Clerk's Stamp:

NB
C30377

COM March 6, 2024

COURT FILE NUMBER:	2401-02680
COURT:	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE:	CALGARY
APPLICANTS: **(Respondents on Application)**	IN THE MATTER OF *THE COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF RAZOR ENERGY CORP., RAZOR HOLDINGS GP CORP., AND BLADE ENERGY SERVICES CORP.
DOCUMENT:	**AUTHORITIES OF ALBERTA PETROLEUM MARKETING COMMISSION**
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AUTHORITIES OF ALBERTA PETROLEUM MARKETING COMMISSION
For the Application scheduled for March 6, 2024 at 3:00pm

Table of Authorities

Legislation

1. *Mines and Minerals Act,* R.S.A. 2000, c. M-17
2. *Petroleum Royalty Regulation,* 2009, AR 22/2008
3. *Petroleum Marketing Act,* R.S.A. 2000, c. P-10
4. *Petroleum Marketing Regulation,* AR 174/2006
5. *Companies' Creditors Arrangement Act*, R.S.C., 1985, C. C-36
6. *Bankruptcy and Insolvency Act,* R.S.C., 1985, c. B-3

Case Law

7. *8640025 Canada Inc. (Re),* 2017 BCCA 303 (CanLII)
8. *PanAmericana de Bienes y Servicios v. Northern Badger Oil & Gas Limited*, 1991 ABCA 181 (CanLII)
9. *Orphan Wells Association v. Grant Thornton Ltd.,* 2019 SCC 5

MINES AND MINERALS ACT

Chapter M-17

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HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Interpretation

1(1) In this Act,

(a) "agreement" means an instrument issued pursuant to this Act or the former Act that grants rights in respect of a mineral, subsurface reservoir, or geothermal resource, but does not include a notification, a transfer referred to in section 12, a unit agreement or a contract under section 9(a);

(a.01) "base of groundwater protection" means the base of groundwater protection as defined in the *Water Wells and Ground Source Heat Exchange System Directive* published by Alberta Environment and Protected Areas, as amended or replaced from time to time;

(a.1) "captured carbon dioxide" means a fluid substance consisting mainly of carbon dioxide captured from an emissions source;

(b) "certificate of record" means a certificate of record within the meaning of the regulations;

(c) "certificate of title" means a certificate granted pursuant to the *Land Titles Act*;

(d) "crude bitumen" means a naturally occurring viscous mixture, mainly of hydrocarbons heavier than pentane, that may contain sulphur compounds and that, in its naturally occurring viscous state, will not flow to a well;

(e) "Department" means the Department administered by the Minister;

(f) "disposition" means a grant, a transfer referred to in section 12 or an agreement;

(g) "estate in a mineral" means an estate in fee simple in a mineral or an estate for a life or lives in being in a mineral;

(h) "fluid mineral substance" means a fluid substance consisting of a mineral or of a product obtained from a mineral by processing or otherwise;

(i) "former Act" means any predecessor of this Act;

(i.1) "geothermal resource" means the natural heat from the earth that is below the base of groundwater protection;

(j) "grant" means letters patent under the Great Seal of Canada or a notification issued pursuant to *The Provincial Lands Act*, RSA 1942 c62, the former Act or this Act;

(k) "issue", with reference to a disposition, means to issue the disposition in accordance with the regulations;

(l) "lessee" means, except in section 82.1, the holder according to the records of the Department of an agreement;

(m) "location" means, except in section 82.1, the tract described in an agreement;

(n) "mine" means any opening or excavation in, or working of, the surface or subsurface for the purpose of working, recovering, opening up or proving any mineral or mineral-bearing substance, and includes works and machinery at or below the surface belonging to or used in connection with the mine;

(o) "mineral claim" means the tract described in a certificate of record;

(p) "minerals" means all naturally occurring minerals, and without restricting the generality of the foregoing, includes

(i) gold, silver, uranium, platinum, pitchblende, radium, precious stones, copper, iron, tin, zinc, asbestos, salts, sulphur, petroleum, oil, asphalt, bituminous sands, oil sands, natural gas, coal, anhydrite, barite, bauxite, bentonite, diatomite, dolomite, epsomite, granite, gypsum, limestone, marble, mica, mirabilite, potash, quartz rock, rock phosphate, sandstone, serpentine, shale, slate, talc, thenardite, trona, volcanic ash, sand, gravel, clay and marl, but

(ii) does not include

(A) sand and gravel that belong to the owner of the surface of land under section 58 of the *Law of Property Act*,

(B) clay and marl that belong to the owner of the surface of land under section 57 of the *Law of Property Act*, or

(C) peat on the surface of land and peat obtained by stripping off the overburden, excavating from the surface, or otherwise recovered by surface operations;

(q) "Minister" means the Minister determined under section 16 of the *Government Organization Act* as the Minister responsible for this Act;

(r) "notification" means a notification in the prescribed form;

(s) "oil sands" means

(i) sands and other rock materials containing crude bitumen,

(ii) the crude bitumen contained in those sands and other rock materials, and

(iii) any other mineral substances, other than natural gas, in association with that crude bitumen or the sands and other rock materials referred to in subclauses (i) and (ii),

and includes a hydrocarbon substance declared to be oil sands under section 7(2) of the *Oil Sands Conservation Act*;

(t) "owner" when used in connection with a mineral claim means the holder according to the records of the Department of a certificate of record;

(u) "quarry" means a pit or excavation in the ground for the purpose of removing, opening up or proving any mineral other than coal or oil sands, and includes works and machinery belonging to or used in connection with the quarry;

(v) "record" means a record as defined in the *Financial Administration Act*;

(w) "registered" means

(i) registered under Division 1 of Part 6, in relation to a transfer, or

(a) to claim damages or compensation of any kind, including, without limitation, damages or compensation for injurious affection, from the Crown, or

(b) to obtain a declaration that the damages or compensation referred to in clause (a) are payable by the Crown,

as a result of the enactment of this section.

2010 c20 s2

Geothermal resources

10.2 The owner of the mineral title in any land in Alberta has the right to explore for, develop, recover and manage the geothermal resources associated with those minerals and with any subsurface reservoirs under the land.

2020 cG-5.5 s31

Authorized disposition

11(1) No disposition may be made of an estate in a mineral owned by the Crown in right of Alberta unless the disposition is specifically authorized by this or another Act.

(2) Subsection (1) does not preclude

(a) the Lieutenant Governor in Council from transferring the administration and control of minerals to the Crown in right of Canada, or

(b) the Minister from executing and delivering a transfer under the *Land Titles Act* in favour of the Crown in right of Canada of an estate in minerals of which the Crown in right of Alberta is the registered owner.

1983 c36 s6;1985 c39 s3

Transfer

12(1) When a person is entitled to receive from the Crown in right of Alberta a title for an estate in a mineral for which a certificate of title is registered under the *Land Titles Act*, a transfer shall be issued by the Minister.

(2) Before the issue of the transfer, the registration fee payable under the *Land Titles Act* shall be paid to the Minister.

(3) The Minister shall forward the fee paid and the transfer to the Registrar for registration of the transfer under the *Land Titles Act*.

1983 c36 s6

Notification

13(1) When a person is entitled to receive from the Crown in right of Alberta a title for an estate in a mineral for which no certificate

(ii) minerals or water is produced, recovered or extracted from the subsurface reservoir,

and

(c) the exception of pore space under this section is deemed to be an exception contained in the original grant from the Crown for the purposes of section 61(1) of the *Land Titles Act*.

(2) Subsection (1) does not operate to affect the title to land that, on the date on which this section comes into force, belongs to the Crown in right of Canada.

(3) The Minister may enter into agreements with respect to the use of pore space.

(4) It is deemed for all purposes, including for the purposes of the *Expropriation Act*, that no expropriation occurs as a result of the enactment of this section.

(5) No person has a right of action and no person shall commence or maintain proceedings

(a) to claim damages or compensation of any kind, including, without limitation, damages or compensation for injurious affection, from the Crown, or

(b) to obtain a declaration that the damages or compensation referred to in clause (a) is payable by the Crown,

as a result of the enactment of this section.

2010 c14 s2

Agreements

Issue of agreements

16 Subject to this Act and the regulations and any express provision in any applicable ALSA regional plan limiting mineral development within a geographic area, the Minister may issue an agreement in respect of a mineral, subsurface reservoir or geothermal resource

(a) on application, if the Minister considers the issuance of the agreement warranted in the circumstances,

(b) by way of sale by public tender conducted in a manner determined by the Minister, or

(c) pursuant to any other procedure determined by the Minister.

RSA 2000 cM-17 s16;2009 cA-26.8 s82;2010 c14 s2;2020 cG-5.5 s31

(a) removing any installations, equipment or casing incidental to the well,

(b) removing any installations or equipment incidental to the mine or quarry, or

(c) doing any act specified in the authorization in relation to the well, mine or quarry.

(5) If a well, mine or quarry becomes the property of the Crown under this section, the Minister has the same rights and duties that the former lessee had in respect of any right of entry order or surface lease relating to the land on which the well, mine or quarry is located.

(6) Notwithstanding subsection (5), the Minister is not subject to any penalty, debt or other obligation incurred by the former lessee under the right of entry order or surface lease.

(7) In subsections (5) and (6),

(a) "right of entry order" means a right of entry order as defined in the *Surface Rights Act* and a right of entry order under Part 4 of the *Metis Settlements Act*;

(b) "surface lease" means a lease or other instrument under which the surface of land is held for any purpose for which a right of entry order may be made under the *Surface Rights Act* or Part 4 of the *Metis Settlements Act*, and that provides for the payment of compensation.

