In This Issue:

Programs sponsored and co-sponsored by the Business Bankruptcy Committee in conjunction with the 2019 Business Law Section Spring Meeting in Vancouver, Canada

Redwater Decision And the Super-Priority of Environmental Liabilities

Useful Links:

Submit Articles for the Business Bankruptcy Newsletter

Join The Committee Online. Free For All Business Law Members

Editorial Board:

Krista L. Kulp, Esq.
Editor-in-Chief
Cole Schotz P.C.
Hackensack, NJ
Kkulp@coleschotz.com

Michael A. Sabella, Esq.
Co-Editor-in-Chief
BakerHostetler LLP
New York, NY
MSabella@bakerlaw.com

Business Bankruptcy Committee Newsletter

"Business Bankruptcy Committee: The World's Largest Organization of Bankruptcy Restructuring Lawyers"

The Business Bankruptcy Committee looks forward to seeing you at the ABA Business Law Section Spring Meeting in Vancouver, British Columbia, Canada from March 28-30, 2019. We have a dynamite lineup of interesting and informative programs for bankruptcy and business law practitioners. These exciting programs are listed below. Please join us!

Additionally, this edition includes an excellent article analyzing the Supreme Court of Canada’s decision in Orphan Well Association, et al. regarding the treatment of environmental regulatory obligations in insolvency proceedings.

Note from Susan Freeman:

Vancouver is a wonderful city with a rich history and great destinations to visit. Tour the Museum of Anthropology at the University of British Columbia (a great piece of 20th century modern architecture, and a stunning setting), walk through Stanley Park, ski at Whistler Mountain, or take in the other countless sites that make Vancouver a must-visit destination. If you have time, you can also visit other nearby cities by Amtrak or rail, like Seattle, Montreal or Toronto.

Anyone who wants to register for the Spring meeting and purchase event tickets can now do so online at https://www.xpressreg.net/eReg/?ShowCode=CLSP0319 or by using the link on our meeting website at www.ambar.org/19blspring. If someone has already registered for the meeting and would like to purchase event tickets they will need to either fax the attached form to 312-988-6279 or call 312-988-5588 and purchase over the phone. Current registrants are not able to purchase tickets online.
Thursday, March 28, 2019: CLE & NON-CLE PROGRAMS:

9:30 AM to 11:00 AM: Cannabis in Canada and the U.S.: From Banking to Bankruptcy
Location: West Level 2, Room 220

Setting the stage with a Washington State regulator with first-hand knowledge of cannabis evolving into a state-sanctioned business enterprise, this program explores challenges facing the enterprise, investors, and the financial services industry in the United States and Canada, from handling and raising money to insurance to winding things up.

Program Chair/Moderator: Andrew M. Troop, Pillsbury Winthrop Shaw Pittman LLP, New York, NY

Program Speakers:
Russ Hauge, Washington State Liquor and Cannabis Board, Olympia, WA
Thomas Pinder, American Bankers Associations, Washington, D.C.
Phoebe Papageorgiou, American Bankers Associations, Washington, D.C.
Jason Rosell, Pachulski Stang Ziehl & Jones LLP, San Francisco, CA
Benjamin D. Tievsky, Pillsbury Winthrop Shaw Pittman LLP, New York, NY
Aimee L. Halfyard, Miller Thomson LLP, Calgary, Canada

11:00 AM to 12:30 PM: Healthcare and Nonprofits in Bankruptcy Subcommittee Meeting: Through the Looking Glass: Are Medicare and Medicaid Provider Agreements Contracts? And Why Do People Care?
Location: West Level 1, Room 112

Healthcare bankruptcy cases come at a steady stream, and frequently some of the most important assets being transferred are the Medicare and Medicaid Provider Agreements. Although usually bankruptcy courts deal with these agreements as executory contracts, there is binding precedent at the circuit court level that they are not contracts at all. What is most unusual is that the federal government regularly argues outside of bankruptcy that the Medicare Provider Agreement is not a contract, but inside of bankruptcy argues the opposite. State governments argue that the Medicaid Provider Agreement is a contract, but that the providers have no property rights in the agreement. Can all of these arguments be correct? And what are the practical implications of how the agreements are treated, and solutions for dealing with these important assets.

Program Moderator: Samuel R. Maizel, Dentons US LLP, Los Angeles, CA

Program Speakers:
Seth Shapiro, US Department of Justice, Washington, D.C.
Kenneth Wang, Office of the California Attorney General, Los Angeles, CA
Elizabeth Green, Baker & Hostetler, Orlando, FL
Thursday, March 28, 2019: CLE & NON-CLE PROGRAMS:

12:30 PM - 2:30 PM: Chapter 11 and Secured Creditors Luncheon: Retail Bankruptcies: From the Outside Looking In
Location: West Level 1, Room 116 & 117

The program focuses on recurring commercial issues in retail bankruptcies from the perspective of outside parties, such as creditors’ committees, landlords, and trade creditors. The panel will also address current trends in retail insolvencies and liquidations.

Program Co-Chairs:
Gary E. Klausner, Levene Neale Bender Yoo& Brill, LLP, Los Angeles, CA
Mette H. Kurth, Fox Rothschild LLP, Wilmington, DE
Clay B. Roberts, White & Case LLP, Miami, FL

Program Moderator: Clay B. Roberts, White & Case LLP, Miami, FL

Program Speakers:
Bradford J. Sandler, Pachulski Stang Ziehl & Jones LLP, Wilmington, DE
Vicki Tickle, McMillan LLP, Vancouver, British Columbia, Canada
Ivan M. Gold, Allen Matkins Leck Gamble Mallory & Natsis LLP, San Francisco, CA

2:30 PM – 4:00 PM: Too Broke to Go Bankrupt? The Impact of the New US Trustee Fees on MidCap Bankruptcy Debtors
Location: West Level 2, Room 217 & 218

Chapter 11 debtors must pay a quarterly fee based on the amount of disbursements they make. Effective January 1, 2018 the maximum fee was increased from $30,000 for disbursements over $30 million per quarter, to 1% of quarterly disbursement over $1 million, capped at $250,000. Thus, a debtor that has disbursements of $10 million per quarter would see their fees increase from $13,000, under prior rules, to $100,000. This fee increase will disproportionately affect middle market debtors, which are reliant on operating income and owner-operators to survive the bankruptcy process. This program will explore the fee increase and what can be done judicially or legislatively to make the bankruptcy process more affordable and efficient.

