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The Supreme Court on Federalism, Bankruptcy and Maritime Law

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The Supreme Court on Federalism, Bankruptcy and Maritime Law

Stephanie Ben-Ishai

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I. INTRODUCTION

The Supreme Court of Canada’s 2019 decisions *Orphan Wells*¹ and *Desgagnés*² both have important implications for the application and practice of bankruptcy law and maritime law, respectively. In both cases, the Court found no conflict between the federal and provincial legislation at issue. Both decisions have provoked significant academic- and practitioner-led critiques, and have illustrated key themes within the division of power analysis in the private law context.

This short article will begin by providing a summary of each case, an overview of the commentary following the decision and a discussion of the subsequent judicial application of the decision. Following this, the key themes that the decisions highlighted, both individually and jointly, will be examined. This discussion will include an assessment of how conflicts between federal and provincial schemes are managed in a private law context, the impact of choice of law clauses, as well as the implications of the public interest and its influence on the priority of creditors. The article will conclude with a comment on federalism in a private law context and will identify the practices in secured lending impacted by these decisions that are worth monitoring going forward, especially in the context of recent Supreme Court of Canada case law on third party litigation funding.

II. THE ORPHAN WELLS DECISION

1. Overview

The majority held that there was no conflict between the *Bankruptcy and Insolvency Act*³ and the provincial environmental remediation regime by narrowing the “creditor” prong of the *Abitibi*⁴ test. The dissent concluded that there was an

¹ *Orphan Well Assn. v. Grant Thornton Ltd.*, [2019] S.C.J. No. 5, 2019 SCC 5 (S.C.C.) [hereinafter “*Orphan Wells*”].

² *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, [2019] S.C.J. No. 58, 2019 SCC 58 (S.C.C.) [hereinafter “*Desgagnés*”].

³ R.S.C. 1985, c. B-3 [hereinafter “BIA”].

⁴ *Newfoundland and Labrador v. AbitibiBowater Inc.*, [2012] S.C.J. No. 67, 2012 SCC 67, at para. 26 (S.C.C.) [hereinafter “*Abitibi*”]. The three-prong test in *Abitibi* determines when environmental obligations imposed by a regulator are considered a provable claim for the purpose of the BIA. It requires that first there must be a debt or liability to a creditor. Second, that this debt or liability is incurred prior to the debtor becoming bankrupt. Third, that it is possible to attach a monetary value to the debt or liability.

operational conflict which would engage the paramountcy doctrine, and that the *Abitibi* test should not be modified. Justice Moldaver, who signed on to the majority in *Abitibi*, co-wrote the dissenting opinion in this case.

2. Factual History and Legal Issues

Redwater Energy Corporation (“Redwater”) was an oil and gas company that owned dozens of oil wells throughout Alberta. Most of these wells were no longer operating and required expensive environmental clean-up.⁵ Redwater encountered financial difficulties. Redwater’s receiver, Grant Thornton Limited (“Grant Thornton”), was told by the Alberta Energy Regulator (“Regulator”) that it would need to meet Redwater’s end-of-life obligations⁶ for the defunct wells. Until this work was done, the Regulator would not transfer any of the licences for Redwater’s profitable assets.⁷ Grant Thornton disclaimed the unprofitable wells, believing that it would eliminate the resulting environmental liabilities.⁸ Grant Thornton argued that in the conflict between secured creditors and the Regulator’s environmental requirements, the paramountcy doctrine should preserve the rights of secured creditors. This position was contested by the provincial regulators intervening in the case.

3. Majority Analysis (Wagner C.J.C., Abella, Karakatsanis, Gascon and Brown JJ.)

Grant Thornton highlighted two conflicts between the provincial regime and the BIA that ought to engage paramountcy. First, trustees are included as licensees in the provincial legislation. Trustees can be released from environmental liability under the BIA,⁹ but licensees are required to satisfy statutory end-of-life obligations. Grant Thornton’s concern stemmed from the possibility that it would be held personally liable to remediate the wells as a licensee, something that is precluded by the BIA.¹⁰

Second, Grant Thornton asserted that the Regulator’s use of its statutory powers to discharge environmental liabilities have the same priority of unsecured claims. These claims cannot be satisfied prior to secured claims by creditors under the BIA; *i.e.*, the Regulator does not have super priority.¹¹ In response, the Regulator suggested that a proper application of the *Abitibi* test demonstrates that “*environ-*

⁵ *Orphan Wells*, at para. 48.

⁶ Statutory end-of-life obligations are duties prescribed to licensees that require the plugging of oil wells to prevent leaks, the dismantling of surface structures and restoration of the surface to its previous conditions. Licensees must accept these conditions in order to obtain licences. *Orphan Wells*, at para. 16.

⁷ *Orphan Wells*, at para. 19.

⁸ *Orphan Wells*, at paras. 51-52.

⁹ *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 14.06(1.2).

¹⁰ *Orphan Wells*, at para. 69.

¹¹ *Orphan Wells*, at para. 70.

mental obligations are not provable claims in bankruptcy”¹² and therefore it would not be a creditor.

The Court concluded that there was no operational conflict or frustration of the BIA’s purpose. The priority scheme was unaffected as the Regulator’s claims were not provable under the *Abitibi* test.

(a) Conflict between the BIA and the Provincial Scheme

The Court held that there was no conflict or frustration of purpose between the BIA and the provincial scheme.¹³ Section 14.06 of the BIA refers to the personal liability of a trustee, as evidenced by consistent references made in both official languages.¹⁴ The *trustee* is protected from personal liability for environmental damages that arise prior to their appointment. However, the *bankrupt estate* remains responsible for any outstanding environmental liabilities.¹⁵ Grant Thornton could not prove a conflict because the Regulator had not held them personally liable.¹⁶ The provincial scheme had been in place for 20 years, and no trustee, including Grant Thornton, had been held personally liable by the Regulator for clean-up costs.¹⁷ The Court disagreed that this hypothetical conflict justified its intervention given the restraint the paramouncy doctrine requires.¹⁸

(b) Provable Claims and *Abitibi*

In *Abitibi*, the Court established a three-part test to determine when environmental obligations imposed by a regulator are considered a provable claim for the BIA: “First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation.”¹⁹

The Court held that the second branch of the *Abitibi* test was satisfied here, as there was no doubt as to whether the environmental liabilities were incurred before Redwater went bankrupt. An analysis of the first and third branches of the test was then undertaken.²⁰

In determining whether a debt or liability to a creditor existed, the majority

¹² *Orphan Wells*, at para. 70.