1983 c36 s6;1990 cM-14.3 s276;1997 c17 s15

Royalty and Other Revenues

Royalty on mineral

33 A royalty determined under this Act is reserved to the Crown in right of Alberta on any mineral recovered pursuant to an agreement.

1983 c36 s6

Amounts payable re geothermal resources

33.1 Amounts determined under this Act for the exploration for and the development and recovery of geothermal resources associated with minerals or subsurface reservoirs that are property of the Crown in right of Alberta are payable to the Crown in right of Alberta.

2020 cG-5.5 s31

Royalty to be prescribed

34(1) Subject to section 34.1, the royalty reserved to the Crown in right of Alberta on a mineral recovered pursuant to an agreement shall be the royalty prescribed from time to time by the Lieutenant Governor in Council.

(2) If a royalty has been reserved to the Crown in right of Canada in any letters patent that convey a mineral, there is reserved to the Crown in right of Alberta

(a) the royalty prescribed from time to time by the Lieutenant Governor in Council in accordance with the Transfer Agreement, or

(b) if no royalty is prescribed under clause (a), the royalty at the rate in effect immediately before the coming into force of the Transfer Agreement.

(3) Except as otherwise provided by the regulations,

(a) the royalty reserved to the Crown in right of Alberta shall be deliverable in kind,

(b) the quantity of the royalty reserved to the Crown in right of Alberta shall be calculated at the place where the mineral is first measured after it is recovered, and

(c) the royalty reserved to the Crown in right of Alberta shall be delivered to the Crown at the place at which the quantity of the royalty is calculated.

RSA 2000 cM-17 s34;2019 c9 s2

Royalty structures – legislative framework guarantee

34.1(1) In this section,

(a) "fundamental restructuring" does not include adjustments or changes made

(i) to simplify or streamline cost calculations, processes, reporting or other similar requirements of an enactment or policy,

(ii) to address significant changes in technology and world markets,

(iii) in accordance with an enactment in force on the date this section comes into force, except as otherwise provided in this section, or in accordance with a relevant policy,

including the planned transition to the Modernized Royalty Framework, 2017, or

(iv) where the Government of Alberta considers that the adjustments or changes are appropriate and consistent with this section;

(b) "hydrocarbon" does not include coal;

(c) "legislative framework" does not include the *Petroleum Marketing Act* and the regulations under that Act.

(2) For a period of 10 years after this section comes into force, no fundamental restructuring of the legislative framework generally applicable to hydrocarbon royalties reserved to the Crown in right of Alberta shall be implemented.

(3) Subject to the regulations, no fundamental restructuring of the legislative framework applicable to hydrocarbon royalties reserved to the Crown in right of Alberta in place on the date a well commences production shall be implemented with respect to that well for a period of 10 years after that date.

(4) For greater certainty, "the legislative framework applicable to hydrocarbon royalties reserved to the Crown in right of Alberta in place on the date a well commences production" in subsection (3) includes the planned transition to the Modernized Royalty Framework, 2017, which will apply to that well according to the terms in force on the date the well commences production.

2019 c9 s3

Crown as owner

35(1) The Crown in right of Alberta is the owner of its royalty share of the mineral at all times until that royalty share is disposed of by or on behalf of the Crown or until the Crown's title to that royalty share is transferred to a lessee or other person pursuant to the regulations, notwithstanding that its share is commingled with and indistinguishable from the lessee's share prior to or at the time of the disposal or transfer of title.

(2) If, at the place where the Crown's royalty share of a mineral is to be delivered to the Crown in right of Alberta, the Crown's royalty share of the mineral is commingled with the lessee's share of the mineral so that the Crown's royalty share cannot be identified, the Crown in right of Alberta is entitled to the quantity of the mineral of equivalent quality that is equal to the Crown's royalty share.

(3) If under the regulations or a contract or agreement under section 9 the quantity of the royalty on a mineral is calculated on the basis of all or any of the products obtained by processing that mineral or by reprocessing the products obtained by processing that mineral, unless otherwise provided a reference to the mineral in any provision in this Act or the regulations respecting the royalty on the mineral shall be read as a reference to the product obtained by the processing or reprocessing, as the case may be.

RSA 2000 cM-17 s35;2008 c36 s6

Regulations

36(1) The Lieutenant Governor in Council may make regulations

(a) prescribing the royalty on a mineral;

(b) prescribing that the quantity of the royalty on a mineral be calculated at a place other than the place where the mineral is first measured after it is recovered;

(c) prescribing that the royalty on a mineral be delivered to the Crown in right of Alberta at a place other than that at which its quantity is calculated;

(d) authorizing the Minister to determine any component or value in the calculation of the royalty on a mineral;

(e) respecting the circumstances under which the quantity of the royalty on a mineral shall be calculated on all or any of the products obtained by processing the mineral or by reprocessing any of those products instead of on the mineral;

(f) respecting the waiver or variation of all or part of the royalty on a mineral and the termination of any such waiver or variation before any date, or before the passing of any time period, specified in the regulations by which the waiver or variation is to expire;

(g) respecting the administration, implementation and operation of section 34.1 generally or with respect to a well or mine or a class of wells or mines;

(h) respecting the legislative framework with respect to a well or a class of wells under section 34.1(3);

(i) defining any word or expression used but not defined in clauses (g) and (h) and section 34.1;

The Alberta Petroleum Marketing Commission

Marketing of Crown's share

86(1) Every agreement to which this section applies is subject to the condition that the Crown's royalty share of a mineral to which this section applies recovered pursuant to the agreement must be delivered to the Alberta Petroleum Marketing Commission.

(2) This section applies only to those agreements and minerals to which it is made applicable by the regulations under subsection (3).

(3) The Lieutenant Governor in Council may make regulations specifying the agreements and minerals to which this section applies.

(4) The Minister may, with respect to any agreement to which this section applies and in any special case when the Minister considers it warranted by circumstances to do so, waive compliance with subsection (1) for any period of time and on any conditions the Minister may prescribe.

RSA 2000 cM-17 s86;2008 c36 s15

Part 5
Oil Sands

McMurray formation

87(1) A lease of bituminous sands rights granted before July 1, 1978 is deemed for all purposes to be a lease of oil sands rights with respect to the McMurray formation.

(2) For the purposes of this Act, the McMurray formation is deemed to be and to have always been a zone designated by the Alberta Energy Regulator.

(3) If any question arises under a disposition or in the administration of this Act or the regulations as to whether

(a) any stratigraphic formation is or is not the McMurray formation, or

(b) any mineral occurring in a stratigraphic formation is or is not oil sands,

the question must be referred to the Minister whose decision on the question is final.

(4) The Minister may, on the application of the lessee of a bituminous sands lease, accept the surrender of the bituminous

(Consolidated up to 52/2019)

ALBERTA REGULATION 222/2008

Mines and Minerals Act

PETROLEUM ROYALTY REGULATION, 2009

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Part 1
General

Interpretation

1(1) In this Regulation,

(a) repealed AR 89/2013 s37;

(b) "crude oil" means a mixture mainly of pentanes and heavier hydrocarbons

(i) that may be contaminated with sulphur compounds,

(ii) that is recovered or is recoverable at a well from an underground reservoir, and

(iii) that is liquid at the conditions under which its volume is measured or estimated,

and includes all other hydrocarbon mixtures so recovered or recoverable except natural gas, field condensate or crude bitumen;

(c) "field condensate" means field condensate as defined in the *Natural Gas Royalty Regulation, 2009*;

(d) "heavy oil" means the category of crude oil determined under section 4 as heavy oil;

(e) repealed AR 52/2019 s7;

(f) "licence" means a licence for a well issued under the *Oil and Gas Conservation Act*;

(g) "licensee" means the holder of a licence according to the records of the Regulator and includes a trustee or receiver-manager of property of a licensee;

(h) "light oil" means the category of crude oil determined under section 4 as light oil;

(i) "medium oil" means the category of crude oil determined under section 4 as medium oil;

(j) "operator", in respect of a well, means the person who is the operator according to the records of the Department;

(k) "pool" means a natural underground reservoir containing or appearing to contain an accumulation of petroleum or natural gas separated or appearing to be separated from any other such accumulation;

(k.1) "producing interval" means a perforation from which production is obtained;

(k.2) "production month" means the month in which petroleum is recovered;

(k.3) "Regulator" means the Alberta Energy Regulator;

(l) "royalty" means royalty reserved to the Crown in right of Alberta;

(m) "solution gas" means

(i) gas that is separated from crude oil after recovery from a well, and

(ii) gas that is dissolved in crude oil under initial reservoir conditions and includes any of that gas that evolves as a result of changes in pressure or temperature, or both, due to human disturbance;

(n) "ultra heavy oil" means the category of crude oil determined under section 4 as ultra heavy oil;

(o) "well event" means

(i) a part of a well completed in a zone and given a unique well identifier by the Regulator,

(ii) parts of a well completed in 2 or more zones and given a single unique well identifier by the Regulator,

(iii) a part of a well completed in and recovering crude oil from a zone but which has not yet been given a unique well identifier by the Regulator, or

(iv) parts of a well completed in and recovering crude oil from 2 or more zones during the period when the parts are considered by the Minister as a single well event for the purposes of this Regulation and before the Regulator makes a decision whether or not to give the parts a single unique well identifier;

(p) "zone" means any stratum or any sequence of strata that is designated by the Regulator as a zone.