Program Chair/Speaker: Jeffrey Sklarz, Green & Sklarz, LLC, Stamford, CT

Moderator: Nellwyn Voorhies, Executive Director, Donlin Recano, Brooklyn, NY

Speakers:
Elizabeth Austin, Member, Pullman & Comley, LLC, Bridgeport, CT
Leah Fiorenza McNeill, Bryan Cave Leighton Paisner, Atlanta, GA
(Hon.) Catherine Furay, Chief Judge, U.S. Bankruptcy Court for the Western District of Wisconsin, Madison, WI
FRIDAY, March 29, 2019: CLE & NON-CLE PROGRAMS:

8:00 AM – 10:00 AM: Ethics Rules and Recent Updates on Informed Consent to Waive Conflicts, Prospective Waivers, Screening Procedures, and Outside Counsel Guidelines
Location: West Level 2, Room 208 & 209

This program will address conflicts of interest generally and the issue of what constitutes informed consent, confirmed in writing, under the ABA Model Rules of Professional Conduct. It will also address recent developments in prospective waivers; screening procedures; joint representation engagements; and outside counsel guidelines.

Program Chair/Speaker: Shannon “A.J.” Singleton, Stoll Keenon Ogden PLLC, Lexington, KY

Moderator: Miriah Holden, Associate Counsel, American Savings Bank, Honolulu, HI

Speakers: Amy Richardson, Partner, Harris, Wiltshire & Grannis LLP, Washington, DC

11:00 AM – 12:00 PM: Individual Chapter 11 Subcommittee Meeting: Obtaining a Discharge in Individual Chapter 11 Cases
Location: West Level 1, Room 116

A panel of attorneys experienced in handling individual chapter 11 cases will discuss the difficulties that individuals face in obtaining a discharge through a chapter 11 plan and defending objections to a discharge or dischargeability of debts in such cases.

Program Co-Chairs:
William L. Norton III, Bradley, Nashville, TN
Bradley D. Pack, Engelman Berger PC, Phoenix, AZ

Program Moderator: Bradley D. Pack, Engelman Berger PC, Phoenix, AZ

Program Speakers:
Grace Robson, Markowitz Ringel Trusty & Hartog, Ft. Lauderdale, FL
Robert W. Miller, Manier & Herod PC, Nashville, TN
FRIDAY, March 29, 2019: CLE & NON-CLE PROGRAMS:

2:30 PM - 4:00 PM: Current Developments Task Force Meeting: Current Developments in Business Bankruptcy Cases
Location: West Level 1, Room 114

A group of experienced practitioners from around the U.S. will provide an update on developments of current interest to business bankruptcy lawyers.

Program Chair/Moderator: Martin J. Bienenstock, Proskauer, New York, NY

Program Speakers:
Robert B. Millner, Dentons, Chicago, IL
Monique Hayes, Goldstein & McClintock LLP, Miami, FL
Ogona M. Brown, Lewis Roca Rothgerber Christie, Las Vegas, NV
Michael R. Enright, Robinson & Cole LLP, Hartford, CT

Program Materials Coordinator: Michael R. Enright, Robinson & Cole LLP, Hartford, CT

2:30 PM – 4:00 PM: Avoidance Updates: Fraudulent Conveyances, Preferences, and Unauthorized Post-Petition Transfers
Location: West Level 2, Room 204

The panel will address noteworthy cases from 2015 forward addressing avoidance action under 11 USC Sections 547 (preferences), 548 (fraudulent conveyances), and 549 (unauthorized post-petition transfers).

Program Chair & Speaker: Steven Fender, Steven Fender, PA

Moderator:
Alan Hochhesier, Principal, Maurice Wutscher, Beachwood, OH

Speakers:
(Hon.) Christopher Klein, Bankruptcy Judge, United States Bankruptcy Court, Eastern District of California, Sacramento, CA
Jeffrey Sklarz, Member, Green & Sklarz LLC, New Haven, CT
Lori Vaughan, Shareholder, Trenam Law, Tampa, FL
FRIDAY, March 29, 2019: CLE & NON-CLE PROGRAMS:

2:30 PM – 4:00 PM: Letters of Credit & Applicant Bankruptcy: U.S. & Canadian Bankruptcy Provisions and Cases for Beneficiaries, Issuers, Applicants & Others
Location: East Meeting Level, Room 8

We will examine the effect on a letter of credit transaction of the bankruptcy of the credit's applicant. May the credit's beneficiary draw on the credit, may it be paid, may the credit's issuer be reimbursed, and may the beneficiary and issuer keep their respective payments and reimbursements?

Program Chair & Moderator: Michael Evan Avidon, Moses & Singer, New York, NY

Speakers:
Natalie Levine, Partner, Cassels Brock & Blackwell LLP, Toronto, Ontario
Mark Parry, Partner & Chair of the Dispute Resolution Practice Group, Moses & Singer LLP, New York, NY
Patricia Redmond, Shareholder, Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Miami, FL
SATURDAY, March 30, 2019: CLE & NON-CLE PROGRAMS:

8:30AM - 10:00AM: *Fiduciary Dodgeball: Governance of Distressed Multi-State Corporate Groups*
*Location:* West Level 2, Room 204

This Program highlights and discusses important differences in the fiduciary duties of directors and officers of distressed companies across different jurisdictions and within multi-jurisdictional companies. The Program is inspired by the paper “Multi-Jurisdiction Survey: Governance of Financially Distressed Entities” by the ABA Joint Subcommittee on Governance of Distressed Companies.