¹³ *Orphan Wells*, at para. 77.

¹⁴ *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 14.06(1.2).

¹⁵ *Orphan Wells*, at paras. 88, 93, 98, 99.

¹⁶ *Orphan Wells*, at para. 103.

¹⁷ *Orphan Wells*, at paras. 111-113.

¹⁸ *Orphan Wells*, at para. 105.

¹⁹ *Newfoundland and Labrador v. AbitibiBowater Inc.*, [2012] S.C.J. No. 67, 2012 SCC 67, at para. 26 (S.C.C.) [emphasis in original].

²⁰ *Orphan Wells*, at para. 120.

narrowed the definition of “creditor” in the first prong of the test. The Court clarified that *Abitibi* should not stand for the proposition that a regulator is always a creditor when enforcing statutory obligations upon a debtor.²¹ The regulator acted in the public interest through issuing its orders and enforcing requirements. The Court found that the public was the beneficiary of these actions and that the province did not stand to gain financially from the orders.²² As a result, the Court concluded that the first prong of the *Abitibi* test was not met and that the Regulator was not a creditor. Despite the Regulator conceding that it was a creditor at a lower court, the Supreme Court was willing to disregard the Regulator’s concession citing that “concessions of law are not binding on this Court”.²³

The “monetary value” step outlined in the third prong of the *Abitibi* test is generally referred to as the “sufficient certainty” test. The Court clarified that as the Regulator was not a creditor, it need not perform this part of the analysis, but proceeded to demonstrate how its analysis differed from the lower courts.²⁴ The Regulator suggested that the courts below erred and went beyond the test to determine whether the Regulator’s obligations were intrinsically financial.²⁵ Rather, the focus of the analysis ought to have been on whether the Regulator would “perform the environmental work and assert a monetary claim for the reimbursement”.²⁶ The Court found that the Regulator was not in the business of remediating abandoned wells, but rather that this was the obligation of the licensee.²⁷

The Orphaned Wells Association (“OWA”) is a non-profit organization with its own mandate and board that operates as an independent entity at arm’s-length with the province.²⁸ This organization performs environmental remediation for orphaned wells with a large backlog of projects. The OWA relies on its own risk assessment tools to determine when and how it will perform environmental work on orphaned wells. Further, given the decade-long backlog — which continues to worsen — in performing environmental work on orphaned wells, it is unlikely that a financial claim would materialize before the estate was finalized and discharged.²⁹ Thus, the sufficient certainty test would not be met. The Court concluded that the Regulator and the OWA are not “inextricably intertwined” as the dissent suggests, and that even if they were, the sufficient certainty test cannot be satisfied.

²¹ *Orphan Wells*, at para. 122.

²² *Orphan Wells*, at para. 122.

²³ *Orphan Wells*, at para. 125.

²⁴ *Orphan Wells*, at para. 139.

²⁵ *Orphan Wells*, at para. 121.

²⁶ *Orphan Wells*, at para. 121.

²⁷ *Orphan Wells*, at para. 145.

²⁸ *Orphan Wells*, at para. 148.

²⁹ *Orphan Wells*, at para. 153.

The conclusion of the *Abitibi* test revealed that the end-of-life obligations binding on Grant Thornton are not provable in the bankruptcy and therefore do not conflict with the priority scheme outlined in the BIA.³⁰ The Court went further to state that “[b]ankruptcy is not a licence to ignore rules”³¹ and that insolvency professionals must comply with provincial laws during bankruptcy, such as fulfilling non-monetary obligations binding on a bankrupt estate. Consequently, the Court allowed the appeal and concluded that there was no conflict between Alberta’s regulatory regime and the BIA, and so no provisions of the regulatory regime would be rendered inoperative.³²

4. Dissenting Analysis (Côté and Deschamps JJ.)

The dissent disagreed with the majority’s analysis and found that there was a conflict between the statutes. It also held that the Regulator had a provable claim because it was a creditor and the required remediation work for the orphaned wells would likely be performed by either itself or the OWA.

(a) *Operational Conflict*

The dissent held that there was an operational conflict stemming from an interpretation of section 14.06(4) that differed from the majority’s analysis. It argued that the majority’s interpretation of section 14.06 as a whole relied on a literal or “plain-meaning” interpretation that would be inconsistent with the modern principles of statutory interpretation.³³ Relying on Hansard evidence, it found that the drafters intentionally did not require the trustee to use the estate’s assets to comply with environmental remediation orders.³⁴ A broader analysis of the provisions around section 14.06(4) also supports the trustee’s right to disclaim property in the face of environmental orders.³⁵ In short, it concluded that Grant Thornton validly disclaimed the unprofitable wells, and that the subsequent remediation orders presented a conflict. Further, the dissent held that the order conditions on transferring the licences effectively did impose personal liability on Grant Thornton. The value of the estate could not meet the cost of the remediation, and additional funds could not be obtained without selling the estate’s profitable assets, which the Regulator prevented until the remediation had taken place.³⁶

(b) *Provable Claims and Abitibi*

Unlike the majority, the dissent arrived at a different conclusion for the first prong

³⁰ *Orphan Wells*, at para. 159.

³¹ *Orphan Wells*, at para. 160.

³² *Orphan Wells*, at para. 162.

³³ *Orphan Wells*, at paras. 218-221.

³⁴ *Orphan Wells*, at paras. 202-206.

³⁵ *Orphan Wells*, at paras. 207-213.

³⁶ *Orphan Wells*, at paras. 227-230.

of the *Abitibi* test and reasoned that the Regulator was in fact a creditor. The dissent reasoned as follows:

Redwater owes a debt to [the Regulator], ... and [the Regulator] has attempted to enforce that debt by issuing the Abandonment Orders, which require Redwater to make good on its obligation. If Redwater (or [Grant Thornton], as the receiver and trustee) does not abide by those orders — to the detriment of the estate's other creditors — it can be held liable under provincial law. This is, by any definition, an exercise of enforcement power, which is precisely what *Abitibi* describes. In fact, [the Regulator] itself conceded this point *twice* — first before the Court of Queen's Bench, and again at the Court of Appeal (chambers judge reasons, at para. 164; C.A. reasons, at para. 73).³⁷

The dissent rejected the argument that a regulator can only be considered a creditor when acting in the public interest.³⁸ Instead, it found that the broad definition of a creditor, as advanced in *Abitibi*, was appropriate and the Court should let the provable claim standard stand. Under the reformulated test, the dissent goes further to say that it is impossible to find a regulator to be a creditor if it is acting in the public interest beyond the very narrow facts of *Abitibi*.³⁹ The dissent concludes that this first prong is in fact met, and that the Court is too easily overturning its recent precedents with its decision.⁴⁰

To the third prong, the dissent held that it was sufficiently certain that the remediation work would be performed by either the Regulator or the OWA.⁴¹ The non-profit status of the OWA was not persuasive enough to convince the dissent that the OWA was intended to serve another, unrelated purpose to the Regulator. Pointing to the Regulator's ability to appoint members to the OWA's board and the OWA's lack of independence and susceptibility to influence from the Regulator as indicators to suggest with sufficient certainty that the Regulator or the OWA would complete the remediation work.

