and expenses for extinguishing fires on the parcel;

(g.1) if the municipality has passed a bylaw requiring the owner or occupant of a parcel to keep the sidewalks adjacent to the parcel clear of snow and ice, unpaid expenses and costs incurred by the municipality for removing the snow and ice in respect of the parcel;

(h) unpaid costs awarded by a composite assessment review board under section 468.1 or the Land and Property Rights Tribunal under section 501, if the composite assessment

review board or the Land and Property Rights Tribunal has awarded costs against the owner of the parcel in favour of the municipality and the matter before the composite assessment review board or the Land and Property Rights Tribunal was related to the parcel;

(h.1) the expenses and costs of carrying out an order under section 646;

(i) any other amount that may be added to the tax roll under an enactment.

(2) Subject to section 659, when an amount is added to the tax roll of a parcel of land under subsection (1), the amount

(a) is deemed for all purposes to be a tax imposed under Division 2 of Part 10 from the date it was added to the tax roll, and

(b) forms a special lien against the parcel of land in favour of the municipality from the date it was added to the tax roll.

RSA 2000 cM-26 s553;2009 c29 s50;2020 cL-2.3 s24(27)

Adding amounts owing to property tax roll

553.1(1) If a person described in any of the following clauses owes money to a municipality in any of the circumstances described in the following clauses, the municipality may add the amount owing to the tax roll of any property for which the person is the assessed person:

(a) a person who was a licensee under a licence of occupation granted by the municipality and who, under the licence, owes the municipality for the costs incurred by the municipality in restoring the land used under the licence;

(b) an agreement holder referred to in section 27.4(1) who owes money to the municipality under section 27.4(1);

(c) a person who owes money to the municipality under section 550(3) or 551(5).

(2) Subject to section 659, when an amount is added to the tax roll of property under subsection (1), the amount

(a) is deemed for all purposes to be a tax imposed under Division 2 of Part 10 from the date it was added to the tax roll, and

Stop order

645(1) Despite section 545, if a development authority finds that a development, land use or use of a building is not in accordance with

(a) this Part or a land use bylaw or regulations under this Part, or

(b) a development permit or subdivision approval,

the development authority may act under subsection (2).

(2) If subsection (1) applies, the development authority may, by written notice, order the owner, the person in possession of the land or building or the person responsible for the contravention, or any or all of them, to

(a) stop the development or use of the land or building in whole or in part as directed by the notice,

(b) demolish, remove or replace the development, or

(c) carry out any other actions required by the notice so that the development or use of the land or building complies with this Part, the land use bylaw or regulations under this Part, a development permit or a subdivision approval,

within the time set out in the notice.

(2.1) A notice referred to in subsection (2) must specify the date on which the order was made, must contain any other information required by the regulations and must be given or sent to the person or persons referred to in subsection (2) on the same day the decision is made.

(3) A person who receives a notice referred to in subsection (2) may appeal to the subdivision and development appeal board in accordance with section 685.

RSA 2000 cM-26 s645;2017 c13 s1(59)

Enforcement of stop order

646(1) If a person fails or refuses to comply with an order directed to the person under section 645 or an order of a subdivision and development appeal board under section 687, the municipality may, in accordance with section 542, enter on the land or building and take any action necessary to carry out the order.

(2) A municipality may register a caveat under the *Land Titles Act* in respect of an order referred to in subsection (1) against the certificate of title for the land that is the subject of the order.

TAB 7

Royal Bank of Canada *Appellant*

v.

North American Life Assurance Company and Balvir Singh Ramgotra *Respondents*

INDEXED AS: ROYAL BANK OF CANADA *v.* NORTH AMERICAN LIFE ASSURANCE CO.

File No.: 24316.

1995: November 8; 1996: February 22.

Present: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Bankruptcy — Settlement of funds — RRSP transferred in good faith to RRIF (insurance annuity) for benefit of third party — Settlements made up to five years prior to bankruptcy void against trustee in bankruptcy if interest of settlor in property did not pass on settlement — RRIFs normally exempt from claims of bankrupt's creditors — Bankruptcy declared within five years of transfer — Whether transfer to RRIF a settlement — If so, whether or not settlement void against trustee in bankruptcy — If so, whether or not funds in RRIF available to satisfy claims of creditors notwithstanding exempt status of RRIF — Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, ss. 67, 91 — The Saskatchewan Insurance Act, R.S.S. 1978, c. S-26, ss. 2(kk), 158.

In June 1990, respondent Ramgotra transferred the funds from his RRSPs into a RRIF managed by respondent insurance company. His wife was designated beneficiary under the RRIF and payments began that August. Circumstances related to relocation of respondent's medical practice led him to make an assignment into bankruptcy in February 1992. On his absolute discharge from bankruptcy in January 1993, his only assets were his clothing and household contents, and the RRIF. While the RRSPs would have been subject to his creditors' claims, the RRIF constituted a life insurance annuity and was therefore exempt from their claims on the basis of s. 67(1)(*b*) (property divisible among creditors on bankruptcy does not include property exempt from seizure under provincial law) of the *Bankruptcy and*

Banque Royale du Canada *Appelante*

c.

La Nord-Américaine, compagnie d'assurance-vie et Balvir Singh Ramgotra *Intimés*

RÉPERTORIÉ: BANQUE ROYALE DU CANADA *c.* NORD-AMÉRICAINE, CIE D'ASSURANCE-VIE

N° du greffe: 24316.

1995: 8 novembre; 1996: 22 février.