**Program Co-Chairs:**
Regina Kelbon, Blank Rome, Philadelphia, PA
Donald Kirk, Carlton Fields, Tampa, FL
Adam Maerov, McMillan LLP, Calgary, Alberta, Canada
J. William Boone, James Bates Brannan Groover, LLP, Atlanta, GA
Matthew Graham, Stearns Weaver Miller, PA, Miami, FL

**Program Moderator:** J. William Boone, James Bates Brannan Groover, LLP, Atlanta, GA

**Program Speakers:**
Kyung Lee, Kasowitz Benson Torres LLP, Houston, TX
Peter Walsh, Jr., Potter Anderson & Corroon LLP, Wilmington, DE
Adam Maerov, McMillan LLP, Calgary, Alberta, Canada
Susan Smith, GlassRatner, Tampa, FL

**Program Materials Coordinator:** Matthew Graham, Stearns Weaver Miller, PA, Miami, FL

10:30AM - 12:00PM: *Business Bankruptcy Brunch: Stranger Things: Centerfolds to Season Ticketholders – How Diverse Creditor Constituencies Influence a Committee*
*Location:* West Level 1, Room 109

**Program Co-Chairs:**
Andrea Hartley, Akerman LLP, Miami, FL
Jeffrey Cohen, Lowenstein Sandler LLP, New York, NY

**Program Speakers:**
Bradford Englander, Whiteford Taylor & Preston, LLP, Falls Church, VA
Lisa Tracy, Executive Office for United States Trustees, Washington, D.C.
Leah Eisenberg, Foley & Lardner LLP, New York, NY

**Program Materials Coordinator:** Stacey Corr-Irvine, Jones Day, New York, NY
THURSDAY, March 28, 2019: MEETINGS:

10:30 AM - 12:00 PM: Business Transactions Subcommittee Meeting  
Location: West Level 1, Room 107 & 108

2:30 PM - 3:30 PM: Leadership Development Subcommittee Meeting  
Location: West Level 1, Room 113

2:30 PM - 3:30 PM: Leadership Development Subcommittee Meeting  
Location: West Level 1, Room 113

3:00 PM - 4:00 PM: Bankruptcy Committees Subcommittee Meeting  
Location: West Level 1, Room 112

3:00 PM - 4:00 PM: Partnerships and Limited Liability Entities in Bankruptcy Subcommittee Meeting  
Location: West Level 2, Room 210

3:00 PM - 4:30 PM: UNCITRAL Task Force Meeting  
Location: West Level 2, Room 214

3:30 PM - 4:30 PM: Trustees & Examiners Subcommittee Meeting  
Location: West Level 1, Room 113

4:00 PM - 5:00 PM: Governance Issues of Distressed Companies Jt. Subcommittee Meeting  
Location: West Level 1, Room 112

4:30 PM - 6:30 PM: Meeting of the Chairs and Vice Chairs of Business Bankruptcy Subcommittees, Working Groups and Task Forces  
Location: West Level 3, Room 301-305
FRIDAY, March 29, 2019: MEETINGS:

8:00 AM - 9:30 AM: Bankruptcy IP and Technology and Webmasters Subcommittee Meeting  
Location: West Level 2, Room 223

10:00AM - 11:00 AM: Legislation Subcommittee Meeting  
Location: West Level 1, Room 116

10:00 AM - 11:00 AM: Trust Indentures Subcommittee Meeting  
Location: West Level 1, Room 117

3:00 PM - 4:00 PM: Pro Bono Services Subcommittee Meeting  
Location: West Level 2, Room 223

4:30 PM - 5:30 PM: Programs Subcommittee Meeting  
Location: West Level 1, Room 117

SATURDAY, March 30, 2019: MEETINGS:

9:00AM - 10:00AM: Government Powers Subcommittee Meeting  
Location: West Level 1, Room 114

10:00AM - 11:00AM: Alternative Dispute Resolution Working Group Meeting  
Location: West Level 1, Room 114
On January 31, 2019, the Supreme Court of Canada released its decision in Orphan Well Association et al v Grant Thornton Limited et al, which was an appeal by the Alberta Energy Regulator (the AER) and the Orphan Well Association (the OWA) arising from the receivership and bankruptcy of Redwater Energy Corp. (Redwater), a small publicly traded oil and gas producer in Alberta. The decision addresses the treatment of environmental regulatory obligations in insolvency proceedings and has significant implications for Canada’s natural resources and financial services sectors.

At issue was the extent to which a receiver is empowered under the federal Bankruptcy and Insolvency Act (the BIA) to sell the debtor’s wells, facilities and pipelines (the PNG Assets) and distribute the sale proceeds to the creditors in accordance with bankruptcy priorities in face of limitations imposed by the Province of Alberta’s oil and gas regulatory regime on such actions where the debtor’s environmental remediation obligations remain unperformed.

The Legal and Statutory Background

Constitutional Division of Powers

Under the Constitution Act, 1867, the federal government has exclusive jurisdiction over bankruptcy and insolvency and the provincial governments have exclusive jurisdiction over non-renewable natural resources. Jurisdiction over the environment is divided between the two levels of government because environmental issues touch upon powers allocated to both.

Where legislation of the two branches of government conflict, the courts resolve the conflict by employing various constitutional law doctrines, including initially determining whether the legislation at issue is within the scope of powers of the enacting body under the Constitution Act. Since both the BIA and Alberta’s regulatory regime were validly enacted, the three levels of court that examined the issues had to analyze the competing legislation to determine whether there was a conflict for the purposes of the constitutional doctrine of federal paramountcy.

Under the paramountcy doctrine, where otherwise valid federal and provincial legislation conflict, the conflicting provisions in the provincial law are inoperative, but only to the extent of the conflict. The paramountcy doctrine has two branches. The first branch is operational conflict, where the two laws impose conflicting requirements and it is impossible to comply with both. The second branch is frustration of purpose, where the effect of the provincial law frustrates the purpose of the federal law. Under the principle of cooperative federalism, courts take a restrained approach in applying the paramountcy doctrine, and favour interpretations of federal and provincial laws that permit the laws to operate harmoniously over interpretations that result in incompatibility.

