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THE SUPREME COURT WEIGHS IN ON RECEIVER'S OBLIGATIONS FOR ORPHAN WELLS

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The decision of the Supreme Court of Canada on January 31, 2019 in *Orphan Well Association v Grant Thornton Ltd.* 2019 SCC 5 could make it much tougher for the oil and gas industry to raise money from major banks. The Court's reasons mark a continuing trend in Canadian constitutional law to harmonize provincial and federal laws by imposing a rigid test for the application of federal paramountcy. At the same time though, the decision exposes the competing public policy interests at stake in protecting the environment and public safety and the rights and interests of secured creditors.

Background of the Litigation

A receiver appointed to liquidate the assets of an oil producer in the Province of Alberta sought to sell the producer's most profitable oil wells, leaving outstanding the responsibility for the abandonment and reclamation of the rest. The Alberta Energy Regulator issued orders under *Alberta's Oil and Gas Conservation Act and Pipeline Act* preserving the environment and public safety for licensed wells which the receiver renounced. The Regulator and the Orphan Well Association, an independent not- for-profit to which the Regulator had delegated authority for improperly abandoned and un-reclaimed or 'orphan' wells', filed an application with the Court that the receiver's renunciation was void and further for orders requiring the receiver to fulfill the end-of-life obligations in relation to all the bankrupt's assets up to the value of the assets remaining in the estate. The receiver in a cross-application sought approval to pursue a sales process excluding the renounced assets and an order that the Regulator could not block the transfer of the licences for the assets it had retained.

The Courts Below

The Court of Appeal agreed with the receiver and held that the use of the Regulator's powers under provincial law during bankruptcy conflicted with the federal *Bankruptcy and Insolvency Act* upending the priority scheme for distribution of the bankrupt's assets by requiring provable claims of the Regulator, an unsecured creditor, to be paid ahead of the claims of the bankrupt's secured creditors.

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The Supreme Court of Canada

On appeal, the Court reversed this decision. It concluded that the Bankruptcy Act did not empower the receiver/trustee to walk away from all responsibilities, obligations and liabilities with respect to the renounced assets. It did offer personal protection to the trustee without affecting the environmental liability of the bankrupt estate. In the trustee's capacity as the "licensee" it remained responsible for abandoning the renounced assets. Similarly, there was no operational conflict caused by the inclusion of the end-of-life liabilities associated with the renounced assets in the determination of whether the licence transfer would be approved by the Regulator.

Of greater interest though, is the Court's characterization of the role of the Regulator and how its role does not pit the provincial laws against the priority claims under the federal Bankruptcy Act. The Regulator, acting in the public interest in issuing the Abandonment Orders and enforcing its requirements was not a creditor.

> "...It is the public, not the Regulator or the General Revenue Fund, that is the beneficiary of those environmental obligations; the province does not stand to gain financially from them."(at 122)

Significantly though, the Court expressly declines to include cases when the Regulator performs environmental work itself. "*I leave such situations to be addressed in future cases in which there are full factual records.*" (at 135) With respect to anticipated abandonment and reclamation work by the Regulator or its delegate, the Court found on the facts that "*The Regulator is not in the business of performing abandonments.*" (145) With respect to its delegate Orphan Wells Association, the Court took note of the mounting backlog of abandoned wells and found that there was no particular high priority for the renounced assets to be addressed in this backlog. (at 151) Therefore, even if the Regulator had acted as a creditor in issuing the Abandonment Orders, it couldn't be said "with sufficient certainty that it would perform the abandonments and advance a claim for reimbursement." (at 154)