Présents: Les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE LA SASKATCHEWAN

Faillite — Disposition de fonds — REER transférés de bonne foi dans un FERR (rente d'assurance) au profit d'un tiers — Inopposabilité au syndic des dispositions faites au cours des cinq ans qui précèdent la faillite si les intérêts du disposant dans les biens n'ont pas cessé lorsque fut faite la disposition — FERR normalement à l'abri des réclamations des créanciers de la faillite — Cession de biens dans les cinq ans du transfert — Le transfert dans le FERR est-il une disposition? — Dans l'affirmative, la disposition est-elle inopposable au syndic? — Si oui, les fonds du FERR peuvent-ils servir à régler les réclamations des créanciers en dépit de l'exemption dont bénéficie le FERR? — Loi sur la faillite et l'insolvabilité, L.R.C. (1985), ch. B-3, art. 67, 91 — The Saskatchewan Insurance Act, R.S.S. 1978, ch. S-26, art. 2kk), 158.

En juin 1990, l'intimé Ramgotra a transféré les fonds de ses REER dans un FERR géré par la compagnie d'assurance intimée. Son épouse a été désignée bénéficiaire du FERR et les paiements ont commencé en août de la même année. Par suite d'événements liés à l'exercice de sa profession de médecin, l'intimé a fait cession de ses biens en février 1992. Lorsqu'il a obtenu sa libération absolue, en janvier 1993, il n'a conservé pour tous biens que ses vêtements, le contenu de sa maison et le FERR. Alors que les REER auraient été touchés par les réclamations de ses créanciers, le FERR, parce qu'il constituait une rente d'assurance-vie, était à l'abri de leurs réclamations par l'effet conjugué de l'al. 67(1)*b*) (les biens constituant le patrimoine attribué aux créanciers ne comprennent pas les biens qui sont exempts de saisie

16 Since Dr. Ramgotra transferred the funds from his two RRSPs into his exempt RRIF when he was solvent, and not for the purpose of defeating his creditors, one might well wonder how the bank could get around the exempt status of the RRIF — a status which, on its face, constitutes an absolute bar to the bank's claim. In the general context of debtor-creditor relations, the bank would have no expectation at all of attaching Dr. Ramgotra's exempt RRIF. On the facts of this case, Dr. Ramgotra's creditors are not being denied something which they would otherwise have, since the general rule is that they would not be entitled to attach the RRIF unless it had been removed from Dr. Ramgotra's estate through a fraudulent conveyance. Why should Dr. Ramgotra's bankruptcy place creditors like the bank in a better position than they would be in absent the bankruptcy? The bank's position before this Court appears to conflict with the principle that creditors should not gain on bankruptcy any greater access to their debtors' assets than they possessed prior to bankruptcy: *M.N.R. v. Anthony* (1995), 124 D.L.R. (4th) 575 (Nfld. C.A.), at p. 580.

Puisque le Dr Ramgotra était solvable au moment où il a transféré les fonds de ses deux REER dans son FERR exempt, et qu'il ne cherchait pas, par cette mesure, à frustrer ses créanciers, on peut fort bien se demander de quelle façon la banque pouvait contourner l'exemption dont bénéficie le FERR — exemption qui, à première vue, constitue un obstacle insurmontable à la réclamation de la banque. Dans le contexte général des rapports entre débiteurs et créanciers, la banque n'aurait aucun espoir de saisir le FERR exempt du Dr Ramgotra. À la lumière des faits de la présente affaire, les créanciers du Dr Ramgotra ne sont pas privés d'une chose à laquelle ils auraient par ailleurs droit puisque, selon la règle générale, ils ne pouvaient saisir le FERR que si celui-ci avait été soustrait du patrimoine du Dr Ramgotra par suite d'un transfert frauduleux. Pourquoi la faillite du Dr Ramgotra devrait-elle placer des créanciers comme la banque dans une position plus avantageuse qu'ils ne le seraient si ce n'était de la faillite? La thèse avancée par la banque devant notre Cour paraît entrer en conflit avec le principe que les créanciers ne devraient pas, du fait d'une faillite, obtenir des droits plus étendus sur les biens de leurs débiteurs qu'ils n'en possédaient avant la faillite: *M.N.R. c. Anthony* (1995), 124 D.L.R. (4th) 575 (C.A.T.-N.), à la p. 580.

17 Moreover, the policy of exempting life insurance investments and policies from execution or seizure under the *BIA*, where family members are designated as beneficiaries, is sound. Given the importance of insurance in providing for the welfare of dependents upon the death of the insured, an insurance policy may be characterized as a necessity. In Saskatchewan, as in the other provinces, many other necessities are excluded from the property of a bankrupt which is subject to execution or seizure by creditors. Examples include food, fuel, clothing, household items, tools of a trade (*The Exemptions Act*, R.S.S. 1978, c. E-14, s. 2), farm buildings, farming equipment, and livestock (*The Saskatchewan Farm Security Act*, S.S. 1988-89, c. S-17.1, s. 65). One might well characterize exempt property collectively as the "bare minimum" which a bankrupt is entitled to maintain

Qui plus est, le fait, dans la *LFI*, d'exempter des mesures d'exécution ou de saisie les polices et placements d'assurance-vie lorsque des membres de la famille sont désignés bénéficiaires est une politique judicieuse. En effet, vu l'importance de l'assurance pour le bien-être des personnes à charge de l'assuré après son décès, il est possible de qualifier les polices d'assurances de nécessité de la vie. En Saskatchewan, tout comme dans les autres provinces, de nombreux autres biens indispensables sont exclus des biens d'un failli qui peuvent faire l'objet de mesures d'exécution ou de saisie par les créanciers. Parmi les biens ainsi exclus, mentionnons la nourriture, le combustible, les vêtements, les articles ménagers, les outils nécessaires à la pratique d'un métier (*The Exemptions Act*, R.S.S. 1978, ch. E-14, art. 2), les bâtiments et l'équipement agricoles, et le bétail (*The Saskatchewan*