1 2019 SCC 5.
2 We will only refer to receivers in this article, but most of the discussion applies equally to trustees in bankruptcy.
3 RSC 1985, c B-3, as am.
4 30 & 31 Victoria, c 3 (U.K.), as am.
Environmental Provisions of the BIA

Section 14.06 of the BIA, which governs the treatment of federal and provincial environmental remediation obligation in insolvency proceedings, provides that:

(i) a receiver is not personally liable for environmental conditions or damage arising before its appointment, or after unless the conditions or damage results from the receiver’s gross negligence or willful misconduct (14.06(2));

(ii) if a remediation order is issued, a receiver that abandons, disposes of or otherwise releases (for convenience we will use the term “disclaim”) any interest in real property affected by environmental conditions or damage within certain time frames is not personally liable for failing to remediate that property (14.06(4));

(iii) the costs of remediating disclaimed real property do not rank as costs of administration of the estate (14.06(6)); and

(iv) the costs incurred by the federal or provincial Crown to remediate real property affected by environmental conditions or damage are secured by a first ranking security against the affected property and any contiguous property related to the activity that caused the condition or damage (14.06(7)).

Alberta’s Oil and Gas Regulatory Regime

The AER is the regulator under Alberta’s oil and gas regulatory regime (the Regulatory Regime), which is set out in a number of statutes, regulations and directives including the Responsible Energy Development Act, the Oil and Gas Conservation Act (the OGCA), the Pipeline Act and the Environmental Protection and Enhancement Act (the EPEA).5

The Regulatory Regime requires companies wishing to construct or operate PNG Assets to obtain a business associate code from the AER. If they are granted a code, then they qualify to hold licenses issued by the AER for the PNG Assets in which they have an interest. A separate license is required for each PNG Asset. In order for a licensee to transfer licenses, it must apply to the AER to obtain its prior written consent. The AER has the discretion whether to approve or deny the transfer, or make the transfer subject to the performance of certain conditions. Any transferee of licenses must also have a business associate code, and must be in compliance with its obligations under the Regulatory Regime.

The licensee of, and any other party having an ownership interest (a working interest participant) in a PNG Asset are responsible for its suspension6, abandonment7, reclamation8 and remediation9 at the end of its life cycle.10

5 Responsible Energy Development Act, SA 2012, c R-17.3, Oil and Gas Conservation Act, RSA 2000, c O-6; Pipeline Act, RSA 2000, c P-15; Environmental Protection and Enhancement Act, RSA 2000, c E-12.
6 “Suspension” is shutting down in accordance with the procedures stipulated in the Regulatory Regime.
7 “Abandonment” is the permanent dismantling of the PNG Asset, which in the case of a well means sealing the hole (with cement) to render it environmentally safe. In the case of a pipeline, it means its permanent deactivation.
8 “Reclamation” is the removal of equipment and buildings, the decontamination of buildings, land or water, and the stabilization, contouring, maintenance, conditioning or reconstruction of the surface of the land.
9 “Remediation” is the clean up of harmful or potentially harmful substances that have been released into the environment.
Suspension must be completed within one year of the licensee ceasing production from or operation of a PNG Asset. There is no time frame, however, within which non-producing PNG Asset must be abandoned and reclaimed unless the AER orders otherwise. While each licensee is responsible for all of the abandonment liabilities associated with a PNG Asset, regardless of its percentage ownership interest, a working interest participant’s obligation is more complicated. The AER can require the working interest participant to abandon the PNG Asset, regardless of its percentage ownership. Where the working interest participant, however, incurs costs that are in excess of its percentage interest, the working interest participant can seek recourse from the other working interest participants, and in the event it is unsuccessful, from the Orphan Well Fund.

The AER has a number of mechanisms to address the risk of a licensee and any working interest participant being insolvent, and therefore unable to carry out abandonment work. The Regulatory Regime expressly imposes on receivers all of the licensee’s obligations under that legislation. The OGCA and Pipeline Act define the term “licensee” as the holder of the license according to the records of the AER together with a trustee or receiver-manager of the property of a licensee. This mechanism was one of the foundations of the AER’s and OWA’s arguments in the Redwater proceedings that the receiver was obliged to abandon Redwater’s disclaimed PNG Assets before making distributions to the secured lender.

In addition, each licensee is required to report to the AER on a monthly basis with respect to the status of and production from its PNG Assets. Based on these reports, the AER calculates a liability management rating (the LMR) for the licensee, which compares the licensees aggregate deemed asset value\(^\text{11}\) to its aggregate deemed liabilities\(^\text{12}\). Where the deemed liabilities exceed the deemed asset values, the licensee’s LMR will be less than 1.0. In such circumstances, the AER will require the licensee to improve its LMR either by abandoning PNG Assets to lower the deemed liabilities, or increasing the deemed asset value by posting a security deposit with the AER. The AER calculates the LMR on a monthly basis, and whenever a licensee applies for the approval of a license transfer.

The Regulatory Regime also created the Orphan Well Fund to address the risk that PNG Assets remain unabandoned because of insolvency and there being no party that could be required to carry out the abandonment work. In these circumstances, the AER is empowered to declare the PNG Asset an “orphan”. The OWA, which is a separate body whose AER-appointed directors include representatives of the AER, the government of Alberta and industry, will exercise the AER’s delegated powers\(^\text{13}\) to take custody of and abandon the PNG Asset. The AER reimburses the OWA for the cost of its abandonment work through the Orphan Well Fund, which in turn is predominantly funded by industry levies collected by the AER. The AER has the power to require any parties responsible for abandoning the orphaned PNG Assets to pay the costs incurred by the OWA in carrying out that work.

\(^{10}\) For ease of reference, except where otherwise indicated, in this article we use the term “abandon” to refer collectively to “suspension”, “abandonment” and “reclamation”.

\(^{11}\) The deemed asset value is the aggregate value of the licensee’s PNG Assets, which is calculated on the basis of the aggregate normalized 12 months’ trailing production revenue from the PNG Assets.

\(^{12}\) Deemed liabilities are calculated by the AER based on the average costs applicable to the abandonment of the PNG Assets in the area in which they are located.

\(^{13}\) The delegation is under the Orphan Fund Delegated Administration Regulation, Alta Reg 45/2001.
Industry Context

The Regulatory Regime more or less took its current form in the early nineties. The pre-existing Regulatory Regime was amended in part to address an increasing number of wells that had not been abandoned, but were no longer producing. In many cases, they had not been producing for decades. In 1989 there were approximately 25,000 such wells. The Albertan government and the AER’s predecessor were concerned about these wells because their experience from the previous downturn in the sector showed that receivers generally could not sell them, and at the end of the receivership were most likely wells to be left for the government or regulator to deal with. Therefore, the definition of “licensee” was amended to include receivers, the Orphan Well Fund was formed and the LMR system was created to ensure that licensees at financial risk posted security for the abandonment obligations.

