

A photograph of an oil pumpjack in a field under a cloudy sky. The pumpjack is a large, dark metal structure with a long horizontal beam and a vertical rod. It is situated on a concrete foundation in a field of dry, yellow grass. The sky is blue with scattered white clouds. The text is overlaid on a semi-transparent dark rectangle in the center of the image.

# What Has Changed Since The Grant Thornton Case?

*Saturday, May 11<sup>th</sup> 2019*

Dr. Fenner Stewart  
Associate Professor, University of Calgary

# Agenda For Presentation

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1. The Case
2. Energy Federalism
3. Impacts on Practice
4. Trident Exploration Case



# Part 1

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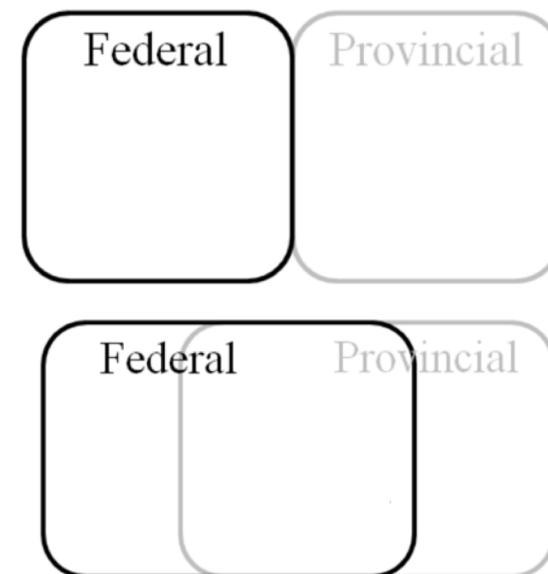
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# Conflicting Laws

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- This case focuses upon 2 regulatory mechanisms:
  1. The Alberta Energy Regulator's (Regulator) mechanism for ensuring that oil and gas well sites are abandoned and reclaimed
  2. The *Bankruptcy and Insolvency Act's* (BIA) mechanism for dictating the priority of creditor's claims in a bankruptcy proceeding



# The Regulator's Mechanism

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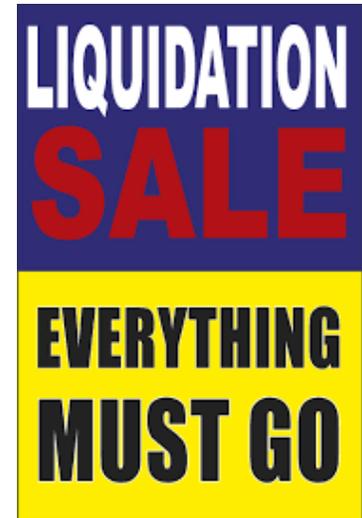
- Does not require a company to issue a performance bond
  - Unless a company's Liability Management Ratio (i.e., the ratio of assets over liabilities) falls below a set standard
- Can, and does, issue abandonment order
  - But the germane regulations do not require that a company abandon and reclaim any given non-producing well within a set time frame



# BIA's Mechanism

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- Allows the trustee, who administers the bankrupt party's estate, to take and sell the bankrupt's valuable well assets to compensate the bankrupt party's creditors
- The proceeds are then distributed to the bankrupt party's creditors according to the set priority for claims



# The Regulator's Mechanism

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- The Regulator does not allow the trustee to take and sell the assets, without doing 1 of 3 things:
  1. reclaiming the bankrupt's value-negative well assets (i.e., value-negative assets);
  2. selling the value-negative assets with the valuable assets; or
  3. posting a security to cover the environmental liabilities.



# Litigation Trigger

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- The Regulator refused to facilitate a sale unless 1 of the requirements were met.
- The trustee refused to accept the Regulator's authority, claiming it ran afoul of the BIA:
  - Trying to collect a debt as a creditor,
  - By using provincial law to jump the BIA's set queue for creditors



# Judicial History

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- The lower courts, the Alberta Court of Queen's Bench and the Court of Appeal of Alberta, agreed with the trustee
  - The Regulator was acting as Newfoundland did in *Newfoundland v. AbitibiBowater*:
    - It was a creditor jumping the queue in bankruptcy.