(2) A reference in this Regulation to a month, whether by its name or not, shall be construed as the period commencing at 8:00 a.m. Mountain Standard Time on the first day of the month and ending immediately before 8:00 a.m. Mountain Standard Time on the first day of the next month.

AR 222/2008 s1;135/2009;199/2010;89/2013;52/2019

Application of regulation

2 Subject to section 2 of the *Petroleum Royalty Regulation, 2017*, this Regulation applies to royalty on crude oil and solution gas obtained from petroleum recovered from a well event on or after January 1, 2009 until December 31, 2026 for wells with a spud date before January 1, 2017.

AR 222/2008 s2;212/2016

s86 of the Mines and Minerals Act

3 Section 86 of the *Mines and Minerals Act* applies to all agreements granting petroleum and natural gas rights or petroleum rights and to crude oil obtained from petroleum recovered pursuant to those agreements.

Categories and densities of crude oil

4(1) The categories of crude oil and the density of each category are as specified in the following Table:

Crude Oil Category and Density Table

Category of Crude Oil	Density
light oil	less than 850 kilograms per cubic metre
medium oil	greater than or equal to 850 kilograms per cubic metre and less than 900 kilograms per cubic metre
heavy oil	greater than or equal to 900 kilograms per cubic metre and less than 925 kilograms per cubic metre
ultra heavy oil	greater than or equal to 925 kilograms per cubic metre

(2) The category for crude oil recovered from a well event during a month is determined by the Minister based on density information included in records provided to the Minister by the Regulator.

(3) In making a determination under subsection (2), the Minister may request and consider density information from the Alberta Petroleum Marketing Commission and the operator.

(4) If density information is not available to make a determination under subsection (2), the category for crude oil recovered from a well event during a month is light oil.

AR 222/2008 s4;89/2013

Prescribing par prices

5 The Minister may, with respect to any month, prescribe an amount per cubic metre as the par price for each of the following:

(a) light oil;

(b) medium oil;

(c) heavy oil;

(d) ultra heavy oil.

Royalty

6(1) The royalty on petroleum recovered from a well event pursuant to an agreement granting petroleum and natural gas rights, petroleum rights or natural gas rights is

(a) that part of the crude oil obtained from the petroleum in each month calculated in accordance with the Schedule, and

(b) that part of the solution gas obtained from the petroleum in each month calculated in accordance with the *Natural Gas Royalty Regulation, 2009*.

(2) The royalty on crude oil and solution gas must be free and clear of all deductions.

Calculation of royalty

6.1 The royalty on petroleum recovered from a well event that is also eligible production under the *New Well Royalty Regulation* is the lesser of

(a) the royalty calculated pursuant to section 6, and

(b) 5%.

AR 32/2011 s18

Approved schemes under the Enhanced Oil Recovery Royalty Regulation

6.2 Notwithstanding anything in this Regulation, the provisions of the *Enhanced Oil Recovery Royalty Regulation* apply to the calculation of royalty under this Regulation on crude oil recovered or produced from, or obtained from petroleum recovered from, a well event to which an approval as defined in the *Enhanced Oil Recovery Royalty Regulation* applies.

AR 156/2014 s16

Adjustment of royalty

7(1) Repealed AR 52/2019 s7.

(2) Repealed AR 52/2019 s7.

(3) Where, by an order made pursuant to the *Oil and Gas Conservation Act*, the maximum allowable production from a well event is determined for a period in excess of one month, the royalty that has been calculated, levied and collected on crude oil shall, on application by the operator or licensee, at the end of that period be recalculated for each month during the period that crude oil was produced from the well event, and for that purpose the production of crude oil is deemed to have been produced at the same rate as specified in the order for each month of the period.

(4) If the royalty that has been levied and collected is in excess of the amount recalculated under subsection (3), a payment of the excess amount must be made in accordance with section 15 of the *Petroleum Marketing Regulation* (AR 174/2006) as if the excess amount was an overdelivery of crude oil for the purposes of that section.

AR 222/2008 s7;52/2019

Crown tract in unit

8 If petroleum owned by the Crown is subject to a unit agreement or unit operation order, the unit area under the unit agreement or order is deemed to be a location for the purpose of determining the royalty calculated under section 2(1) of the Schedule applicable to the portion of the production allocated to any tract contained in an agreement.

Lesser royalty

9 Where in the opinion of the Lieutenant Governor in Council it is necessary or desirable in the interests of conservation or of maintaining or increasing the recovery of crude oil or natural gas from one or more well events in one or more wells, a pool or any portion of a pool, the Lieutenant Governor in Council may by order

(a) prescribe a royalty with respect to the crude oil recovered from the one or more well events, the pool or portion of the pool, that is less than the royalty that would otherwise be deliverable under this Regulation, and

(b) prescribe the period in respect of which the order is to apply.

Responsibility of operator

10 Where petroleum is recovered from a well in a month pursuant to an agreement, the operator of the well for that month is responsible as the agent of the lessee of the agreement for the delivery of the royalty on crude oil under the agreement in respect of that month.

Objections

10.1 An operator is authorized to make an objection under section 39 of the Act.

AR 170/2015 s13

Minister's decision final

11 Where any question arises pertaining to the interpretation or application of this Regulation, the Minister is the sole judge of the question and there is no appeal from the Minister's decision.

Part 2
Transitional Well Events

Definitions

11.1 In this Part,

(a) "eligible well event" means a well event that is an eligible well event under section 11.2;

(b) "measured depth" means, in respect of a well event, the longest distance, in metres, along the bore of the well from the kelly bushing of the well to

(i) the base of the deepest producing interval in the well event, or

(ii) if the production of the well event is commingled with the production of one or more other well events, to the base of the deepest producing interval in the well from which the commingled production is obtained;

(c) "transitional election" means an election made in respect of an eligible well event in accordance with section 11.3;

(d) "transitional well event" means a well event in respect of which a transitional election is in effect under this Part.

AR 135/2009 s4

Eligible well event

11.2(1) A well event that meets all of the following criteria is an eligible well event for the purposes of this Part:

(a) the well event is part of a well with a spud date on or after November 19, 2008 and on or before December 31, 2010;

(b) the measured depth of the well event, according to the records of the Regulator, is greater than or equal to 1000 metres and less than or equal to 3500 metres;

(c) the well event is not part of a well that produces oil sands or crude bitumen, other than a gas well as defined in the *Oil and Gas Conservation Rules* (AR 151/71).

(2) Information must be provided to the Minister by the licensee if required to aid in determining whether a well event meets the criteria set out in this section.

AR 135/2009 s4;199/2010;89/2013

Transitional election

11.3(1) The licensee of an eligible well event may elect, in accordance with this section, to have the royalty on crude oil and solution gas obtained from petroleum recovered from that well event determined under this Regulation in accordance with the provisions set out in the Schedule for transitional well events.

(2) The licensee must furnish the election to the Minister by electronic transmission to Petrinex in accordance with the directions of the Minister respecting the operation of the Registry not later than the last day of the first production month of the eligible well event or December 31, 2010, whichever is earlier.

(3) Despite subsection (2), if the first production month of an eligible well event occurs before July 2009, the election must be furnished under that subsection between June 4, 2009 and June 30, 2009.

AR 135/2009 s4;199/2010;140/2014

When transitional election has effect

11.4(1) A transitional election made in respect of an eligible well event has effect from the first day of the first production month of the eligible well event.

(2) Despite subsection (1), if the first production month of an eligible well event occurs before July 2009, a transitional election made in respect of that well event has effect from the first day of the first production month of the well event after December 2008.

AR 135/2009 s4

When transitional election ceases to have effect

11.5 A transitional election ceases to have effect in respect of a well event on the earlier of the following:

(a) the date on which the well event ceases to be an eligible well event;

(a.1) the date on which a licensee opts out of a transitional election in accordance with section 11.6;

(b) December 31, 2013.

AR 135/2009 s4;199/2010

Opting out of transitional election

11.6(1) The licensee of an eligible well event may opt out of a transitional election by giving notice to the Minister by electronic transmission to Petrinex between January 1, 2011 and February 15, 2011 in accordance with the directions of the Minister respecting the operation of Petrinex.

(2) If a licensee opts out of a transitional election under subsection (1), the royalty for the transitional well event shall be calculated in accordance with section 5 of the Schedule until the end of the December 2010 production month.

AR 199/2010 s6;140/2014

Part 3
Consequential Amendments, Expiry and Coming into Force

12 to **21** *(These sections amend other regulations; the amendments have been incorporated into those regulations.)*

22 Repealed AR 90/2018 s1.

Coming into force

23 This Regulation comes into force on January 1, 2009.

Schedule

Crown Royalty Share of Crude Oil

Definitions

1 In this Schedule,

(a) "Crown interest" means the percentage of Crown ownership of crude oil recovered from a well event as determined by the Minister in accordance with section 26.1 of the *Petroleum and Natural Gas Tenure Regulation* (AR 263/97);

(b) "par price" means the par price prescribed under section 5 of the Regulation applicable to the category of crude oil determined by the Minister under section 4 of the Regulation;

(c) "quantity" means the monthly production in cubic metres of crude oil from a well event according to the records of the Regulator;

(d) "transitional well event" means a well event in respect of which a transitional election is in effect under Part 2 of this Regulation or under Part 2.1 of the *Natural Gas Royalty Regulation, 2009* (AR 221/2008).

Calculation of Crown royalty share

2(1) Subject to subsection (2), the royalty for a month is the amount calculated in accordance with the following formula:

$$\text{royalty in cubic metres} = (r_p\% + r_q\%) \times \text{quantity} \times \text{Crown interest}$$

where

$r_p\%$ is the percentage rate for price calculated in accordance with section 3 of this Schedule;

$r_q\%$ is the percentage rate for quantity calculated in accordance with section 4 of this Schedule.