Ultimately, the dissent concluded that proceeding with the remediation orders effectively wipes out the estate's remaining value and leaves its creditors (save the Regulator) without any form of recovery.⁴² The dissent reminded the Court that in the exercise of statutory interpretation, its goal is to interpret law and not policy.⁴³

III. RESPONSE TO THE *ORPHAN WELLS* DECISION

1. Commentary

³⁷ *Orphan Wells*, at para. 238 [emphasis in original].

³⁸ *Orphan Wells*, at para. 239.

³⁹ *Orphan Wells*, at para. 248.

⁴⁰ *Orphan Wells*, at para. 252.

⁴¹ *Orphan Wells*, at para. 255.

⁴² *Orphan Wells*, at para. 289.

⁴³ *Orphan Wells*, at para. 290.

(a) Effects on Secured Lending

The most consistent and “loudest” response from the commentary that followed *Orphan Wells* was that the decision would be detrimental for secured lenders. One such analysis described the decision as “a blow to secured lenders and creditors”.⁴⁴ In circumstances where a company’s end-of-life obligations exceed the liquidation value of the estate, there would be little incentive for a secured creditor to seek recovery at all as it would merely lead to further economic losses arising from pursuing its outstanding balances.⁴⁵ Traditional lending practices to oil and gas companies may potentially be upended due to this decision. Kashuba, Fougere and Makowsky suggest this decision increases the difficulty for oil and gas companies to survive because lenders would require larger financial reserves for environmental remediation.⁴⁶ Lenders may also take a more active role in overseeing their debtor companies and scrutinizing processes and decisions in hopes of preserving recovery of their capital.

However, initial comments from the Canadian Association of Petroleum Producers and the Explorers and Producers of Canada indicate that they do not anticipate that the decision will cause challenges.⁴⁷ Instead, both small and large energy producers maintain that this decision restores the balance between obligations to the environment and creditor interests. It is also possible that the decision could help foster a secondary market for environmental financing, which currently does not exist in Canada.⁴⁸

(b) Polluter Pay, or Third Party Pay?

This decision prompts a transition from a “polluter pay” principle to a “third party

⁴⁴ Saad Gaya, “*Orphan Well Association v. Grant Thornton Ltd: Constitutional Doctrines Applied to Cleaning up Old Oil Wells*” *The Court.ca* (April 5, 2019), online: <www.thecourt.ca/orphan-well-association-v-gtl-constitutional-doctrines-applied-to-cleaning-up-old-oil-wells/>.

⁴⁵ Sean F. Collins, Walker W. MacLeod & Kimberly J. Howard, “Redwater – SCC Delivers the Final Word” *McCarthy Tétrault* (February 4, 2019), online: <www.mccarthy.ca/en/insights/blogs/restructuring-roundup/redwater-scc-delivers-final-word>.

⁴⁶ Kyle Kashuba, Kevin A. Fougere & Tanis Makowsky, “SCC Says Orphan Wells Cannot be Ignored” *Torys* (February 4, 2019), online: <www.torys.com/insights/publications/2019/02/scc-says-orphan-wells-cannot-be-ignored>.

⁴⁷ Tracy Johnson, “Supreme Court Rules Energy Companies Must Clean up Old Wells – Even in Bankruptcy” *CBC News* (January 31, 2019), online: <www.cbc.ca/news/business/supreme-court-redwater-decision-orphan-wells-1.4998995>.

⁴⁸ Dale Smith, “SCC Decision Will Impact Provincial Regulators” *Law Times* (May 29, 2019), online: <www.lawtimesnews.com/practice-areas/litigation/scc-decision-will-impact-provincial-regulators/263544>. See also *Orphan Wells*, at para. 290 (the Canadian Bankers’ Association noted that upfront bonding for environmental obligations was becoming common in the United States).

pay” system.⁴⁹ The dissent goes further to note that this becomes a “lender-pays regime”.⁵⁰ Such a transition references the opportunities for underfunded energy companies with large outstanding environmental liabilities to shirk these obligations upon bankruptcy. The cost of these environmental liabilities are ultimately borne by the company’s creditors. However, Professor Girgis rejects this assertion.⁵¹ She instead suggests that this decision serves to remind creditors that there are now additional factors to consider prior to making the decision to lend.⁵² However, this calculation can only be made if the priorities in bankruptcy are clear and static.⁵³ Ultimately, the shift to a third party pay system is a nod to a super priority status attributed to regulators in matters of environmental contamination and resulting liabilities. Markets favour stability and predictability, and this decision signifies additional concerns that lenders must consider before extending funds.

(c) Potentially Negative Consequences for Licensed Insolvency Trustees in Bankruptcy

Other commentators also speculated that the decision would act as a disincentive for insolvency professionals from taking on cases with substantial environmental liabilities.⁵⁴ Based on this ruling, there is also the possibility for increased administrative expenses to ensure that obligations and outstanding environmental liabilities are addressed prior to the estate’s assets being distributed.⁵⁵ The decision has demonstrated that the Regulator was able to obtain funds to cover the remediation of the orphan wells, effectively receiving the value of the assets and

⁴⁹ *Orphan Wells*, at para. 291.

⁵⁰ *Orphan Wells*, at para. 291.

⁵¹ Jassmine Girgis, “Lessons from *Redwater*: Discard the *AbitibiBowater* Test and Legislate Super Priority for the Regulator” *ABlawg* (March 1, 2019), online: <www.ablawg.ca/2019/03/01/lessons-from-redwater-discard-the-abitibibowater-test-and-legislate-super-priority-for-the-regulator/>.