# The Supreme Court of Canada Holding

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- The SCC overturned these courts, holding that
  - The Regulator was not a creditor, but a disinterested regulator,
  - Who was merely ensuring the bankrupt party complied with its legal obligations.

IN THE PUBLIC  
INTEREST

# Part 2

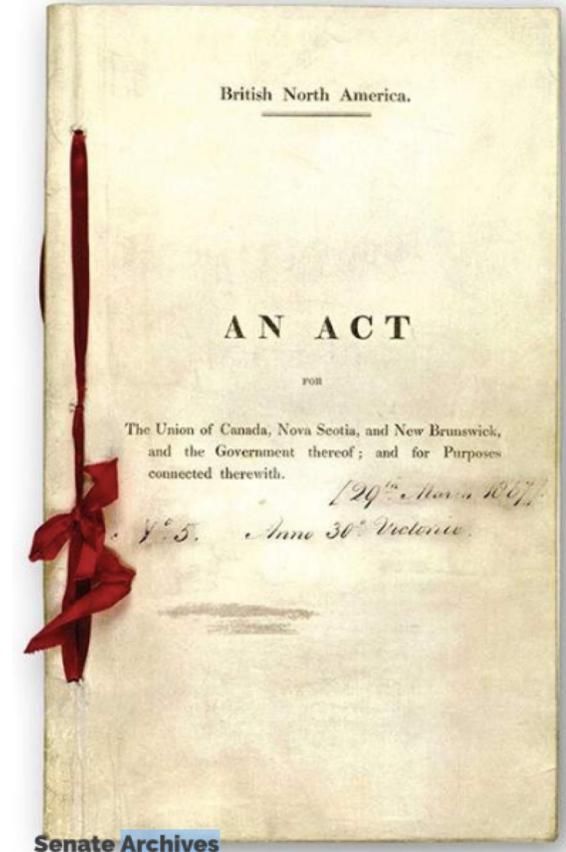
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1. The Case
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# Constitutional Federalism at Play

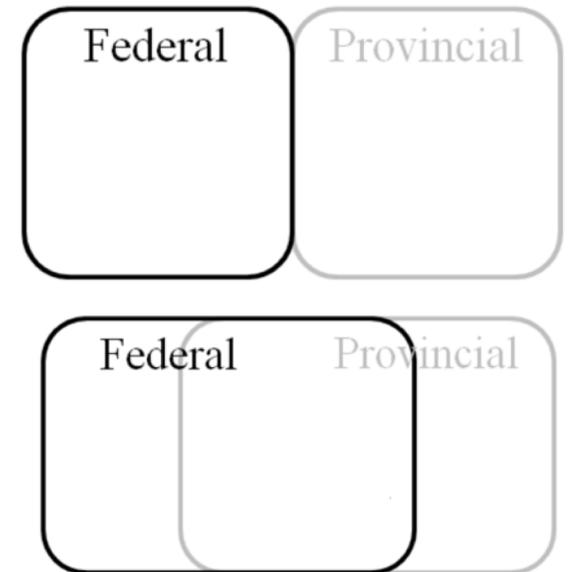
1. The Exclusivity Principle
2. Heads of Power
3. Pith and Substance Analysis
4. Double Aspects Doctrine
5. Ancillary Powers Doctrine
6. Doctrine of Interjurisdictional Immunity
7. The Doctrine of Federal Paramountcy
8. The Principle of Cooperative Federalism
9. Indigenous Peoples and Federalism