(2) Where the calculation of $(r_p\% + r_q\%)$

(a) is less than 0%, the amount is 0%, or

(b) is more than

(i) 50%, the amount is 50%, in the case of a production month prior to and including the December 2010 production month, or

(ii) 40%, the amount is 40%, in the case of a production month commencing with and subsequent to the January 2011 production month.

Calculation of rate for price

3(1) In the case of a production month prior to and including the December 2010 production month, the r_p% for the purposes of section 2 of this Schedule is calculated in accordance with the following Table:

Rate for Price Table 1

Par Price	Formula
par price greater than zero and less than or equal to $250.00 per cubic metre	$r_p\% = \big($(par price – 190.00) x 0.0006$\big)$ x 100
par price greater than $250.00 per cubic metre and less than or equal to $400.00 per cubic metre	$r_p\% = \big[\big($(par price – 250.00) x 0.0010$\big)$ + 0.0360$\big]$ x 100
par price greater than $400.00 per cubic metre	$r_p\% = \big[\big($(par price – 400.00) x 0.0005$\big)$ + 0.1860$\big]$ x 100

(2) In the case of a production month commencing with and subsequent to the January 2011 production month, the r_p% for the purpose of section 2 of this Schedule is calculated in accordance with the following Table:

Rate for Price Table 2

Par Price	Formula
par price greater than zero and less than or equal to $250.00 per cubic metre	$r_p\% = \big($(par price – 190.00) x 0.0006$\big)$ x 100
par price greater than $250.00 per cubic metre and less than or equal to $400.00 per cubic metre	$r_p\% = \big[\big($(par price – 250.00) x 0.0010$\big)$ + 0.0360$\big]$ x 100
par price greater than $400.00 per cubic metre and less than or equal to $535.00 per cubic	$r_p\% = \big[\big($(par price – 400.00) x 0.0005$\big)$ + 0.1860$\big]$ x 100

metre	
par price greater than $535.00 per cubic metre	$r_p\% = [((\text{par price} - 535.00) \times 0.0003) + 0.2535] \times 100$

(3) Where the r_p% calculated under subsections (1) or (2) exceeds 35%, the r_p% is deemed to be 35%.

Calculation of rate for quantity

4(1) The r_q% for the purpose of section 2 of this Schedule is calculated in accordance with the following Table:

Rate for Quantity Table

Quantity	Formula
quantity greater than zero and less than or equal to 106.4 cubic metres	$r_q\% = ((\text{quantity} - 106.4) \times 0.0026) \times 100$
quantity greater than 106.4 cubic metres and less than or equal to 197.6 cubic metres	$r_q\% = ((\text{quantity} - 106.4) \times 0.0010) \times 100$
quantity greater than 197.6 cubic metres and less than or equal to 304.0 cubic metres	$r_q\% = [((\text{quantity} - 197.6) \times 0.0007) + 0.0912] \times 100$
quantity greater than 304.0 cubic metres	$r_q\% = [((\text{quantity} - 304.0) \times 0.0003) + 0.1657] \times 100$

(2) Where the r_q% calculated under subsection (1) exceeds 30%, the r_q% is deemed to be 30%.

Calculation of Crown royalty share for transitional well events

5(1) Notwithstanding section 2 of this Schedule, and subject to subsection (2), the royalty for a month for a transitional well event is the amount calculated in accordance with the following formula:

$$\text{royalty in cubic metres} = (r_p\% + r_q\%) \times \text{quantity} \times \text{Crown interest}$$

where

r_p% is the percentage rate for price calculated in accordance with section 6 of this Schedule;

r_q% is the percentage rate for quantity calculated in accordance with section 7 of this Schedule.

(2) Where the calculation of (r_p% + r_q%)

(a) is less than 0%, the amount is 0%, or

(b) is more than 50%, the amount is 50%.

Calculation of rate for price for transitional well events

6(1) The r_p% for the purpose of section 5 of this Schedule is calculated in accordance with the following Table:

Rate for Price Table for Transitional Well Events

Par Price	Formula
par price greater than zero and less than or equal to $250.00 per cubic metre	$r_p\% = \left((\text{par price} - 210.00) \times 0.00035\right) \times 100$
par price greater than $250.00 per cubic metre and less than or equal to $350.00 per cubic metre	$r_p\% = \left[\left((\text{par price} - 250.00) \times 0.0001\right) + 0.0140\right] \times 100$
par price greater than $350.00 per cubic metre	$r_p\% = \left[\left((\text{par price} - 350.00) \times 0.00005\right) + 0.0240\right] \times 100$

(2) Where the r_p% calculated under subsection (1) exceeds 35%, the r_p% is deemed to be 35%.

Calculation of rate for quantity for transitional well events

7(1) The r_q% for the purpose of section 5 of this Schedule is calculated in accordance with the following Table:

Rate for Quantity Table for Transitional Well Events

Quantity	Formula
quantity greater than zero and less than or equal to 30.4 cubic metres	$r_q\% = \left((\text{quantity} - 30.4) \times 0.0013\right) \times 100$
quantity greater than 30.4 cubic metres and	$r_q\% = \left((\text{quantity} -$

less than or equal to 152.0 cubic metres	30.4) x 0.0013$\big)$ x 100
quantity greater than 152.0 cubic metres and less than or equal to 273.6 cubic metres	r_q% = $\big[\big($(quantity – 152.0) x 0.0008$\big)$ + 0.1581$\big]$ x 100
quantity greater than 273.6 cubic metres	r_q% = $\big[\big($(quantity – 273.6) x 0.0002$\big)$ + 0.2554$\big]$ x 100

(2) Where the r_q% calculated under subsection (1) exceeds 35%, the r_q% is deemed to be 35%.

AR 222/2008 Sched.;135/2009;199/2010;89/2013

PETROLEUM MARKETING ACT

Chapter P-10

Table of Contents

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Definitions

1 In this Act,

(a) "agreement" has the same meaning as in the *Mines and Minerals Act*;

indemnities, to arise in the normal course of the performance of the agreement if the agreement is properly performed.

(3) The Commission may, with the approval of the Lieutenant Governor in Council, provide indemnities in addition to those authorized by subsections (1) and (2).

2013 c16 s7

Delegation

7 Subject to the regulations, the Commission may in writing delegate any power, duty or function conferred or imposed on it by this Act or any other Act or any regulation or rules to any person.

RSA 2000 cP-10 s7;2012 cR-17.3 s100;2013 c16 s8

Commission as Crown agent

8(1) The Commission is for all purposes an agent of the Crown in right of Alberta and its powers may be exercised only as an agent of the Crown in right of Alberta.

(2) An action or other legal proceeding in respect of any right or obligation acquired or incurred by the Commission on behalf of the Crown in right of Alberta, whether in its name or in the name of the Crown in right of Alberta, may be brought or taken by or against the Commission, in the name of the Commission, in any court that would have jurisdiction if the Commission were not an agent of the Crown.

RSA 1980 cP-5 s7

Fiscal year

9 The fiscal year of the Commission is the calendar year, unless otherwise prescribed by the Lieutenant Governor in Council.

RSA 1980 cP-5 s9

Records and accounts

9.1 The Commission shall prepare and retain records and accounts in accordance with the regulations as required by the Minister.

2013 c16 s9

Information to the Commission

9.2(1) The Lieutenant Governor in Council may make regulations respecting the keeping of and the furnishing to the Commission of information that relates to hydrocarbon substances and that is required for the purposes of

(a) evaluating, formulating or administering any policy or program of

(i) the Crown, or

Definition

14(1) In section 16, "crude oil" means the crude oil component of petroleum.

(2) This section is repealed on Proclamation.

RSA 2000 cP-10 s14;2009 c20 s9

Dealing with Crown's royalty share

15 Subject to the regulations, the Commission shall

(a) accept delivery of the Crown's royalty share of a hydrocarbon substance required to be delivered to the Commission pursuant to an agreement, a contract under section 9(a) of the *Mines and Minerals Act* or an enactment,

(b) deal with the Crown's royalty share of the hydrocarbon substance in a manner that is, in the Commission's opinion, in the public interest of Alberta, and

(c) engage in other hydrocarbon-related activities in a manner that is, in the Commission's opinion, in the public interest of Alberta.

RSA 2000 cP-10 s15;2009 c20 s9;2013 c16 s14

Direction to provide goods and services

16(1) The Commission may, in accordance with the regulations, direct a supplier to provide goods or services or both.

(2) The Commission may include in a direction under subsection (1) any terms and conditions that it considers appropriate.

(3) The Commission may pay consideration for the provision of the goods or services in accordance with the regulations.

(4) A supplier who receives a direction under subsection (1) shall comply with

(a) the direction, and

(b) any regulations relating to the provision of the goods or services.

(5) Where the Commission gives a direction under subsection (1) and the Commission is unable to reach an agreement with the supplier as to the just and reasonable consideration to be paid by the Commission for the goods or services, the Alberta Utilities Commission may, on the application of the Commission or the supplier, fix charges instead of consideration in accordance with the regulations.

(6) No compensation is payable for goods or services provided under this section other than consideration or charges instead of consideration that are paid or fixed under this section.

(7) A supplier who contravenes subsection (4) is guilty of an offence and is liable to a fine of not more than $5000 for each day that the contravention continues.