⁵² Jassmine Girgis, “Lessons from *Redwater*: Discard the *AbitibiBowater* Test and Legislate Super Priority for the Regulator” *ABlawg* (March 1, 2019), online: <www.ablawg.ca/2019/03/01/lessons-from-redwater-discard-the-abitibibowater-test-and-legislate-super-priority-for-the-regulator/>.

⁵³ Jassmine Girgis, “Lessons from *Redwater*: Discard the *AbitibiBowater* Test and Legislate Super Priority for the Regulator” *ABlawg* (March 1, 2019), online: <www.ablawg.ca/2019/03/01/lessons-from-redwater-discard-the-abitibibowater-test-and-legislate-super-priority-for-the-regulator/>.

⁵⁴ Saad Gaya, “*Orphan Well Association v. Grant Thornton Ltd*: Constitutional Doctrines Applied to Cleaning up Old Oil Wells” *The Court.ca* (April 5, 2019), online: <www.thecourt.ca/orphan-well-association-v-gtl-constitutional-doctrines-applied-to-cleaning-up-old-oil-wells/>.

⁵⁵ Kyle Kashuba, Kevin A. Fougere & Tanis Makowsky, “SCC Says Orphan Wells Cannot be Ignored” *Torys* (February 4, 2019), online: <www.torys.com/insights/publications/2019/02/scc-says-orphan-wells-cannot-be-ignored>.

leaving none to creditors. With this trend, it has also been suggested that trustees and lawyers may be more aggressive in obtaining indemnities for their fees before agreeing to represent these clients. This would ensure that they need not litigate to get paid in situations where the value of remediation exceeds the value of the estate.⁵⁶

(d) *Uncertainty Continues for the Abitibi Test*

Richard Butler argues that far from clarifying the *Abitibi* test, the decision in *Orphan Wells* only continues the uncertainty.⁵⁷ He posits that sufficient certainty of government action could be achieved in two ways: the government actually undertakes or plans to do the work, or through implication as the remediator of last resort.⁵⁸ The dissent found sufficient certainty that the wells would be remediated by the government, either by the Regulator or the OWA. Butler argues that this finding undercuts the point of *Abitibi*, negates the need for the three-part test and runs contrary to the principles of cooperative federalism.⁵⁹ “No realistic alternatives mean that any regulator orders, with monetary consequences, themselves become a sufficient basis for a Crown claim provable and constitutional conflict. The sufficient certainty step may as well have been skipped altogether”.⁶⁰ This interpretation belies the suggestion that the provincial government set up and funded a mechanism, *i.e.*, the OWA, specifically to remediate the orphan wells.

(e) *Effect on the Number of Orphan Wells*

It is also possible that the decision could ironically result in more orphan wells despite its policy intentions. This concern was highlighted by Côté J. in her dissenting reasons.⁶¹ If insolvent companies cannot pass on their remediation obligations through the insolvency process, the wells will remain orphans and become the responsibility of the OWA.⁶² This could apply even to valuable, still-operational wells, since their licence cannot be transferred without the company’s other wells being remediated. The result will be semi-operational wells

⁵⁶ See Erin D. Farrell, Jessica E.M. Boily & Haddon Murray, “Third Time’s a Charm for Alberta Regulator: How the SCC Decision in Redwater Could Change the Role of Environmental Orders in Ontario Insolvency Proceedings” *Gowling WLG* (March 5, 2019), online: <gowlingwlg.com/en/insights-resources/articles/2019/redwater-could-change-environmental-orders-ontario/>.

⁵⁷ Richard Butler, “Understanding *Redwater*” (2019) 34:3 B.F.L.R. 461.

⁵⁸ Richard Butler, “Understanding *Redwater*” (2019) 34:3 B.F.L.R. 461, at 471.

⁵⁹ Richard Butler, “Understanding *Redwater*” (2019) 34:3 B.F.L.R. 461, at 472.

⁶⁰ Richard Butler, “Understanding *Redwater*” (2019) 34:3 B.F.L.R. 461, at 472.

⁶¹ *Orphan Wells*, at para. 221.

⁶² Sean F. Collins, Walker W. MacLeod & Kimberly J. Howard, “Redwater – SCC Delivers the Final Word” *McCarthy Tétrault* (February 4, 2019), online: <www.mccarthy.ca/en/insights/blogs/restructuring-roundup/redwater-scc-delivers-final-word>.

becoming orphaned as a function of the company being unable to obtain licences due to outstanding orphans.

(f) *The Decision Could Increase Regulatory Enforcement*

Some observers have suggested that enforcement may become more aggressive, since the decision makes it easier to enforce environmental remediation orders.⁶³ As one law firm put it, “regulators may intervene earlier while there is still a business to save”.⁶⁴ Further, it is also less likely that governments will pursue the directors and officers of insolvent corporations with environmental liabilities as trustees step into the role of fulfilling outstanding environmental obligations.⁶⁵ There has also been discussion about whether the decision will have a broader application than just for orphaned wells, while others claim that this sort of issue is unique to Alberta.⁶⁶ Additionally, an argument can be made that the clarification of the *Abitibi* test makes it easier for provincial environment ministries to enforce the “polluter pay” principle beyond bankruptcy given the new level of attention provided by officers and directors.⁶⁷ However, the unique statutory matrix surrounding orphan wells may limit the decision’s application in other commercial circumstances, let alone under other provincial regimes.⁶⁸

(g) *Subsequent Judicial Treatment*

Since the *Orphan Wells* decision was released at the beginning of 2019, it has been cited by the courts 33 times (as of February 22, 2020). Fourteen of these cases arose from a single proceeding at the Trademarks Opposition Board. The majority of other cases referenced *Orphan Wells* in relation to paramourncy, though others

⁶³ Holly Sherlock & Talia Gordner, “Environmental Obligations Cannot Be Ignored Even in Bankruptcy: *Orphan Wells Association v. Grant Thornton Ltd.*” *McMillan* (February 2019), online: <www.mcmillan.ca/Environmental-Obligations-Cannot-be-Ignored-Even-in-Bankruptcy-Orphan-Wells-Association-v-Grant-Thornton-Ltd>.

⁶⁴ Maurice Fleming, Harriette E. Codrington & Bonnie Fish, “The Tides Have Turned with Redwater: Provincial Environmental Obligations Have Priority Over Secured Creditors in a Bankruptcy” *Fogler Rubinoff* (February 5, 2019), at 3, online: <foglers.com/uploads/press/file/655/Bankruptcy-Feb-5.pdf>.