Notwithstanding these changes, however, the inventory of non-producing wells increased at an average rate of 6% per year until 2017, when there were 88,000 non-producing, unabandoned wells, and 155,000 non-producing, unreclaimed wells. The unabandoned, unreclaimed facilities and pipelines that were not operating also increased in that period. Hence, the abandonment work was not keeping pace with the growth in the inventory. In part, the reason for this was that licensees were not required to carry out those abandonments within a specified time period after the PNG Assets stop producing and operating.

Over time, it became apparent that other aspects of the Regulatory Regime were not working well. It was assumed that the LMR would provide timely warning of a licensee’s financial inability to perform its abandonment obligations so that they could be secured before it was too late. In many instances, however, the LMR was still in excess of 1.0 even though the licensee was insolvent and a receiver had been appointed. By the time licensees are approaching insolvency, they do not generally have the means to provide security. In addition, the LMR system was premised on quantifications that over-estimates the value actually available and under-estimated the liabilities.

The LMR system was also based upon the assumption that in the event a licensee became insolvent, the proceeds of sale by a receiver of PNG Assets would be applied to address the licensee’s abandonment obligations. The basis for this assumption was both the inclusion of receivers in the definition of “licensees” and the 1989 decision of the Court of Appeal of Alberta in PanAmericana de Bienes y Servicios v Northern Badger Oil & Gas Limited. Lenders, on the other hand, assumed based on the enactment of section 14.06 of the BIA, seemingly affirmed by the Supreme Court of Canada in 2012 in Newfoundland and Labrador v AbitibiBowater Inc. (Abitibi), that except to the extent the statutory charge created by section 14.07(7) was applicable, secured claims took priority to borrowers’ environmental obligations. This disconnect between the understanding of the applicable law by the AER and the lending community was an important factor underlying the Redwater proceedings at each level of court.

14 1991 ABCA 181.
The Regulatory Regime also does not effectively provide for predecessor liability. In other words, where a licensee or working interest participant transfers its interest in a PNG Asset, generally only the transferee will be liable for the abandonment obligations. The benefit of this is that transferors do not have to provide for abandonment obligations of transferred PNG Assets in their financial statements and therefore have better access to capital. There can be, however, systemic safety issues when this is the effect of transferring nonproducing PNG Assets. A well-capitalized licensee is able to sell packages of producing and nonproducing PNG Assets to a less well-capitalized licensee (as long as the latter has an LMR in excess of 1.0), with the effect that the abandonment liabilities for those PNG Assets are transferred from the well-capitalized entity to the less well-capitalized entity. In the long term, this may not be beneficial for the industry or the Province.

In receiverships, the AER encourages sales that bundle PNG Assets that have a higher value relative to their associated abandonment liabilities with PNG Assets that have higher abandonment liabilities relative to their value. The positive effect of this is that the immediate effect of a receivership on the OWA is mitigated. However, such bundling is not necessarily beneficial in the long term. Generally, bundling reduces the amounts realized by receivers because purchasers deduct abandonment liabilities from the acquisition prices. Further, in the current economic climate, purchasers have in many instances not been sufficiently well capitalized to perform all of their new abandonment liabilities, notwithstanding having post-transfer LMRs in excess of 1.0. The AER attempted to address this issue by requiring transferees to either have post-transfer LMRs in excess of 2.0 or to provide evidence of their financial capacity to satisfy their abandonment obligations. However, given that the financial information built into the LMR gives an incomplete picture of a licensee’s ability to perform its abandonment obligations, this change is an imperfect response to the risk.

**Background to the Proceedings**

Redwater had 84 wells and 7 processing facilities. Of these, only 16 wells were producing and 3 facilities were operational. The remaining wells and facilities had no reserve value and were burdened with significant abandonment obligations. Because of ongoing financial struggles, ATB Financial, Redwater’s secured lender, demanded repayment of its loans and applied to the Court of Queen’s Bench of Alberta for an order appointing a receiver. The Court appointed Grant Thornton Limited (GTL) as receiver in May of 2015 and as trustee in the bankruptcy in October 2015. After its appointment, GTL reviewed Redwater’s PNG Assets and concluded that only the producing PNG Assets had value and could be sold. GTL therefore disclaimed all of the non-producing PNG Assets under section 14.06(4) of the *BIA*, with the exception of a well that was leaking, which GTL safely abandoned.

The AER responded by issuing orders requiring Redwater to abandon the disclaimed PNG Assets and applied to the Court for an order setting aside the disclaimer and directing GTL to abandon the disclaimed PNG Assets. GTL applied for an order upholding the disclaimer, approving a sale process, and preventing the AER from making license transfers to purchasers who were compliant with the Regulatory Regime conditional on GTL abandoning or paying security deposits with respect to disclaimed PNG Assets. The latter order was necessary because if the AER was able to require that GTL pay the gross proceeds of sale to secure the abandonment obligations associated with the disclaimed PNG Assets, or require GTL to perform those obligations, the AER would be paid before any creditor. GTL believed that this practical priority conflicted with the priority regime under the *BIA*. 
The Court of Queen’s Bench determined that GTL was entitled under section 14.06 to disclaim PNG Assets, and that the effect of the disclaimer was that GTL had no obligation to abandon the PNG Assets. Further, the court concluded that the abandonment obligations were provable claims under the *BIA*, subject to the *BIA’s* priority rules, and that the AER could only receive distributions in respect of that claim in the manner contemplated by the *BIA*. The Court concluded that the provisions of the Regulatory Regime that required GTL to abandon the disclaimed PNG Assets and pay security deposits to the AER in respect of their associated abandonment obligations were inoperative under the paramountcy doctrine.

The AER and OWA appealed the decision to the Alberta Court of Appeal, which in a two to one decision upheld the decision of the Court of Queen’s Bench. The AER and OWA then appealed to the Supreme Court of Canada.