(8) Where a supplier contravenes subsection (4), the Commission may, whether or not the supplier has been convicted of an offence in respect of the contravention, apply to the Court of King's Bench for an order requiring the supplier to comply with the direction or the regulations, as the case may be.

(9) Where

(a) a supplier is the lessee under an agreement, and

(b) a direction is given to the supplier under subsection (1) calling for goods or services to be provided in respect of a hydrocarbon substance that is, in whole or in part, the Crown's royalty share of a mineral payable pursuant to the agreement,

a contravention of subsection (4) by the supplier is, for the purposes of section 45(1)(c)(i) of the *Mines and Minerals Act*, deemed to be a failure to comply with that Act in relation to the agreement, whether or not the supplier has been convicted of an offence in respect of the contravention.

RSA 2000 cP-10 s16; 2007 cA-37.2 s82(21);2009 c20 s9; 2009 c53 s130;2012 cR-17.3 s100;AR 217/2022

17 Repealed 2009 c20 s9.

Discharge of lessee's liability

18(1) Subject to this section and the regulations, the delivery to the Commission of the Crown's royalty share of a hydrocarbon substance recovered pursuant to an agreement operates to discharge the lessee with respect to the lessee's liability to pay that royalty to the Crown in right of Alberta.

(2) Where money is paid to the Commission pursuant to regulations made under section 19(1)(e) as provided for under section 19(2)(a),

(a) the money is deemed to be payable under an agreement and is for all other purposes deemed to be a money royalty

payable on the hydrocarbon substance under an agreement, and

(b) the payment of the money operates to discharge the lessee of an agreement with respect to the lessee's liability to pay royalty on the hydrocarbon substance to the Crown in right of Alberta to the extent that the money represents the value of the royalty on the hydrocarbon substance as determined under the regulations.

RSA 2000 cP-10 s18;2009 c20 s9

Regulations

19(1) The Lieutenant Governor in Council may make regulations

(a) specifying substances or classes of substances as hydrocarbon substances for the purposes of this Act;

(a.1) respecting delegation by the board under section 2;

(a.2) prescribing powers, duties and functions that may not be delegated under section 2;

(a.3) respecting the providing of indemnities by the Commission under section 6.3(1) and (2);

(a.4) respecting delegations by the Commission under section 7;

(b) respecting the preparation and retention of records and accounts under section 9.1;

(b.1) respecting directives issued by the Minister under section 12.2(1);

(c) respecting information to be furnished to the Commission, the persons required to furnish that information, the form in which that information must be furnished and the time within which the information must be furnished;

(d) respecting the imposition of pecuniary penalties payable to the Commission, the circumstances in which the penalties may be imposed, the persons liable to pay the penalties and the time by which the penalties must be paid;

(e) respecting the respective rights, powers, liabilities and obligations of the Commission, lessees and others in the event that the quantity of a hydrocarbon substance delivered to the Commission in a month is less than or greater than the Crown's royalty share of the hydrocarbon substance actually payable in respect of that month;

(f) providing for any matter in connection with or incidental to the administration of sections 15 to 18.

(2) Without limiting the powers of the Lieutenant Governor in Council under subsection (1)(e), regulations may be made under that subsection

(a) respecting the powers of the Commission, in the event of a deficiency in deliveries of the quantity of the Crown's royalty share of a hydrocarbon substance under an agreement in a month, notwithstanding any provision to the contrary in the *Mines and Minerals Act* or a regulation under that Act,

(i) to accept the payment of money instead of delivery of the deficient quantity, or

(ii) to direct the payment to the Commission of an amount of money determined by it in accordance with the regulations as the value to the Crown of the deficient quantity;

(b) respecting the powers of the Commission, in the event of deliveries of a hydrocarbon substance to the Commission in a month in excess of the quantity of the Crown's royalty share of the hydrocarbon substance for that month, to act as the agent of the owner of the excess quantity for the disposition and delivery of the excess quantity to a purchaser in accordance with the regulations.

(3) A failure to comply with the regulations under this section in respect of an agreement is, for the purposes of section 45(1)(c)(i) of the *Mines and Minerals Act*, deemed to be a failure to comply with that Act in relation to the agreement, whether or not the lessee has been convicted of an offence in respect of the contravention.

(4) Reports and other information supplied to the Commission pursuant to regulations under this section are, for the purposes of section 38 of the *Mines and Minerals Act*, deemed to be supplied under that Act.

RSA 2000 cP-10 s19;2009 c20 s9;2013 c16 s15

Regulations re provision of goods and services

19.1(1) The Lieutenant Governor in Council may make regulations

(a) specifying goods or services or classes of goods or services for the purposes of section 16;

(b) specifying persons or classes of persons as suppliers for the purposes of section 16;

(c) respecting the giving of directions to suppliers and respecting the provision of goods or services by suppliers under section 16;

(d) respecting the consideration to be paid by the Commission under section 16(3) and the fixing of charges instead of consideration by the Alberta Utilities Commission;

(e) respecting applications to the Alberta Utilities Commission for the purposes of section 16(5);

(f) respecting the rights, powers, liabilities and obligations of the Commission, suppliers and others in relation to the provision of goods or services and consideration for goods or services or charges instead of consideration under section 16.

(2) A failure to comply with the regulations under this section in respect of an agreement is, for the purposes of section 45(1)(c)(i) of the *Mines and Minerals Act*, deemed to be a failure to comply with that Act in relation to the agreement, whether or not the lessee has been convicted of an offence in respect of the contravention.

(3) Reports and other information supplied to the Commission pursuant to regulations under this section are, for the purposes of section 38 of the *Mines and Minerals Act*, deemed to be supplied under that Act.

2009 c20 s9

(Consolidated up to 247/2018)

ALBERTA REGULATION 174/2006

Petroleum Marketing Act
Mines and Minerals Act

PETROLEUM MARKETING REGULATION

Table of Contents

Part 4
General

Definitions

1 In this Regulation,

(a) "actual deliveries", in relation to a delivery month and a battery, means the quantity of crude oil actually delivered to the Commission from the battery to a field delivery point during the delivery month, as determined by the Commission on the basis of the information in the possession of the Commission, including the final shipper's balance that related to or included that quantity;

(b) "agency contract" means a contract under which the Crown in right of Alberta and the Commission appoint a person as their agent for the purpose, among others, of marketing certain quantities of the Crown's royalty share of crude oil;

(c) "agent" or "Commission's agent" means a person appointed as an agent under an agency contract;

(d) "agreement" means an agreement as defined in the *Mines and Minerals Act*;

(e) "amendment report" means a report furnished or required to be furnished to the Commission pursuant to a notice given under section 4(5);

(f) "battery", in relation to any crude oil, means each battery at which the crude oil is measured after its recovery from a well;

(g) "Commission" means the Alberta Petroleum Marketing Commission;

(h) "Commission's field price" means

(i) with respect to royalty oil delivered to the Commission in a delivery month, the value to the Crown of the oil, in dollars per cubic metre, as

Part 2
Underdelivery and Overdelivery of Oil

Field delivery point for royalty oil

11(1) Subject to subsection (2), the place at which royalty oil shall be delivered to the Commission is prescribed as follows:

(a) if the battery at which the Crown's royalty share of crude oil is calculated is connected directly to a pipeline, the place where the royalty oil is to be delivered to the Commission is the point on the pipeline at which the battery is connected to it;

(b) if the battery at which the Crown's royalty share of crude oil is calculated is not connected directly to a pipeline, the place at which the royalty oil is to be delivered to the Commission is

(i) the nearest unloading facility connected to a pipeline, or

(ii) if there is another unloading facility connected to a pipeline entailing a higher net revenue return to the Crown, that other unloading facility.

(2) The Commission may in a particular case direct or consent to the delivery of royalty oil at a place other than that prescribed under subsection (1), either indefinitely or for a specified period.

Direction to deliver royalty deficiency

12(1) If there is an underdelivery balance at a battery for a delivery month, the Commission, by a notice given to the operator of the battery for that delivery month, may direct that the default under the agreement or agreements resulting from the deficient delivery be remedied by the delivery in kind to the Commission of crude oil in equal quantity and of like quality to the underdelivery balance

(a) in the month in which the direction is given,

(b) in a particular subsequent month, or

(c) in instalments in 2 or more particular subsequent months,

whichever is specified in the direction.

(2) A direction to an operator under subsection (1) relating to the underdelivery balance for a particular delivery month may include underdelivery balances for the same battery for any previous

delivery months if the operator to whom the direction is given was also the operator of that battery for each of those previous delivery months.

(3) The Commission may, with or without conditions, direct or consent to the postponement of delivery in kind of all or part of the volumes of royalty oil specified in a direction under subsection (1) to a later month or months and, on doing so, the direction is deemed to be amended accordingly.

(4) If a direction under subsection (1) is not complied with, then,

(a) to the extent that the quantity of crude oil delivered pursuant to the direction is less than the underdelivery balance or the aggregate of the underdelivery balances, as the case may be, specified in the direction, the Commission may, in a monthly statement, charge the operator with the payment to the Commission of an amount of money equal to, whichever of the following amounts is shown in the monthly statement,

(i) the amount calculated by multiplying the quantity of the undelivered royalty oil by the Commission's field price or respective field prices, as the case may be, for the delivery month or months in which the royalty oil was originally payable, or

(ii) the amount calculated by multiplying the quantity of the undelivered royalty oil by the Commission's field price or respective field prices, as the case may be, for the month or months in which the royalty oil should have been delivered in accordance with the direction,

and

(b) to the extent the quality of crude oil delivered pursuant to the direction is less than that required to be delivered pursuant to the direction, the Commission may, in a monthly statement, charge the operator with the payment to the Commission of an amount of money that in the Commission's opinion is equal to the difference in value between the crude oil delivered and that required to be delivered.

