Intelligence MEMOS

From: Fenner Stewart

To: The Honourable Mr. Justice Clément Gascon

cc: Concerned Albertans

Date: February 7, 2018

Re: **Oil Well Reclamation and the *Redwater* Decision**

Next week, you and other justices of the Supreme Court of Canada will begin hearing arguments in the *Redwater* case. Earlier rulings in this case struck down a central pillar of Alberta's oil-well abandonment scheme, allowing bankrupt companies to avoid their environmental liabilities.

The good news for Albertans – indeed, all Canadians concerned about environmental protection – is that your previous rulings in this area, in particular your ruling in *AbitibiBowater Inc*, hint at the possibility that you may frame the law in a different manner than did the Alberta Court of Appeal in *Redwater*.

The *Redwater* case pits the Alberta Energy Regulator against Grant Thornton, which is the receiver of the bankrupt Redwater Energy Corp. The regulator wants the proceeds from Redwater's valuable oil-well assets to clean up its derelict wells before its creditors receive what remains. Grant Thornton wants all proceeds for the creditors.

Before *Redwater*, Alberta courts upheld a sacred covenant between Albertans and the petroleum industry: an exploration and production company can profit from producing oil and gas from the lands of Albertans so long as the company – not the public – reclaims the land on which it drills.

Since 1991, the precedent set by the *Northern Badger* case has played a critical role in upholding this covenant. As you put it, *Northern Badger* stands for the proposition that "the detached regulator or public enforcer issuing order for the public good," or simply the "disinterested regulator," isn't a creditor for the purposes of the *Bankruptcy and Insolvency Act* (BIA) . Specifically, *Northern Badger* held that the predecessor to the Alberta Energy Regulator was, indeed, such a disinterested regulator, granting it the authority to enforce this covenant when it was most crucial to do so: when an oil and gas company filed for bankruptcy.

By overturning *Northern Badger*, *Redwater* has stripped the regulator of its ability to ensure the public trust in this matter. The Alberta Court of Appeal supposed it had no choice, asserting that the Supreme Court of Canada in *AbitibiBowater* determined that *Northern Badger* could not "survive the 1997 amendments to the BIA." Respectfully, the Supreme Court of Canada did not go so far in *AbitibiBowater*.

Properly interpreted, *AbitibiBowater* does not diminish *Northern Badger*. In *AbitibiBowater*, the Supreme Court prevented Newfoundland from exploiting its legal authority to jump the queue in bankruptcy. Newfoundland acted no better than a deceptive creditor, attempting to frustrate the bankruptcy process and take from deserving creditors under a spurious claim of serving the public interest. By contrast, *Northern Badger* protects the "public enforcer issuing order for the public good." *AbitibiBowater* stands beside *Northern Badger* to protect both the disinterested regulator and the deserving creditor.

Northern Badger failed only to provide the tools to distinguish between the disinterested regulator and the one that merely disguises itself as disinterested to reap an unjust reward. Respectfully, the Alberta Court of Appeal overturned *Northern Badger*, when it should have accepted the challenge of interpreting *AbitibiBowater* in a manner that clarifies this distinction. As argued in my new article, *Redwater* is an opportunity to clarify this distinction. In doing so, you can shepherd the common law, while upholding the public trust on this important issue for Albertans.

For citations of cases, follow the hyperlinks provided on the first reference for each case. For Dr. Stewart's article, see Fenner L. Stewart, "How to Deal with a Fickle Friend? Alberta's Troubles with The Doctrine of Federal Paramountcy" in the *2017 Annual Review of Insolvency Law*.

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