**The Supreme Court Decision**

The Supreme Court issued a split decision, with a majority of five justices and a dissent of two justices. The majority, in reasons written by Chief Justice Wagner, determined that disclaimers contemplated by section 14.06(4) of the *BIA* only protected receivers from personal liability for environmental obligations, and that receivers remained responsible for performing those obligations to the extent there were funds in the estate. Further, abandonment obligations, whether enforced by the AER through abandonment orders or the LMR licence transfer conditions, were not provable claims in bankruptcy and therefore did not disrupt the *BIA’s* priority scheme. Finally, based on these determinations, the majority concluded that section 14.06(4) of the *BIA* and the Regulatory Regime were not in conflict for the purposes of the paramountcy doctrine.

**Disclaimer by Receivers of Real Property affected by Environmental Conditions or Damage**

Wagner C.J. wrote that section 14.06(4) only provided for one effect of disclaimer, which was that the receiver was not personally liable for complying with an order to remediate the environmental condition or damage affecting the disclaimed property. Hence, the subsection was intended only to give receivers comfort that the protections against personal liability found in section 14.06(2) also applied when property was disclaimed. Because they found that the “plain meaning” was based on words that were precise and unequivocal, the plain meaning played a dominant role in the interpretative process.

Wagner C.J. supported this interpretation by referring to extracts from testimony before Parliamentary committees that were examining amendments to section 14.06 before the amendments were enacted. The extracts that Wagner C.J. cited were focused only on personal liability. Based on those extracts, he found that Parliament was concerned with confirming that remediation orders did not create a separate personal liability, but did not want receivers to think that they could avoid the estate’s environmental liability by disclaiming. He concluded, therefore, that even after disclaiming property, the receiver could not “walk-away” from the remediation obligations, and had to perform them before making any distributions to creditors.
Wagner C.J. found that section 14.06(4) provided no greater or different protection than that found in section 14.06(2), and wrote that while a disclaimer does not permit a receiver to “walk-away” from remediation obligations, it might have other purposes. He did not elaborate on what those purposes were.

Based on the finding that receivers remained responsible for remediating disclaimed property, and that the AER was not seeking to impose personal liability on receivers, Wagner C.J. concluded that there was no conflict as between Regulatory Regime’s requirement that the receiver, as licensee, abandon the disclaimed PNG Assets and section 14.06(4) for the purposes of either branch of the paramountcy doctrine. Wagner C.J. did clarify, however, that to the extent that the AER did seek to impose personal liability on receivers outside the narrow exception contemplated by section 14.06(2), there would be a conflict for the purposes of the paramountcy doctrine under both branches.

Justice Côté, in dissenting reasons, wrote that Wagner C.J. did not correctly apply the rule of statutory interpretation, which requires that the words of provisions must be read in their entire context, in their grammatical and ordinary sense, and harmoniously with the scheme and object of the statute and intention of Parliament. Côté J. found that section 14.06(4), by implication, affirmed the common law power of receivers to disclaim property. Further, referring to jurisprudence and academic commentary on the power to disclaim contracts, Côté J. said that disclaimers permitted receivers to better administer estates so as to maximize realizations for the benefit of creditors. If receivers were required to continue to administer, and pay liabilities associated with, valueless, liability laden assets, this would not benefit the estate or the creditors.

Côté J. also pointed out that if the interpretation of Wagner C.J. is correct, a disclaimer under section 14.06(4) would have virtually no purpose, which was contrary to the interpretative rule that Parliament does not speak in vain. In concluding that disclaimers were intended to permit receivers to better administer the estate, Côté J. referred to section 14.06(5), which permits receivers to obtain stays of remediation orders to enable it to assess the economic viability of complying with the order. Such an assessment suggested a purpose of disclaimer beyond protection from personal liability. Further, section 14.06(6) provides that the costs of remediation of disclaimed property cannot rank as costs of administration. Hence, if the receiver remains responsible for remediating disclaimed property, it is unclear how, in light of this subsection, it could recover its remediation costs. Finally, Côté J. pointed to other extracts from the Parliamentary record which clearly contemplated that one of the intended effects of a receiver disclaiming property was that it would cease to be responsible for its remediation.

Côté J. therefore concluded that because disclaimers had the effect of insulating receivers from any further obligations with respect to the disclaimed property, and because the inclusion of receivers in the definition of licensee under the Regulatory Regime had the effect of disregarding the disclaimers and imposing those obligations on the receiver, there was an operational conflict with section 14.06(4) for the purposes of the paramountcy doctrine. The purposes of section 14.06(4), which included absolving receivers of responsibility for remediating disclaimed property and protecting receivers from personal liability, were frustrated because the Regulatory Regime disregarded the receiver’s disclaimers and the AER sought to enforce Redwater’s abandonment obligations against GTL.
Abitibi test for determining whether Regulatory Obligations are Provable Claims

Wagner C.J. acknowledged that if the remediation obligations were provable claims for the purposes of the BIA, then requiring the receiver to satisfy them before making distributions to any other creditors would result in a conflict for the purposes of both branches of the paramountcy doctrine. He noted, however, that not all regulatory obligations are provable claims for the purposes of the BIA. This is a crucial distinction because if an obligation is a provable claim, then it cannot be enforced outside the procedures contemplated by the BIA, and can only be paid in accordance with the BIA’s priority scheme. Under the BIA, if environmental remediation obligations are provable claims, then unless they are secured under section 14.06(7), they are ordinary, unsecured claims under section 141 of the BIA. Section 14.06(7) does create a first ranking security for the Crown’s remediation costs, but the security is limited to the affected real property and contiguous property involved in the activities giving rise to the environmental conditions and damage. There is no general, prior ranking charge against all of a debtor’s assets.

The test for determining whether environmental regulatory obligations are provable claims was first set out in Abitibi. Justice Deschamps, writing for the majority in Abitibi, set out a three-pronged test, under which she concluded that a regulatory obligation could be a provable claim if it satisfied the following requirements:

1. there must be a debt, a liability or an obligation to a creditor;
2. the debt, liability or obligation must be incurred as of a specific time; and
3. it must be possible to attach a monetary value to the debt, liability or obligation.