(5) When an amount of money becomes owing to the Commission under subsection (4), the direction under subsection (1) ceases to apply.

(6) The Commission may not give a notice under subsection (1) in respect of an underdelivery balance for a delivery month if it has

charged the operator under section 13(1) with the payment of a money amount in respect of the same underdelivery balance.

Money in lieu of royalty deficiency

13(1) If there is an underdelivery balance at a battery for a delivery month, the Commission, in a monthly statement sent to the operator of the battery, may charge the operator with the payment to the Commission of an amount of money calculated by multiplying the underdelivery balance by the Commission's field price for that underdelivery balance for that month.

(2) The Commission may not charge a battery operator with the payment of an amount of money under subsection (1) of this section in respect of an underdelivery balance for a delivery month if a notice has been given under section 12(1) in respect of the same underdelivery balance.

Money amounts owing under section 12 or 13

14(1) If the operator of a battery is charged with the payment of an amount of money owing in respect of an underdelivery balance pursuant to section 12(4) or 13(1),

(a) the obligation to pay the amount of money so charged replaces the obligation to deliver the underdelivery balance in kind to the Commission,

(b) full payment of the amount of money so charged operates to fulfil the obligation to deliver the underdelivery balance in kind to the Commission, and

(c) any crude oil delivered to the Commission in purported payment in kind of the underdelivery balance shall be dealt with by the Commission under section 15 as though it were an overdelivery of crude oil to which that section applies.

(2) If after a battery operator has been charged with the payment of a money amount under section 12(4) or 13(1) it is found that the amount owing to the Commission is greater or less than the amount charged, the Commission may adjust the amount owing to the Commission by decreasing or increasing it and cause the adjustment to be reflected in a subsequent monthly statement to the operator.

(3) Where a money amount is owing to the Commission under section 12(4) or 13(1) by reason of a charge contained in a monthly statement and the amount remains wholly or partly unpaid after the person so charged is succeeded as the operator of the battery concerned then, despite anything in section 12 or 13,

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to February 20, 2024

Last amended on April 27, 2023

À jour au 20 février 2024

Dernière modification le 27 avril 2023

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to February 20, 2024. The last amendments came into force on April 27, 2023. Any amendments that were not in force as of February 20, 2024 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 20 février 2024. Les dernières modifications sont entrées en vigueur le 27 avril 2023. Toutes modifications qui n'étaient pas en vigueur au 20 février 2024 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

TABLE OF PROVISIONS

An Act to facilitate compromises and arrangements between companies and their creditors

TABLE ANALYTIQUE

Loi facilitant les transactions et arrangements entre les compagnies et leurs créanciers

R.S.C., 1985, c. C-36

L.R.C., 1985, ch. C-36

An Act to facilitate compromises and arrangements between companies and their creditors

Loi facilitant les transactions et arrangements entre les compagnies et leurs créanciers

Short Title

Short title

1 This Act may be cited as the *Companies' Creditors Arrangement Act*.

R.S., c. C-25, s. 1.

Titre abrégé

Titre abrégé

1 *Loi sur les arrangements avec les créanciers des compagnies*.

S.R., ch. C-25, art. 1.

Interpretation

Definitions

2 (1) In this Act,

aircraft objects [Repealed, 2012, c. 31, s. 419]

bargaining agent means any trade union that has entered into a collective agreement on behalf of the employees of a company; (*agent négociateur*)

bond includes a debenture, debenture stock or other evidences of indebtedness; (*obligation*)

cash-flow statement, in respect of a company, means the statement referred to in paragraph 10(2)(a) indicating the company's projected cash flow; (*état de l'évolution de l'encaisse*)

claim means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*; (*réclamation*)

collective agreement, in relation to a debtor company, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the debtor company and a bargaining agent; (*convention collective*)

Définitions et application

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

accord de transfert de titres pour obtention de crédit Accord aux termes duquel une compagnie débitrice transfère la propriété d'un bien en vue de garantir le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible. (*title transfer credit support agreement*)

actionnaire S'agissant d'une compagnie ou d'une fiducie de revenu assujetties à la présente loi, est assimilée à l'actionnaire la personne ayant un intérêt dans cette compagnie ou détenant des parts de cette fiducie. (*shareholder*)

administrateur S'agissant d'une compagnie autre qu'une fiducie de revenu, toute personne exerçant les fonctions d'administrateur, indépendamment de son titre, et, s'agissant d'une fiducie de revenu, toute personne exerçant les fonctions de fiduciaire, indépendamment de son titre. (*director*)

agent négociateur Syndicat ayant conclu une convention collective pour le compte des employés d'une compagnie. (*bargaining agent*)

biens aéronautiques [Abrogée, 2012, ch. 31, art. 419]

Form of applications

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Documents that must accompany initial application

(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Publication ban

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be

Forme des demandes

10 (1) Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

a) d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;

b) d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;

c) d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Interdiction de mettre l'état à la disposition du public

(3) Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Redressements normalement nécessaires

11.001 L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation

limited to relief that is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

2019, c. 29, s. 136.

de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

2019, ch. 29, art. 136.

Rights of suppliers

11.01 No order made under section 11 or 11.02 has the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

2005, c. 47, s. 128.

Droits des fournisseurs

11.01 L'ordonnance prévue aux articles 11 ou 11.02 ne peut avoir pour effet :

a) d'empêcher une personne d'exiger que soient effectués sans délai les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie de valeur qui ont lieu après l'ordonnance;

b) d'exiger le versement de nouvelles avances de fonds ou de nouveaux crédits.

2005, ch. 47, art. 128.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 10 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Suspension : demande initiale

11.02 (1) Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de dix jours qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Stays, etc. — other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

Suspension : demandes autres qu'initiales

(2) Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)a);

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Preuve

(3) Le tribunal ne rend l'ordonnance que si :

a) le demandeur le convainc que la mesure est opportune;

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

2005, c. 47, s. 128, 2007, c. 36, s. 62(F); 2019, c. 29, s. 137.

Restriction

(4) L'ordonnance qui prévoit l'une des mesures visées aux paragraphes (1) ou (2) ne peut être rendue qu'en vertu du présent article.

2005, ch. 47, art. 128, 2007, ch. 36, art. 62(F); 2019, ch. 29, art. 137.

Stays — directors

11.03 (1) An order made under section 11.02 may provide that no person may commence or continue any action against a director of the company on any claim against directors that arose before the commencement of proceedings under this Act and that relates to obligations of the company if directors are under any law liable in their capacity as directors for the payment of those obligations, until a compromise or an arrangement in respect of the company, if one is filed, is sanctioned by the court or is refused by the creditors or the court.

Suspension — administrateurs

11.03 (1) L'ordonnance prévue à l'article 11.02 peut interdire l'introduction ou la continuation de toute action contre les administrateurs de la compagnie relativement aux réclamations qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de la compagnie dont ils peuvent être, ès qualités, responsables en droit, tant que la transaction ou l'arrangement, le cas échéant, n'a pas été homologué par le tribunal ou rejeté par celui-ci ou les créanciers.

Exception

(2) Subsection (1) does not apply in respect of an action against a director on a guarantee given by the director relating to the company's obligations or an action seeking injunctive relief against a director in relation to the company.

Exclusion

(2) La suspension ne s'applique toutefois pas aux actions contre les administrateurs pour les garanties qu'ils ont données relativement aux obligations de la compagnie ni aux mesures de la nature d'une injonction les visant au sujet de celle-ci.

Persons deemed to be directors

(3) If all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the company is deemed to be a director for the purposes of this section.

2005, c. 47, s. 128.

Présomption : administrateurs

(3) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie est réputé un administrateur pour l'application du présent article.

2005, ch. 47, art. 128.

Persons obligated under letter of credit or guarantee

11.04 No order made under section 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made,

Suspension — lettres de crédit ou garanties

11.04 L'ordonnance prévue à l'article 11.02 est sans effet sur toute action, poursuite ou autre procédure contre la

establishes a *provincial pension plan* as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

2005, c. 47, s. 128; 2009, c. 33, s. 28.

province est une province instituant un régime général de pensions au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un régime provincial de pensions au sens de ce paragraphe.

Pour l'application de l'alinéa c), la disposition législative provinciale en question est réputée avoir, à l'encontre de tout créancier et malgré tout texte législatif fédéral ou provincial et toute autre règle de droit, la même portée et le même effet que le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* quant à la somme visée au sous-alinéa c)(i), ou que le paragraphe 23(2) du *Régime de pensions du Canada* quant à la somme visée au sous-alinéa c)(ii), et quant aux intérêts, pénalités et autres charges afférents, quelle que soit la garantie dont bénéficie le créancier.

2005, ch. 47, art. 128; 2009, ch. 33, art. 28.

Meaning of *regulatory body*

11.1 (1) In this section, ***regulatory body*** means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.

Définition de *organisme administratif*

11.1 (1) Au présent article, ***organisme administratif*** s'entend de toute personne ou de tout organisme chargé de l'application d'une loi fédérale ou provinciale; y est assimilé toute personne ou tout organisme désigné à ce titre par règlement.

Regulatory bodies — order under section 11.02

(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

Organisme administratif — ordonnance rendue en vertu de l'article 11.02

(2) Sous réserve du paragraphe (3), l'ordonnance prévue à l'article 11.02 ne porte aucunement atteinte aux mesures — action, poursuite ou autre procédure — prises à l'égard de la compagnie débitrice par ou devant un organisme administratif, ni aux investigations auxquelles il procède à son sujet. Elles n'ont d'effet que sur l'exécution d'un paiement ordonné par lui ou le tribunal.