⁶⁵ *Re Northstar Aerospace Inc.*, [2013] O.J. No. 4460, 2013 ONCA 600 (Ont. C.A.).

⁶⁶ Dale Smith, “SCC Decision Will Impact Provincial Regulators” *Law Times* (May 29, 2019), online: <www.lawtimesnews.com/practice-areas/litigation/scc-decision-will-impact-provincial-regulators/263544>.

⁶⁷ Dale Smith, “SCC Decision Will Impact Provincial Regulators” *Law Times* (May 29, 2019), online: <www.lawtimesnews.com/practice-areas/litigation/scc-decision-will-impact-provincial-regulators/263544>.

⁶⁸ Dale Smith, “SCC Decision Will Impact Provincial Regulators” *Law Times* (May 29, 2019), online: <www.lawtimesnews.com/practice-areas/litigation/scc-decision-will-impact-provincial-regulators/263544>.

have cited it to assist in applying the *Abitibi* test,⁶⁹ for statutory interpretation principles and to assess if concessions of law are binding.

The most fulsome discussion of *Orphan Wells* was in a case adjudicating the bankruptcy of Sequoia Resources.⁷⁰ In that case, the Alberta Court of Queen's Bench held that an abandonment and remediation order was not a liability for the purposes of an oppression claim.⁷¹ The result of this finding was to nullify the claim entirely. The Court of Appeal later upheld this analysis.⁷²

IV. THE *DESGAGNÉS* DECISION

1. Overview

The majority in *Desgagnés* held that there was no conflict between the *Civil Code of Québec*⁷³ and maritime law because Parliament had not included express language to oust provincial laws governing contracts. It further held that there was no need to read down the *Civil Code* since the contract for ship engine parts did not engage the core of the federal head of power over shipping and navigation. The concurring analysis differed by characterizing the dispute as fundamentally about property and civil rights, eliminating the need for further constitutional analysis.

2. Factual History and Legal Issues

Wärtsilä was in the business of supplying engine parts for ships. Wärtsilä supplied engine parts for ships to Desgagnés through its Quebec office and negotiated a contract which included a six-month warranty and a clause that limited Wärtsilä's liability to €50,000. The contract specified that the governing law would be that of the location of Wärtsilä's office. After the six-month warranty period, a major ship failure occurred in one of Desgagnés' ships fitted with Wärtsilä's crank shaft. The trial judge concluded that it was Wärtsilä's crankshaft that caused the issue and damage to the ship. She concluded that the dispute was governed by the *Civil Code*. While the dispute related to maritime activities, it was not "integrally connected". The trial judge found that Wärtsilä was responsible for the quantum of the damages, amounting to over \$5.6 million. Upon appeal, the majority of the Quebec Court of Appeal found that maritime law governed the dispute, and therefore Wärtsilä was

⁶⁹ *Newfoundland and Labrador v. AbitibiBowater Inc.*, [2012] S.C.J. No. 67, 2012 SCC 67, at para. 26 (S.C.C.).

⁷⁰ *Sequoia Resources Corp. (Trustee of) v. Perpetual Energy Inc.*, [2019] A.J. No. 1790, (sub nom. *PricewaterhouseCoopers v. Perpetual Energy Inc.*) 2020 ABQB 6 (Alta. Q.B.).

⁷¹ *Sequoia Resources Corp. (Trustee of) v. Perpetual Energy Inc.*, [2019] A.J. No. 1790, (sub nom. *PricewaterhouseCoopers v. Perpetual Energy Inc.*) 2020 ABQB 6, at paras. 218-226 (Alta. Q.B.).

⁷² *Sequoia Resources Corp. (Trustee of) v. Perpetual Energy Inc.*, [2020] A.J. No. 107, (sub nom. *PricewaterhouseCoopers v. Perpetual Energy Inc.*) 2020 ABCA 36, at para. 7 (Alta. C.A.).

⁷³ CQLR, c. CCQ-1991.

able to rely on the limitation of liability clause, with a maximum liability of €50,000.

The main question on appeal to the Supreme Court of Canada was whether the contractual claim was governed by the federal authority over navigation and shipping or the provincial authority over property and civil rights.

3. Majority Analysis (Moldaver, Karakatsanis, Gascon, Côté, Rowe and Martin JJ.)

The majority viewed maritime law as non-statutory law with principles derived from precedent and custom while simultaneously allowing it to be judicially developed unless “supplanted by validly enacted federal legislation”.⁷⁴ In the characterization analysis, the majority examined the pith and substance of the matter. As this analysis had not been conducted for a non-statutory area of law, *i.e.*, maritime law, a slightly different pith and substance analysis was required which focused on the substantive law at issue. The majority characterized the matter as “the sale of marine engine parts intended for use on a commercial vessel”.⁷⁵ They reasoned that the sale of marine engine parts intended for use on a commercial vessel is truly sufficiently connected to navigation and shipping,⁷⁶ but also agreed that the *Civil Code*, specifically pertaining to warranties in contracts of sales, is a valid provincial law in pith and substance that concerns property and civil rights pursuant to section 92(13).⁷⁷

The majority held that the integral connection test for the trade and commerce power should be applied more strictly than for the shipping and navigation power, since there is more risk of federal overreach in trade and commerce issues.⁷⁸ Unlike the concurring opinion, the majority upheld the status quo of different standards for different powers.⁷⁹ The majority then concluded that the supply of marine engine parts is integrally connected to navigation and shipping.⁸⁰ However, it differed from the Court of Appeal, who ended their analysis after also coming to this conclusion.

After conducting a division of powers analysis, the majority held that there was a double aspect to the sale of marine engine parts, but that neither interjurisdictional immunity nor paramountcy applied to these facts.⁸¹ Interjurisdictional immunity did not apply to this situation because there was no precedent for contractual issues

⁷⁴ *Desgagnés*, at para. 18.

⁷⁵ *Desgagnés*, at para. 36.

⁷⁶ *Desgagnés*, at para. 5.

⁷⁷ *Desgagnés*, at para. 48.

⁷⁸ *Desgagnés*, at para. 57.

⁷⁹ *Desgagnés*, at para. 58.

⁸⁰ *Desgagnés*, at paras. 60-80.

