Supreme Court of Canada Overturns Alberta Court of Appeal in Orphan Well Association v Grant Thornton Ltd

By the BD&P Energy Group

On May 12, 2015, Redwater Energy Corporation (Redwater), a junior oil and gas company active in Alberta, was put into receivership. Six months later, on October 28, 2015, Redwater entered bankruptcy. While all insolvency proceedings in Canada are subject to judicial supervision, Redwater's journey from the Alberta Court of Queen's Bench to the Supreme Court of Canada has been of particular interest to insolvency, banking, and oil and gas industry professionals. The Redwater proceedings have asked the Courts to determine whether provincial regulations intended to safeguard unpaid abandonment and reclamation obligations (AROs) must give way to the federal bankruptcy regime and, in particular, a trustee's right to enhance the value of a bankrupt's estate by renouncing negatively valued assets for the benefit of creditors and other stakeholders.

Through the Liability Management Rating program, Alberta's provincial oil and gas regulatory regime restricts the ability of energy companies to transfer licenses related to valuable, productive wells if the transferor would be left with unproductive wells burdened with AROs that exceed the deemed value of its remaining assets. Redwater's Receiver and Trustee, Grant Thornton Limited (Grant Thornton), however, relied on the federal Bankruptcy and Insolvency Act (the BIA) to disclaim those of Redwater's assets that it did not view as having any value. This enabled Grant Thornton to sell the productive assets and distribute the net sales proceeds to Redwater's secured creditors. The result was that a significant number of Redwater's unproductive wells were left to the Orphan Well Fund to abandon and remediate. The Alberta Energy Regulator (AER) and Orphan Well Association disputed Grant Thornton's ability to circumvent the provincial regulatory regime by renouncing the unproductive assets, but both the Alberta Court of Queen's Bench and Alberta Court of Appeal determined that Canada's bankruptcy and insolvency regime prevailed in the face of a perceived jurisdictional conflict.

On January 31, 2019—nearly four years after the Redwater saga began—the Supreme Court of Canada has finally staked a position. In a 5-2 split decision that will certainly instigate significant discussion within the insolvency, banking, and oil and gas communities, a majority of the Court overturned both lower court decisions and held that the AER's use of its statutory powers to regulate the oil and gas industry and defray the public cost of unfunded AROs does not conflict with the federal bankruptcy regime. Rather than identifying a conflict, the majority observed that there is an extent to which the AER's role in overseeing asset and license transfers involving distressed companies actually facilitates the purposes of the BIA. As a result, the costs of complying with the abandonment orders that the AER issued to Redwater and its Receiver/Trustee must first come from the funds of the estate before Grant Thornton can distribute the remaining value to Redwater's creditors.

The issues that were before the Court exist at the "untidy intersection of provincial environmental legislation and federal legislation." The Court's analysis is therefore heavily informed by the specific statutory and regulatory schemes at issue and the various interpretive questions that arise. In deciding this case as it did, the majority affirms that provincial regulatory regimes can, and arguably should, coexist with federal laws up to the point that the provincial scheme creates a clear and genuine conflict with a federal law.

We will continue to review the Court's written judgment and assess its broader implications. Please stay tuned for our more detailed analysis of this highly significant decision.
This bulletin is intended as general information only and is not to be taken as legal advice. If you require additional information please contact the authors or any member of our Energy Group.

1 2019 SCC 5 [Redwater].
2 Redwater at para 67