According to Deschamps J., the first prong was satisfied when a regulator exercised enforcement powers against a debtor. The second prong was relatively straightforward and was satisfied whenever environmental conditions or damage pre-dated the proceedings. The third prong was satisfied that it was sufficiently certain that the regulatory body would carry out the remediation work and thereby have a monetary claim against the debtor. To determine if there was sufficient certainty, Deschamps J. applied the test under the BIA for determining whether contingent claims were provable or were to remote or speculative. Deschamps J. said that the court had to examine the factual context, including whether the debtor was in control of the contaminated property (Abitibi was a proceeding under the Companies’ Creditors Arrangement Act), whether the debtor had the means to remediate the property, and whether other parties could be required to remediate the property. Deschamps J. also said that after examining these factors, the court could also examine the effect that compliance with the remediation order would have on the insolvency process.

With respect to the first prong, Wagner C.J. wrote that Deschamps J.’s conclusion that a regulator would be found to be a creditor whenever it exercised enforcement powers against a debtor was confined to the “unique” facts of Abitibi.\(^{17}\) Otherwise, reasoned Wagner C.J., a regulator would almost always be found to be a creditor. Wagner C.J. determined that a regulator was not a creditor for the purposes of the first prong when it was acting in its

\(^{16}\) RSC 1985, c. C-36, as am.

\(^{17}\) In Abitibi, the lower court concluded that the Province, in making remediation orders, was attempting to create a claim that it could be employed to limit any recovery of the debtor under NAFTA as a result of the expropriation by the government of its property without compensation. The court concluded that the Province was seeking a financial advantage and acting more like a creditor than a disinterested regulator.
regulatory capacity in enforcing public duties in the public interest, and was not attempting to gain a pecuniary advantage or engaging in a colourable attempt to recover a debt.

Applying this reframed first prong, Wagner C.J. found that in ordering Redwater to abandon the disclaimed PNG Assets and requiring GTL to satisfy the associated abandonment obligations as a condition to licence transfers, the AER was acting in its regulatory capacity for the benefit of the public, and not as a creditor seeking a financial benefit. The AER was also not engaging in a colourable attempt to recover a debt.

In her dissenting reasons, Côté J. wrote that there was insufficient reason to change the first prong of the Abitibi test, and that under the majority’s revision, a regulatory body would almost never be found to be a creditor. She also found that the AER, by making the abandonment order and requiring payment of security deposits in respect of abandonment obligations for disclaimed assets as a condition for permitting licence transfers, the first prong was satisfied.

With respect to the third prong, Wagner C.J. concluded that the sufficient certainty requirement was not satisfied because:

(1) it was not certain that the AER would in fact abandon the disclaimed PNG Assets;
(2) the OWA, which would otherwise abandon them, was distinct from the AER;
(3) the evidence was that the OWA would only abandon the orphaned PNG Assets over an extended time period (exceeding a decade) and it was therefore uncertain that such abandonments would ever take place; and
(4) the AER was unlikely to file a claim for the remediation costs in the insolvency proceedings.

These factors were focused on the subjective actions and intentions of the AER, rather than the objective factors that Deschamps J. relied upon in Abitibi. Therefore, the majority also changed the manner in which the third prong was applied from focusing on objective factors to focusing on subjective factors.

In her dissent, Côté J. relied on the factual findings of the Court of Queen’s Bench, which she noted were to be given deference at the appellate level absent some overriding error, which was not apparent. Applying the more objective approach of Deschamps J. in Abitibi, she then concluded that it was sufficiently certain that either the AER or the OWA would carry out the abandonment work and have a provable claim. She rejected the majority’s conclusion that the AER and OWA could be meaningfully distinguished, as the OWA simply exercising powers delegated to it by the AER and was intimately related to the AER.

With respect to the LMR licence transfer conditions, which the AER employed to require security deposits or the performance of abandonment work, Wagner C.J. concluded that they were regulatory in nature and applicable to all licensees, whether or not insolvent. Wagner C.J. stated that the licence transfer conditions ensured that the value of the PNG Assets reflected their inherent abandonment obligations and aligned with the polluter-pay
principle. As such, the AER was simply enforcing regulatory obligations which were public duties and therefore, under the first prong of the revised Abitibi test, the AER was acting in a regulatory capacity and not as a creditor. Since the licence transfer conditions requiring the payment of security deposits or the performance of abandonment work were not provable claims, imposing them did not disrupt the BIA’s priority regime and therefore there was no paramountcy issue.

Côté J., by contrast, concluded that the license transfer conditions had the effect of requiring the payment or performance of Redwater’s abandonment obligations before any other creditors and because the abandonment obligations were provable claims under the Abitibi test, the license transfer conditions impermissibly conflicted with the BIA’s priority regime.

**Impact of the Supreme Court Decision**

The majority decision gives certainty with respect to how environmental remediation obligations are to be dealt with during insolvency proceedings. The decision, however, has created uncertainty by leaving many questions unanswered, which will likely require consultation among important stakeholders in the sector, including the AER, producers, the service industry, lenders and the insolvency professionals.

Practically speaking, disclaimers have limited utility, the AER is able to employ its power over license transfers to control the receivers’ sale processes, and abandonment obligations are outside the bankruptcy system and must be performed before there is any recovery for creditors. Absent pragmatic arrangements between the AER, lenders and receivers going forward that permit insolvent estates to be administered in a commercially reasonable fashion, the ability of insolvency law to address insolvencies in the oil and natural gas sector will be constrained.

While it is too early to understand the many consequences of the decision, the following are areas of concern to stakeholders in the oil and gas industry:

1. **Regulatory Obligations generally not subject to Bankruptcy Rules.**

   The test for whether a regulatory obligation is a provable claim, as articulated by Wagner C.J., will rarely be satisfied. The requirement to pay a quantified security deposit in order to satisfy LMR licence transfer conditions arguably satisfied Deschamps J.’s version of the test, as she indicated that sufficient certainty did not even have to be considered when the obligation was framed in monetary terms. However, under the re-framed first prong, as long as the regulator is acting in its regulatory capacity for the public benefit, it can require the payment of monetized amounts and that requirement will be outside the bankruptcy system. The only exception to this is when the regulator is either seeking a pecuniary benefit or enforcing a statutory debt enforcement remedy. Since the LMR license transfer system is arguably exactly that, it is unclear when provisions of statutes requiring the
payment of money will be regulatory in nature and when they will be a debt enforcement mechanism. It is also unclear when, absent extraordinarily bad behavior, regulators will be found to not be acting in the public interest.