Exception

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

Exception

(3) Le tribunal peut par ordonnance, sur demande de la compagnie et sur préavis à l'organisme administratif et à toute personne qui sera vraisemblablement touchée par l'ordonnance, déclarer que le paragraphe (2) ne s'applique pas à l'une ou plusieurs des mesures prises par ou devant celui-ci, s'il est convaincu que, à la fois :

a) il ne pourrait être fait de transaction ou d'arrangement viable à l'égard de la compagnie si ce paragraphe s'appliquait;

b) l'ordonnance demandée au titre de l'article 11.02 n'est pas contraire à l'intérêt public.

Declaration — enforcement of a payment

(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may,

Déclaration : organisme agissant à titre de créancier

(4) En cas de différend sur la question de savoir si l'organisme administratif cherche à faire valoir ses droits à

on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

1997, c. 12, s. 124; 2001, c. 9, s. 576; 2005, c. 47, s. 128; 2007, c. 29, s. 106, c. 36, s. 65.

11.11 [Repealed, 2005, c. 47, s. 128]

Interim financing

11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority — secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority — other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

titre de créancier dans le cadre de la mesure prise, le tribunal peut déclarer, par ordonnance, sur demande de la compagnie et sur préavis à l'organisme, que celui-ci agit effectivement à ce titre et que la mesure est suspendue.

1997, ch. 12, art. 124; 2001, ch. 9, art. 576; 2005, ch. 47, art. 128; 2007, ch. 29, art. 106, ch. 36, art. 65.

11.11 [Abrogé, 2005, ch. 47, art. 128]

Financement temporaire

11.2 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter à la compagnie la somme qu'il approuve compte tenu de l'état de l'évolution de l'encaisse et des besoins de celle-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

Priorité — créanciers garantis

(2) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

Priorité — autres ordonnances

(3) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens de la compagnie au titre d'une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Facteurs à prendre en considération

(4) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la durée prévue des procédures intentées à l'égard de la compagnie sous le régime de la présente loi;

b) la façon dont les affaires financières et autres de la compagnie seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la conclusion d'une transaction ou d'un arrangement viable à l'égard de la compagnie;

e) la nature et la valeur des biens de la compagnie;

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to February 20, 2024

Last amended on April 27, 2023

À jour au 20 février 2024

Dernière modification le 27 avril 2023

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence
31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts
(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve
31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois
(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to February 20, 2024. The last amendments came into force on April 27, 2023. Any amendments that were not in force as of February 20, 2024 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 20 février 2024. Les dernières modifications sont entrées en vigueur le 27 avril 2023. Toutes modifications qui n'étaient pas en vigueur au 20 février 2024 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

TABLE OF PROVISIONS

An Act respecting bankruptcy and insolvency

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An Act respecting bankruptcy and insolvency

Loi concernant la faillite et l'insolvabilité

Short Title

Short title

1 This Act may be cited as the *Bankruptcy and Insolvency Act*.

R.S., 1985, c. B-3, s. 1; 1992, c. 27, s. 2.

Titre abrégé

Titre abrégé

1 *Loi sur la faillite et l'insolvabilité*.

L.R. (1985), ch. B-3, art. 1; 1992, ch. 27, art. 2.

Interpretation

Definitions

2 In this Act,

affidavit includes statutory declaration and solemn affirmation; (*affidavit*)

aircraft objects [Repealed, 2012, c. 31, s. 414]

application, with respect to a bankruptcy application filed in a court in the Province of Quebec, means a motion; (*Version anglaise seulement*)

assignment means an assignment filed with the official receiver; (*cession*)

bank means

(a) every bank and every authorized foreign bank within the meaning of section 2 of the *Bank Act*,

(b) every other member of the Canadian Payments Association established by the *Canadian Payments Act*, and

(c) every local cooperative credit society, as defined in subsection 2(1) of the Act referred to in paragraph (b), that is a member of a central cooperative credit society, as defined in that subsection, that is a member of that Association; (*banque*)

Définitions et interprétation

Définitions

2 Les définitions qui suivent s'appliquent à la présente loi.

accord de transfert de titres pour obtention de crédit Accord aux termes duquel une personne insolvable ou un failli transfère la propriété d'un bien en vue de garantir le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible. (*title transfer credit support agreement*)

actif à court terme Sommes en espèces, équivalents de trésorerie — notamment les effets négociables et dépôts à vue —, inventaire, comptes à recevoir ou produit de toute opération relative à ces actifs. (*current assets*)

actionnaire S'agissant d'une personne morale ou d'une fiducie de revenu assujetties à la présente loi, est assimilée à l'actionnaire la personne ayant un intérêt dans cette personne morale ou détenant des parts de cette fiducie. (*shareholder*)

administrateur S'agissant d'une personne morale autre qu'une fiducie de revenu, toute personne exerçant les fonctions d'administrateur, indépendamment de son titre, et, s'agissant d'une fiducie de revenu, toute personne exerçant les fonctions de fiduciaire, indépendamment de son titre. (*director*)

bankrupt means a person who has made an assignment or against whom a bankruptcy order has been made or the legal status of that person; (*failli*)

bankruptcy means the state of being bankrupt or the fact of becoming bankrupt; (*faillite*)

bargaining agent means any trade union that has entered into a collective agreement on behalf of the employees of a person; (*agent négociateur*)

child [Repealed, 2000, c. 12, s. 8]

claim provable in bankruptcy, ***provable claim*** or ***claim provable*** includes any claim or liability provable in proceedings under this Act by a creditor; (*réclamation prouvable en matière de faillite* ou *réclamation prouvable*)

collective agreement, in relation to an insolvent person, means a collective agreement within the meaning of the jurisdiction governing collective bargaining between the insolvent person and a bargaining agent; (*convention collective*)

common-law partner, in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year; (*conjoint de fait*)

common-law partnership means the relationship between two persons who are common-law partners of each other; (*union de fait*)

corporation means a company or legal person that is incorporated by or under an Act of Parliament or of the legislature of a province, an incorporated company, wherever incorporated, that is authorized to carry on business in Canada or has an office or property in Canada or an income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, insurance companies, trust companies or loan companies; (*personne morale*)

court, except in paragraphs 178(1)(a) and (a.1) and sections 204.1 to 204.3, means a court referred to in subsection 183(1) or (1.1) or a judge of that court, and includes a registrar when exercising the powers of the court conferred on a registrar under this Act; (*tribunal*)

creditor means a person having a claim provable as a claim under this Act; (*créancier*)

affidavit Sont assimilées à un affidavit une déclaration et une affirmation solennelles. (*affidavit*)

agent négociateur Syndicat ayant conclu une convention collective pour le compte des employés d'une personne. (*bargaining agent*)

banque

a) Les banques et les banques étrangères autorisées, au sens de l'article 2 de la *Loi sur les banques*;

b) les membres de l'Association canadienne des paiements créée par la *Loi canadienne sur les paiements*;

c) les sociétés coopératives de crédit locales définies au paragraphe 2(1) de la loi mentionnée à l'alinéa b) et affiliées à une centrale — au sens du même paragraphe — qui est elle-même membre de cette association. (*bank*)

bien Bien de toute nature, qu'il soit situé au Canada ou ailleurs. Sont compris parmi les biens les biens personnels et réels, en droit ou en equity, les sommes d'argent, marchandises, choses non possessoires et terres, ainsi que les obligations, servitudes et toute espèce de domaines, d'intérêts ou de profits, présents ou futurs, acquis ou éventuels, sur des biens, ou en provenant ou s'y rattachant. (*property*)

biens [Abrogée, 2004, ch. 25, art. 7]

biens aéronautiques [Abrogée, 2012, ch. 31, art. 414]

cession Cession déposée chez le séquestre officiel. (*assignment*)

conjoint de fait La personne qui vit avec la personne en cause dans une relation conjugale depuis au moins un an. (*common-law partner*)

conseiller juridique Toute personne qualifiée, en vertu du droit de la province, pour donner des avis juridiques. (*legal counsel*)

contrat financier admissible Contrat d'une catégorie prescrite. (*eligible financial contract*)

convention collective S'agissant d'une personne insolvable, s'entend au sens donné à ce terme par les règles de droit applicables aux négociations collectives entre elle et l'agent négociateur. (*collective agreement*)

créancier Personne titulaire d'une réclamation prouvable à ce titre sous le régime de la présente loi. (*creditor*)

Special services

(6) An inspector duly authorized by the creditors or by the other inspectors to perform special services for the estate may be allowed a special fee for those services, subject to approval of the court, which may vary that fee as it deems proper having regard to the nature of the services rendered in relation to the obligations of the inspector to the estate to act in good faith for the general interests of the administration of the estate.

R.S., 1985, c. B-3, s. 120; 1992, c. 27, s. 49; 2001, c. 4, s. 30; 2004, c. 25, s. 65(F); 2005, c. 47, s. 85.

Claims Provable

Claims provable

121 (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

Contingent and unliquidated claims

(2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.

Debts payable at a future time

(3) A creditor may prove a debt not payable at the date of the bankruptcy and may receive dividends equally with the other creditors, deducting only thereout a rebate of interest at the rate of five per cent per annum computed from the declaration of a dividend to the time when the debt would have become payable according to the terms on which it was contracted.