⁸¹ *Desgagnés*, at paras. 85, 89.

engaging the core of federal competence over navigation and shipping.⁸² This is in contrast to the discrete and specialized laws applicable to marine negligence, which are required in order to ensure that a consistent body of rules operates at sea.⁸³ Paramountcy also did not apply because of the non-statutory nature of maritime law. The Court could not accept that those largely common law rules could prevail over valid provincial legislation.⁸⁴ Finally, absent “very clear language” to occupy the field exclusively, federal laws will not oust valid provincial ones.⁸⁵ Therefore, there was no genuine conflict between the *Civil Code* and maritime law, and paramountcy could not apply.⁸⁶

4. Concurring Analysis (Wagner C.J.C., Abella and Brown JJ.)

The concurring opinion agreed with the majority that the *Civil Code* properly governed the dispute. However, it differed from the majority on the importance of statutory limits over Parliament’s authority over navigation and shipping.⁸⁷ The concurring judges asserted that the important part of the pith and substance analysis is not if Parliament defined the scope of its legislative authority, but rather if the matter fits into one of its heads of power.⁸⁸ Concluding that the dispute was pith and substance about property and civil rights, it did not conduct an analysis about interjurisdictional immunity or paramountcy.⁸⁹

The concurring opinion also differed from the majority as to whether there should be different tests for different heads of power. The concurrence argued that this would be “a recipe for confusion and inconsistency”.⁹⁰ Despite this divergence, it arrived at the same conclusion as the majority that the shipping and navigation power does not encompass all maritime matters.⁹¹ Interestingly, the concurrence stressed that the decision should not be seen as a comment on whether Parliament would be able to legislate contracts of trade by sea where the dominant matter is not the sale of goods.⁹²

V. RESPONSE TO THE *DESGAGNÉS* DECISION

1. Commentary

⁸² *Desgagnés*, at para. 94.

⁸³ *Desgagnés*, at para. 96.

⁸⁴ *Desgagnés*, at para. 103.

⁸⁵ *Desgagnés*, at para. 105.

⁸⁶ *Desgagnés*, at para. 106.

⁸⁷ *Desgagnés*, at paras. 131-136.

⁸⁸ *Desgagnés*, at para. 140.

⁸⁹ *Desgagnés*, at paras. 159, 179, 189, 192.

⁹⁰ *Desgagnés*, at para. 145.

⁹¹ *Desgagnés*, at para. 149.

⁹² *Desgagnés*, at para. 190.

A major concern with the *Desgagnés* decision is that it chips away at the uniformity of what had previously been considered within the scope of maritime law. This case was not the first to do so. In earlier cases, the Supreme Court indicated that valid provincial laws will be allowed to have incidental effects on the federal head of power, including in maritime law, unless interjurisdictional immunity or paramountcy applied.⁹³ The question then becomes which activities are governed by maritime laws, and which are governed by provincial ones. One commentator highlighted the inconsistency of regulating marine engine parts through maritime law, but the terms and conditions of that sale through provincial law.⁹⁴

An important implication of greater provincial authority is that it may lead to different results depending on where the contract was signed, or if the action was started in a provincial or federal court.⁹⁵ This conclusion is a departure from previous case law concerning maritime law, which emphasized that decisions should be consistent throughout Canada.⁹⁶ This distinction is not merely a theoretical one. Contracts signed in Quebec expressly prevent manufacturers from limiting their liability for latent defects.⁹⁷ Such clauses are permitted elsewhere in Canada.⁹⁸ As a result of this decision, choice of provincial law clauses are expected to become

⁹³ Sean Harrington, “*Transport Desgagnés Inc. v. Wärtsilä Canada Inc.*: A Case Comment” *CMLA* (December 2019), at paras. 33-35, online: <www.cmla.org/papers/Case%20Comment%20on%20Transport%20Desgagnés%20Inc.%20v.%20Wärtsilä%20Canada%20Inc..pdf>.

⁹⁴ Sean Harrington, “*Transport Desgagnés Inc. v. Wärtsilä Canada Inc.*: A Case Comment” *CMLA* (December 2019), at para. 38, online: <www.cmla.org/papers/Case%20Comment%20on%20Transport%20Desgagnés%20Inc.%20v.%20Wärtsilä%20Canada%20Inc..pdf>.

⁹⁵ Sean Harrington, “*Transport Desgagnés Inc. v. Wärtsilä Canada Inc.*: A Case Comment” *CMLA* (December 2019), at para. 36, online: <www.cmla.org/papers/Case%20Comment%20on%20Transport%20Desgagnés%20Inc.%20v.%20Wärtsilä%20Canada%20Inc..pdf>.

⁹⁶ Charles Kazaz & Ian Breneman, “The Little Engine that Couldn’t: SCC Rules on Limitation of Liability for Sale of Ship Engine Parts” *Blakes* (December 4, 2019), online: <www.blakes.com/insights/bulletins/2019/the-little-engine-that-couldnt-scc-rules-on-limita>.

⁹⁷ George J. Pollack, Michael H. Lubetsky & Joseph-Anaël Lemieux, “*Desgagnés Transport v. Wärtsilä Canada*: Canadian Maritime Law Enters Uncharted Waters” *Davies* (December 4, 2019), online: <www.dwpv.com/en/Insights#/article/Publications/2019/Canadian-Maritime-Law-Enters-Uncharted-Waters>.

⁹⁸ Elizabeth Raymer, “Provincial Rather than Maritime Law Applies to Marine Engine Contract: SCC” *Canadian Lawyer Mag* (November 28, 2019), online: <www.canadianlawyermag.com/practice-areas/corporate-commercial/provincial-rather-than-maritime-law-applies-to-marine-engine-contract-scc/323363>.

more common in contracts with a maritime nexus.⁹⁹ It is also possible that Parliament will take up the concurring opinion's call and enact a federal *Sale of Goods Act* that would apply to navigation and shipping.¹⁰⁰

2. Subsequent Judicial Treatment

There has been limited judicial treatment of the *Desgagnés* decision. It has only been cited twice by the courts since the decision was released. One Quebec lower court decision cited it as standing for the proposition that deference should be required in cases raising constitutional questions.¹⁰¹ The second decision was in an application for advice and directions for the *Greenhouse Gas Reference* at the Alberta Court of Appeal.¹⁰²

VI. COMMON THEMES ARISING FROM *ORPHAN WELLS* AND *DESGAGNÉS*

1. Cooperative Federalism, Paramountcy and Interjurisdictional Immunity

Both decisions address the question of how apparent conflicts between federal and provincial schemes should be managed in the private law context. This discussion necessarily led the Supreme Court to review the principles of cooperative federalism, or “flexible federalism” as it was referred to in *Desgagnés*, in each case. Cooperative or flexible federalism recognizes that overlapping powers are unavoidable¹⁰³ in the division of powers between federal and provincial governments. To manage the tension inherent in overlapping jurisdictions, there must be a role for each order of government.¹⁰⁴ This concept is viewed as a guiding, legal principle¹⁰⁵ that develops mechanisms to redistribute powers and resources.¹⁰⁶

⁹⁹ Elizabeth Raymer, “Provincial Rather than Maritime Law Applies to Marine Engine Contract: SCC” *Canadian Lawyer Mag* (November 28, 2019), online: <www.canadianlawyermag.com/practice-areas/corporate-commercial/provincial-rather-than-maritime-law-applies-to-marine-engine-contract-scc/323363>.