# Doctrine of Federal Paramountcy

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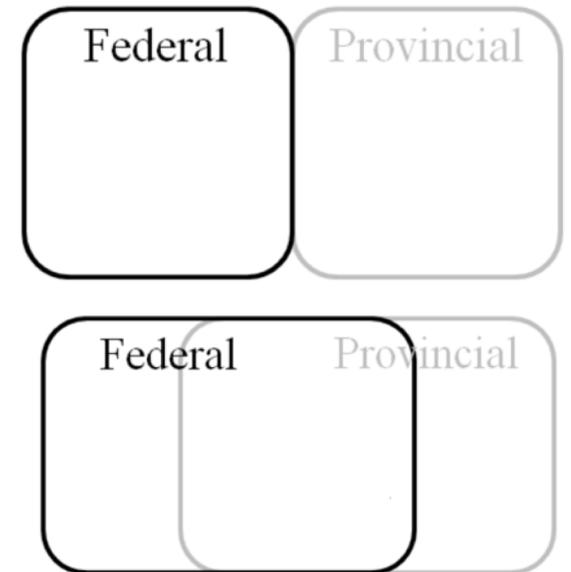
- **Rule:** “[T]he federal law prevails when there is a genuine inconsistency between federal and provincial legislation, that is, when the operational effects of provincial legislation are incompatible with federal legislation.”
  - **Consider:** *Alberta (Attorney General) v. Moloney*, [2015] 3 S.C.R. 327



# Principle of Co-operative Federalism

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- **Rule:** When applying Federal Paramountcy, a court must interpret statutes in a manner that, if at all possible, preserves the otherwise valid statutory provision(s) of a provincial law.
- **Consider:** *Rogers Communications Inc. v. Châteauguay (City)*, [2016] 1 S.C.R. 467



# Part 3

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1. The Case
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# Impacts on Creditor Rights

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- Does the judgment undermine creditors?
  - No, in terms of affecting financing, the SCC has merely affirmed the *status quo*
    - The law is the same as it has been since at least the early 1990s.
  - So, the lending risk created by the well abandonment regulations in question are the same as they have always been.



# Impacts on Orphan Well Problem

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- Does the judgment fix the orphan well problem?
  - No, the problems of regulatory design remain
  - The Big Problem: As a general rule, the Alberta legislation does not require oil and gas companies to reclaim wells within a reasonable time frame.



# What is the Impact?

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- Does this mean that the case had no impact?
  - No, without the judgment, any time a provincial regulator attempted to impose the law upon one who filed for bankruptcy, it would have diminished the value of the estate in question, and would have conflicted with the *BIA*.



# Part 4

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1. The Case
2. Energy Federalism
3. Impacts on Energy Federalism
4. Trident Exploration Case



# Trident Exploration Case

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Calgary

## **Shuttered junior gas company simply walked away from 4,700 wells, says Alberta Energy Regulator**

Calgary-based company says abandonment and reclamation obligations estimated at \$329 million

# Facts

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- The company could not make payroll.
- Trident contacted a US hedge fund in an attempt to secure financing so that the company could continue operations through a restructuring.
- Company shut down abruptly on April 30<sup>th</sup> without responding to an order to properly manage its 4,700 wells.
- 1,500 wells have not been shut-in and continue to produce.



# Facts

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- Trident terminated 33 employees and 61 contractors.
- Abandonment and reclamation obligations are estimated to be \$329 million.
- Other outstanding obligations to secured lenders equals approximately \$90 million.
- No financial recovery for shareholders or unsecured creditors expected.



# Facts

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- The OWA petitioned the court to appoint a receiver.
- PWC appointed as receiver.
- **Consider:** Judicature Act 13(2): A receiver may be appointed when it appears to the Court to be just or convenient on any terms and conditions the Court thinks just.



# Facts

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- Company Statement:
  - "Without regulatory collaboration and clarity, Trident is unable to address its near-term liquidity needs and has no financial ability to continue operating. We fear that many other companies may falter without clear, sound policy making post-Redwater."



# Some Lingering Questions

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- Will Trident situation become a trend?
- If so, what procedures ought to be put in place to deal with it?
- More immediate, who is backing the millions need for Debtor-in-possession financing?



# Thank You

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## Email

- [fenner.stewart@ucalgary.ca](mailto:fenner.stewart@ucalgary.ca)

## Twitter

- @DrFLS

## Webpage

- <https://fennerstewart.academia.edu/>

## Article

- The Constitutional Importance of The Grant Thornton Case, (2019) School of Public Policy Research Paper Series.