Even if the first prong is satisfied, by making the third prong much more subjective, the hurdles to satisfying it appear to be more significant. In these proceedings, the third prong was not satisfied because of regulatory delegation, anticipated delay in carrying out remediation work, and the requirement that the regulator advance a claim in the bankruptcy.  

Given the uncertainty described above, lenders and receivers will have difficulty in identifying the rare circumstances where regulatory obligations will be treated by courts as provable claims that are subject to bankruptcy priorities and procedures.

2. **Super-Priority for Regulatory Obligations.**

One of the most important practical consequences of the majority decision is that, in concluding that abandonment obligations and license transfer conditions are not provable claims, and must be performed before distributions are made to creditors, those obligations have in effect a super-priority ranking and are outside the bankruptcy and insolvency procedures and priorities. As such, abandonment obligations appear to rank in priority to secured lenders, lien holders, unsecured creditors, Canada Revenue Agency for employee withholdings, employees for arrears of wages secured by priority charges under the *BIA*, municipalities for property taxes and all of the other persons and entities that Parliament, for policy reasons, has given limited priority rights to in the *BIA*.

In section 14.06(7) Parliament did create a limited, specific priority for environmental remediation costs incurred by the Crown. The majority supported their conclusions by referring to that provision. The priority for remediation obligations resulting from the decision, however, attaches to all assets of the debtor, rather than the assets affected by the environmental conditions and damage and certain contiguous assets. This marks a significant change in priorities that could apply to many other types of regulatory obligations, including those in other natural resource extraction industries.

3. **Quantification of Environmental Obligations.**

While the AER calculates the abandonment liabilities of licensees on a monthly basis, those calculations are perceived to be less than actual abandonment costs. Without conducting extensive due diligence, lenders will have difficulty quantifying their borrowers’ abandonment liabilities for the purposes of determining loan availability. Similarly, receivers may need to conduct significant due diligence on abandonment liabilities before being able to determine the amount available to creditors for distribution.

---

18 The latter factor is problematic because the *BIA* applies to all *provable* claims, whether or not a proof of claim is filed or the claim is ever actually *proven*. In fairness, however, the decision in *Abitibi* supports this requirement.
Generally, the proof of claim procedures in the BIA allow for the quantification of all claims against bankrupt debtors. However, those procedures do not assist in quantifying regulatory obligations because they only apply to provable claims. Therefore, absent a procedure that the AER agrees to for quantifying abandonment obligations, this will remain an important area of uncertainty when lenders are attempting to determine loan availability and receivers are attempting to determine amounts available for distribution.

4. Costs of Administration.

Wagner C.J. did not address the payment of receivership administration costs, including the receiver’s fees and costs, the operating costs incurred during the receivership, the costs of running a sale process, and the receiver’s borrowings pursuant to receivers’ certificates. Certainty on this issue could lead to insolvency professionals requiring indemnities before accepting mandates, but there are indications that the AER is not going to attempt to assert priority over administration costs. Further, although the majority decision is silent on this point, it may be implicit that administration costs can be paid before environmental regulatory obligations because if receivers are to be required to perform those obligations, they must be paid both for doing so and for carrying out the other obligations that must be performed in the course of a receivership.

5. Efficacy of Disclaimers.

Since receivers are protected from personal liability without disclaiming properties affected by environmental conditions and damage, and remain responsible for remediating any disclaimed properties to the extent that there are assets in the estate, the efficacy of disclaimers is limited. Further, because section 14.06(6) does not permit the inclusion of the costs of remediating disclaimed property in costs of administration, until this apparent inconsistency is resolved by the courts, there may be risk to receivers in disclaiming properties requiring remediation. The decision, however, without elaborating, speculated that disclaimers may have other effects.

6. Credit Availability.

Credit availability for borrowing base style loans to oil and gas producers is based on the lender’s analysis of the lending value of the borrower’s proven reserves, based on the present value of future revenues from them, less certain production and operating costs. Since it is generally assumed that they are secured in priority to any other obligations, there would have to be a margin reserved for abandonment obligations from the amount available for borrowing. Even if the industry recovers from its current commodity price and market access issues, this will reduce credit availability going forward. Further, the uncertainty discussed above with respect to quantification of abandonment liabilities will complicate the analysis of credit availability. Also, one of the consequences of there not being statutory mandated timelines within which abandonment of non-producing PNG Assets must occur is that it is unclear how the obligations will impact current cash flow and ability to repay loans in the ordinary course. This uncertainty could also negatively affect credit availability.

19 This would presumably include the operating, transportation, builders’ and other statutory liens that the oil and gas service industry rely on.
7. **Chilling Effect on Insolvencies.**

If abandonment obligations exceed the value of a borrower’s assets, lenders may conclude there is no economic benefit in either providing further credit or commencing insolvency proceedings. In that event, unless arrangements can be made with the AER, the borrower’s business may simply shut down. If the cessation of operations is sudden, producing and operating PNG Assets may simply be left derelict, without procedures being taken to safely suspend them, and the AER might not become aware of the situation for a period of time. This could enhance risks to both the environment and the public, and result in all of the borrower’s PNG Assets becoming orphans. While both the AER and OWA have been concerned that receivers have been typically selling producing PNG Assets and leaving non-producing PNG Assets in the Orphan Well system, those sells at least mitigated the impact on the system.

All of these issues are significant and difficult to resolve absent solutions that balance the interests and risks faced by the stakeholders in the industry including the AER, the provincial and federal governments, the lending community, the oil and gas producers and servicers, and insolvency professionals.

**About the Authors:** Tom Cumming and Caireen E. Hanert are partners in the Restructuring and Insolvency group in Gowling WLG’s Calgary office. Anthony Mersich is an associate in that group. Gowling WLG served as co-counsel to Grant Thornton Limited, the Receiver and Trustee in the Redwater Energy Corporation receivership and bankruptcy proceedings.