¹⁰⁰ Sean Harrington, “*Transport Desgagnés Inc. v. Wärtsilä Canada Inc.*: A Case Comment” *CMLA* (December 2019), at para. 54, online: <www.cmla.org/papers/Case%20Comment%20on%20Transport%20Desgagnés%20Inc.%20v.%20Wärtsilä%20Canada%20Inc..pdf>.

¹⁰¹ *Morin c. Conseil de Bande Kitigan Zibi Anishinabeg*, [2019] J.Q. no 20195, 2019 QCCS 5448, at para. 43 (Que. S.C.).

¹⁰² *Reference re Greenhouse Gas Pollution Pricing Act*, [2019] A.J. No. 1619, 2019 ABCA 470 (Alta. C.A.).

¹⁰³ *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, 2007 SCC 22, at para. 42 (S.C.C.).

¹⁰⁴ *Desgagnés*, at para. 4.

¹⁰⁵ Kate Glover, “Structural Cooperative Federalism” (2016) 76 S.C.L.R. (2d) 45, at para. 7.

¹⁰⁶ P.W. Hogg, *Constitutional Law of Canada*, 5th ed. Suppl. (Toronto: Thomson Carswell, 2007), at 5-46.

The theme emerged in Saskatchewan's factum in the *Orphan Wells* case as a justification for why the federal and provincial regimes should be seen as acting in harmony.¹⁰⁷ Cooperative federalism was also raised in the factums from Alberta, British Columbia and Saskatchewan to argue that a conflict did not exist.¹⁰⁸ Responding to this line of argument, the majority held that cooperative federalism should be used to encourage courts to "avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with provincial legislation".¹⁰⁹ This idea was central to the majority's finding that a hypothetical conflict between statutes was no conflict at all.¹¹⁰

However, the dissenting analysis in *Orphan Wells* held that the majority used cooperative federalism to unduly narrow the scope of the federal law so as to not find a conflict.¹¹¹ Cooperative federalism "supports, rather than supplants the modern approach to statutory interpretation. . . . To rely on judicial restraint, then, to avoid a conflict between a federal and provincial law is to disregard Parliament's express instruction".¹¹² In this particular case, the dissent argued that the majority's interpretation was inappropriate because of language in section 14.06(4) of the BIA which appeared to anticipate and pre-empt a conflict. In short, the majority held that cooperative federalism could be used to eliminate the potential of a conflict, whereas the dissent held that such an interpretation would go too far.¹¹³

The interplay between cooperative federalism and paramountcy was referenced by the majority in *Orphan Wells*. Picking up on *Lemare Lake*,¹¹⁴ the majority indicated that any decision about whether to apply paramountcy "should also give due weight to the principle of co-operative federalism".¹¹⁵ The idea that it should be a restraint on paramountcy was picked up elsewhere in the majority decision.¹¹⁶ It was also raised in *Desgagnés*, where restraint was cited as necessary to avoid the

¹⁰⁷ *Orphan Well Assn. v. Grant Thornton Ltd.*, Factum of the Attorney General of Saskatchewan, at paras. 16-19.

¹⁰⁸ *Orphan Well Assn. v. Grant Thornton Ltd.*, SCC Factum of the Attorney General of Saskatchewan, at paras. 16-19; *Orphan Well Assn. v. Grant Thornton Ltd.*, SCC Factum of the Attorney General of Alberta; *Orphan Well Assn. v. Grant Thornton Ltd.*, SCC Factum of the Attorney General of British Columbia.

¹⁰⁹ *Orphan Wells*, at para. 66.

¹¹⁰ *Orphan Wells*, at paras. 105, 111.

¹¹¹ *Orphan Wells*, at para. 185.

¹¹² *Orphan Wells*, at paras. 185-186.

¹¹³ *Orphan Wells*, at paras. 66, 186.

¹¹⁴ *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, [2015] S.C.J. No. 53, [2015] 3 S.C.R. 419, 2015 SCC 53 (S.C.C.).

¹¹⁵ *Orphan Wells*, at para. 66.

¹¹⁶ *Orphan Wells*, at paras. 76, 105, 111.

erosion of provincial authority.¹¹⁷

In *Desgagnés*, the concept of flexible federalism was raised by the intervener's factum as a reason to favour a constrained approach to interjurisdictional immunity.¹¹⁸ Per the doctrine of interjurisdictional immunity,

the core of exclusive heads of power under the *Constitution Act, 1867*, can be protected from the effects of a law validly enacted by the other order of government (*Canadian Western Bank*, at paras. 33-34; *Rogers*, at para. 59; *COPA*, at para. 26). If the doctrine is found to apply, the impugned provisions remain valid but are declared inapplicable to matters that would fall under the core of the exclusive head of power of the other order of government.¹¹⁹

The cases cited for both interpretations are consistent.¹²⁰ As with paramourcy, described as the provincial law being declared inoperative in instances where valid provincial and federal legislation conflict,¹²¹ both the majority in *Orphan Wells* and the concurrence in *Desgagnés* cautioned against the use of interjurisdictional immunity in the modern conception of federalism.¹²²

2. Defining the Heads of Federal and Provincial Power

The proceedings in both cases also dealt with the question of what is at the core of a constitutionally defined head of power. While ultimately the Supreme Court did not adjudicate on this question in *Orphan Wells*, it was raised by the Attorneys General of Alberta, British Columbia and Saskatchewan in their factums. As an alternative argument, Alberta said that its jurisdiction over natural resources had responsible stewardship of those resources at its core.¹²³ British Columbia's factum used slightly different language, finding that the "development, management and conservation of non-renewable resources" were at the core of the provincial jurisdiction.¹²⁴ Neither factum used a legal framework to arrive at that conclusion,

¹¹⁷ *Desgagnés*, at paras. 48, 57.

