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Redwater Decision Prioritizes Environmental Work in Insolvency

Impacts and Opportunities for Environmental Services Professionals

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Agenda

- 1. The Facts and the Decision.***
- 2. Lessons Learned.***
- 3. Impact on Stakeholders.***
- 4. Potential Opportunities for Environmental Services Professionals.***

Facts and Supreme Court decision

Orphan Well Association v. Grant Thornton Ltd., 2019 SCC 5 (“Redwater”)

- Redwater Energy Corporation, with a secured debt owing to the Alberta Treasury Branches (“ATB”), went into receivership and bankruptcy under federal *Bankruptcy and Insolvency Act* (BIA).
- GTL, the Receiver/Trustee disclaimed 107 out of 127 AER-licensed assets. The AER and the OWA sought Orders compelling the Trustee (as licensee under Alberta’s OGCA &PA) to fulfil Redwater’s statutory environmental obligations.

Issues:

1. Ability of a Trustee / Receiver to ‘disclaim’ or ‘renounce’ uneconomic property; and
2. Priority of a Regulator’s environmental orders, including the payment of the LMR security deposit to address licensee’s environmental obligations.

Facts and Supreme Court decision

The Participants on Appeal

- OWA and AER; GTL and ATB
- Intervenors - including CAPP, British Columbia, Saskatchewan, the Canadian Association of Insolvency and Restructuring Professionals.

Alberta Courts' (QB and CA) Decision:

- Court of Appeal (2:1 split) upheld the trial judge's decision that Receivers and Trustees are permitted under the federal BIA to sell economic assets and disclaim costly environmental liabilities.
- Regulators do not have priority over other creditors of an insolvent licensee for environmental claims or obligations.
- Operational conflict existed between the federal BIA and Alberta's OGCA & PA, regarding certain rights of Trustees and Receivers. Paramountcy doctrine applies, the federal BIA prevails.



Facts and Supreme Court decision

SCC's Decision:

- 5:2 split, majority overturning the Alberta Courts' decisions.
- Power of a Trustee/Receiver to 'disclaim' property under the BIA exists but only concerns Trustee/Receiver's personal liability. The liabilities disclaimed remain the obligations of the bankrupt estate.
- Environmental obligations (and related regulatory programs such as the LMR security deposit) and the Regulator's abandonment/reclamation orders, are NOT financial claims or 'claims provable in bankruptcy.' Therefore, they must be complied with by the Trustee in priority to any other claim including secured creditors.
- Alberta's oil and gas regulatory regime can coexist with the BIA. Paramountcy doctrine does not apply.

Facts and Supreme Court decision

- **Super-priority not automatic. The 3-part test to determine whether an environmental obligation amounts to a claim provable in bankruptcy:**
 - (1) there must be a debt, a liability or an obligation to a creditor;
 - (2) the debt, liability or obligation must be incurred before the debtor becomes bankrupt; and
 - (3) it must be possible to attach a monetary value to the debt, liability or obligation.

Newfoundland and Labrador v. AbitibiBowater Inc. 2012 SCC 67 (Abitibi).
- **A Regulator is not a Creditor: A regulator exercising a power to enforce a public duty is not a creditor of the individual or corporation subject to that duty. In seeking to enforce the bankrupt's end-of-life obligations, the Regulator is acting in the public interest and for the public good.**
(*Northern Badger* - 1991 ABCA)
- **"Monetary value"/"Sufficient certainty" test: It must be sufficiently certain that the regulator will perform the environmental work **and seek reimbursement.****

Lessons Learned

Prioritizing the Environment

- Environmental protection highlighted as a public good and as priority of *all* business endeavors.
- Forces changes in business practices, especially for industries that environmental laws are *indirectly* engaged, such as the lending industry.

No winners or losers in the short term

- the current state of the market and the economy;
 - requires a generation or more for OWA to address existing inventory of orphans; and
 - all stakeholders must cooperate to achieve all objectives.
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- SCC principles of super-priority of environmental obligations extrapolating to all sectors, not only oil & gas

Impact on Stakeholders

Lenders and Insolvency Proceedings:

- Become “creative” in reducing risk: environmental reporting, abandonment plans marked against an independent engineering assessment (monitor and quantify), cash sweeps, force sales of valuable properties to pay down debt prior to insolvency, prematurely call loans.
- Secured creditors may walk away. Fewer receiverships and bankruptcies of corporations with significant environmental liabilities.
- Uncertainty about receivership charges and trustees’ costs of administration.
- Organized insolvency sales processes likely to dwindle.

Impact on Stakeholders

Oil & Gas and Service Industry:

- Reduced credit availability and cash strain.
- Reserve or sinking funds may be required for enviro. obligations.
- Directors and officers jump ship to avoid personal liabilities.
- Potentially more operating wells and facilities being dumped on the OWA with more insolvencies of companies.
- Unemployment increase in all collateral sectors (including services).
- Unsecured creditors of the insolvent – trades and suppliers, **including environmental services professionals**, further down the payment waterfall.

Potential Opportunities for Environmental Services Professionals

- More governmental agencies/regulators in other sectors may extrapolate the Redwater “public good” super-priority for environmental obligation.
- Remediation and reclamation service opportunities will likely increase. **However, who will pay the bill is crucial!**
 - the insolvent?
 - the Receiver/Trustee; or
 - the Regulator? (the power lies here during insolvency)

Potential Opportunities for Environmental Services Professionals

- **Business proposal should be made before the liabilities go to OWA.**
- **Proposal may be made to the insolvent company and Regulator where secured creditor is not involved; or to the Receiver/Trustee and Regulator.**
- **Ensure the Regulator agrees in writing prior to the service provider carrying out the work.**

Potential Opportunities for Environmental Services Professionals

- **Other potential areas of economic growth for environmental services – Proactive/Preventive Consulting and Software services:**
- **Assist lenders in creating new approaches to minimizing environmental risks.**
- **Assist companies in complying with new lender obligations.**
- **Assist companies in monitoring and implementing abandonment and reclamation strategies.**
- **Take-over appropriate wells and facilities from the government for new businesses, such as subsurface waste disposal.**

Thank you and Questions?

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