¹¹⁸ *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, SCC Factum of the Intervener, Attorney General of Ontario, at para. 8.

¹¹⁹ *Desgagnés*, at para. 90.

¹²⁰ The Court in both cases cited: *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, 2007 SCC 22 (S.C.C.); *Alberta (Attorney General) v. Moloney*, [2015] S.C.J. No. 51, [2015] 3 S.C.R. 327, 2015 SCC 51 (S.C.C.); *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, [2015] S.C.J. No. 53, [2015] 3 S.C.R. 419, 2015 SCC 53 (S.C.C.); *Reference re Pan-Canadian Securities Regulation*, [2018] S.C.J. No. 48, [2018] 3 S.C.R. 189, 2018 SCC 48 (S.C.C.).

¹²¹ *Desgagnés*, at para. 99.

¹²² *Desgagnés*, at paras. 91, 155.

¹²³ *Orphan Well Assn. v. Grant Thornton Ltd.*, SCC Factum of the Attorney General of Alberta, at paras. 70-71.

¹²⁴ *Orphan Well Assn. v. Grant Thornton Ltd.*, SCC Factum of the Attorney General of British Columbia, at paras. 5, 14-17.

instead relying on inference and legislative history. British Columbia's factum also argued that reciprocal interjurisdictional immunity could be adopted in this case because section 14.06 of the BIA is not at the core of the federal jurisdiction over bankruptcy.¹²⁵

What lies at the core of a federal power was discussed in much more detail in *Desgagnés*. The majority applied an integral connection test informed by other case law about the federal government's authority over navigation and shipping.¹²⁶ This test is unique to the federal power over navigation and shipping. The majority acknowledged that it is not as stringent as the test that applies to the trade and commerce power, but held that this area was not at risk for federal overreach.¹²⁷ The concurrence differed with the majority on this point. It held that "applying different tests for different heads of power is a recipe for confusion and inconsistency" that lacked a logical basis.¹²⁸ Its analysis largely sidestepped the issue of defining the core of the federal power by finding that the issue was pith and substance largely one of property rights.¹²⁹

3. When Conflicts Cannot Arise

Both cases also provided examples of where a conflict or frustration of purpose cannot arise for the purposes of paramountcy or interjurisdictional immunity. They are:

- when the conflict is between a statute and non-statutory rules;¹³⁰ and
- theoretical conflicts.¹³¹

Interestingly, factums in both cases raised the silence of the federal government in the dispute.¹³² The factums argued that valid provincial laws should not be invalidated where the federal government does not contest its validity. The federal government did not contest the validity of the provincial laws in either case; however, these cases raise the question of what weight its submissions would have carried had the federal government commented.

¹²⁵ *Orphan Well Assn. v. Grant Thornton Ltd.*, SCC Factum of the Attorney General of British Columbia, at paras. 31, 44, 48.

¹²⁶ *Desgagnés*, at paras. 52-56.

¹²⁷ *Desgagnés*, at paras. 57-58.

¹²⁸ *Desgagnés*, at para. 145.

¹²⁹ *Desgagnés*, at para. 189.

¹³⁰ *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22, 2007 SCC 22, at para. 103 (S.C.C.); *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, SCC Factum of the Intervener, Attorney General of Ontario, at paras. 43-46.

¹³¹ *Orphan Wells*, at para. 111.

¹³² *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, SCC Factum of the Intervener, Attorney General of Ontario, at para. 36; *Orphan Well Assn. v. Grant Thornton Ltd.*, SCC Factum of the Attorney General of Saskatchewan, at paras. 47-49.

VII. CONCLUSION

Both decisions raise important questions for federalism in the context of private law claims and disputes. The decision in *Orphan Wells* has provoked more widespread reaction and further opportunities for judicial consideration. One major challenge going forward will be the application of this decision in a subsequent insolvency situation involving a *Companies Creditors' Arrangement Act*¹³³ proceeding, rather than a BIA proceeding. One commentator speculated that the result may have been different if Redwater had been liquidated through a CCAA proceeding. If the majority's analysis holds and the Regulator is not a creditor, then it would not be able to vote on a CCAA plan. Secured creditors could be enticed to support the plan because they would be able to recover more than if they forced the company into bankruptcy which would allow the Regulator to take a dominant claim.¹³⁴ It also remains unclear how the new apparent super priority for environmental obligations will interact with statutory super priority claims, such as those for the Crown.¹³⁵

It will be important to empirically track if the decision in *Orphan Wells* has in fact had an impact on the way secured lending is taking place and/or the types of indemnities that insolvency professionals and trustees are insisting on in such files. Similarly, it will be important to take note of whether there is a change in the nature of contracts and choice of law clauses that parties are entering into in the maritime context as a result of the *Desgagnés* decision. This empirical data will assist in evaluating the add-on transactional costs imposed by the decisions and could help guide future federalism decisions in the private law context.

Finally, with the Supreme Court's recent decision on third party litigation funding agreements¹³⁶ in the insolvency context, it will be helpful to evaluate the role that access to such funding will play in mitigating risks associated with lending and recovering from a business with potential environmental liabilities. The extent to which the mitigation of such risk is assisted by third party litigation funding may provide more certainty for lenders in this context.

¹³³ R.S.C. 1985, c. C-36 [hereinafter "CCAA"].

¹³⁴ John F. Grieve & Travis P. Lysak, "Secured Creditors Beware: The SCC Surprises the Insolvency World in Redwater" *Fasken* (February 7, 2019), online: <www.fasken.com/en/knowledge/2019/02/secured-creditors-beware-the-scc-surprises-the-insolvency-world-in-redwater/>.

¹³⁵ Maurice Fleming, Harriette E. Codrington & Bonnie Fish, "The Tides Have Turned with Redwater: Provincial Environmental Obligations Have Priority Over Secured Creditors in a Bankruptcy" *Fogler Rubinoff* (February 5, 2019), at 3, online: <foglers.com/uploads/press/file/655/Bankruptcy-Feb-5.pdf>.

¹³⁶ 9354-9186 *Québec Inc. v. Callidus Capital Corp.*, [2020] S.C.J. No. 100, 2020 SCC 10 (S.C.C.).