Family support claims

(4) A claim in respect of a debt or liability referred to in paragraph 178(1)(b) or (c) payable under an order or agreement made before the date of the initial bankruptcy event in respect of the bankrupt and at a time when the spouse, former spouse, former common-law partner or child was living apart from the bankrupt, whether the order or agreement provides for periodic amounts or lump sum amounts, is a claim provable under this Act.

R.S., 1985, c. B-3, s. 121; 1992, c. 27, s. 50; 1997, c. 12, s. 87; 2000, c. 12, s. 14.

Services spéciaux

(6) Un inspecteur régulièrement autorisé par les créanciers ou par les autres inspecteurs à exécuter des services spéciaux pour le compte de l'actif peut avoir droit à des honoraires spéciaux pour ces services, sous réserve de l'approbation du tribunal qui peut modifier ces honoraires comme il le juge à propos eu égard à la nature des services rendus par rapport à l'obligation qu'a l'inspecteur d'agir de bonne foi en vue de l'intérêt général de l'administration de l'actif.

L.R. (1985), ch. B-3, art. 120; 1992, ch. 27, art. 49; 2001, ch. 4, art. 30; 2004, ch. 25, art. 65(F); 2005, ch. 47, art. 85.

Réclamations prouvables

Réclamations prouvables

121 (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date à laquelle il devient failli, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à cette date, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

Décision

(2) La question de savoir si une réclamation éventuelle ou non liquidée constitue une réclamation prouvable et, le cas échéant, son évaluation sont décidées en application de l'article 135.

Créances payables à une date future

(3) Un créancier peut établir la preuve d'une créance qui n'est pas échue à la date de la faillite, et recevoir des dividendes tout comme les autres créanciers, en en déduisant seulement un rabais d'intérêt au taux de cinq pour cent par an calculé à compter de la déclaration d'un dividende jusqu'à la date où la créance devait échoir selon les conditions auxquelles elle a été contractée.

Réclamations alimentaires

(4) Constitue une réclamation prouvable la réclamation pour une dette ou une obligation mentionnée aux alinéas 178(1)b) ou c) découlant d'une ordonnance judiciaire rendue ou d'une entente conclue avant l'ouverture de la faillite et à un moment où l'époux, l'ex-époux ou ancien conjoint de fait ou l'enfant ne vivait pas avec le failli, que l'ordonnance ou l'entente prévoie une somme forfaitaire ou payable périodiquement.

L.R. (1985), ch. B-3, art. 121; 1992, ch. 27, art. 50; 1997, ch. 12, art. 87; 2000, ch. 12, art. 14.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *8640025 Canada Inc. (Re),*
2017 BCCA 303

Date: 20170817
Dockets: CA44619; CA44620

Docket: CA44619

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as Amended

In the Matter of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as Amended

In the Matter of a Plan of Compromise and Arrangement of 8640025 Canada Inc. and Teliphone Data Centers Inc.

Between:

8640025 Canada Inc. and Teliphone Data Centers Inc.

Respondents
(Petitioners)

And

TNW Networks Corp.

Appellant
(Respondent)

And

Ernst & Young Inc., Court Appointed Monitor for the Petitioners

Respondent

Docket: CA44620

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as Amended

In the Matter of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as Amended

In the Matter of a Plan of Compromise and Arrangement of 8640025 Canada Inc. and Teliphone Data Centers Inc.

Between:

8640025 Canada Inc. and Teliphone Data Centers Inc.

Respondents
(Petitioners)

And

Teliphone Corp.

Appellant
(Respondent)

And

Ernst & Young Inc., Court Appointed Monitor for the Petitioners

Respondent

Before: The Honourable Mr. Justice Goepel
The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Hunter

On appeal from: An order of the Supreme Court of British Columbia, dated July 18, 2017 (*8640025 Canada Inc. and Teliphone Data Centers Inc. (Re)*, 2017 BCSC 1291, Vancouver Docket No. S1610905).

Oral Reasons for Judgment

Counsel for the Appellant (CA44619), TNW Networks Corp.:	G.F. Gregory
Counsel for the Appellant (CA44620), Teliphone Corp.:	C.R. Clarke, Q.C.
Appearing for 8640025 Canada Inc. and Teliphone Navigata-Western Inc.:	Sandeep Panesar
Counsel for the Respondent, Ernst & Young Inc.:	S.F. Collins
Counsel for the Bank of Nova Scotia:	H.L. Williams
Counsel for TELUS Communications:	J.R. Sandrelli
Counsel for Cascade Divide Enterprises:	D.F. Hepburn

Place and Date of Hearing:	Vancouver, British Columbia August 14, 2017
Place and Date of Judgment:	Vancouver, British Columbia August 17, 2017

Summary:

An order for sale of assets of a business made pursuant to s. 36 of the Companies' Creditors Arrangement Act ("CCAA") is challenged on the basis that some of the assets authorized to be sold were assets of entities not before the Court in the CCAA *proceeding. Held: appeal allowed. The Court did not have the jurisdiction under the* CCAA *to authorize the sale of assets of entities that had not brought themselves within the CCAA proceeding.*

[1] **HUNTER J.A.**: These appeals from an order made under the *Companies' Creditors Arrangement Act* ("*CCAA*") come to the Court with leave.

[2] The order under appeal authorizes a sale of certain assets pursuant to s. 36 of the *CCAA*. The appellants argue that some of the assets to be sold under this authorization are owned by parties other than the companies that are subject to the *CCAA* proceeding. This, they say, goes beyond the jurisdiction of the *CCAA* court. If that is a correct characterization of the effect of the order under appeal, the issue is one of law and the standard of review is one of correctness.

[3] The respondents' position is that the intent of the asset purchase agreement is to restrict the sale to the Petitioners' assets, but if some of the assets do in fact belong to other entities, the Monitor is nonetheless entitled to sell them with the Court's approval. The Monitor relies on orders of the *CCAA* court leading up to the sale approval and the broad discretion of a *CCAA* court under s. 11 of the *CCAA*.

[4] Given the need for a decision on this appeal in a compressed timeline, I will not review all of the background to the order under appeal, but a brief review of the proceedings is necessary to provide context both for the order for sale and some of the arguments raised by the parties in this appeal.

[5] These proceedings commenced on November 25, 2016, when 8640025 Canada Inc., which I will refer to as 864, and Teliphone Data Centres Inc. filed a petition pursuant to the *CCAA* seeking the protection of that legislative regime in order to file a plan of compromise or arrangement. A third company, Teliphone

Canada Corp., was subsequently added as a Petitioner. I will refer to these three companies as the Petitioners.

[6] The Petitioners are members of a group of telecommunication companies, referred to as the TNW Group of Companies. The appellants are also part of the TNW Group of Companies, although neither of the appellants is a petitioner in these proceedings.

[7] The TNW Group sells telephone and long distance services to business and residential customers. They currently utilize the facilities of Telus Communications Company and Bell Canada, although Telus has served notice of its intention to disconnect the TNW Group for failure to meet their financial obligations to Telus.

[8] On November 30, 2016, an amended and restated initial order was made by the Supreme Court of British Columbia pursuant to the *CCAA*. The order stated that the petitioners were companies to which the *CCAA* applies, thereby founding jurisdiction. The order went on to extend the stay of proceedings which had been issued a few days earlier and appointed a monitor to monitor the business and financial affairs of the Petitioners.

[9] On December 21, 2016, a further order was made replacing the initial monitor with Ernst & Young, further extending the stay, and containing the following direction:

> 5. The Monitor is authorised and directed as part of the Petitioners restructuring to carry out a process for the solicitation of all offers to invest in the Petitioners or to purchase all or part of the Petitioners' assets, whether as a going concern or otherwise… In determining the Solicitation Process and Solicitation Plan, the Monitor will review and evaluate the assets of the Petitioners, and the costs and values associated with the Business.

[10] The distinction between the assets of the Petitioners and those associated with the Business has emerged as the most difficult challenge for the Monitor in this proceeding. The evidence was that all of the companies in the group operated seamlessly together as one business. The companies in the TNW Group use the same facilities and the degree of integration is so great that financial statements of

most of the companies in the Group are prepared on a consolidated basis. It quickly became apparent that the integrated nature of the business of the TNW Group would create difficulties in separating out what assets belonged to the Petitioners and what assets used in the Petitioners' Business were owned by other parties not within the *CCAA* process.

[11] To address this problem, in January of 2017, six of the secured creditors of the Petitioners applied to the *CCAA* judge for an order adding three parties, TNW Networks Corp. and Teliphone Corp., (who are appellants in this appeal) and a subsidiary of Teliphone Corp. called Teliphone Canada Corp., as petitioners to the *CCAA* proceedings. TNW Networks Corp. was identified as a critical part of the operations of the TNW Group. Teliphone Corp. and Teliphone Canada Corp. were characterized as being involved in the Petitioners' business.

[12] This application was dismissed by Mr. Justice Affleck with reasons indexed as 2017 BCSC 303. The reasons for judgment of Affleck J. are significant in light of the issue before this Court.

[13] Mr. Justice Affleck began his analysis by reference to s. 3(1) of the *CCAA* in these terms:

> [24] Subsection 3(1) on its face makes the *Act* applicable to a company which is a debtor or affiliated debtor company. A debtor company is defined in s. 2 of the *Act* as a company that is bankrupt or insolvent, has committed an act of bankruptcy, or has made an assignment in bankruptcy or is in the course of being wound up because of insolvency.
>
> [25] The record before me does not demonstrate that the proposed petitioners are insolvent. …

[14] He described s. 3 as a gateway to applying the *Act* to an eligible company, and held that since the proposed petitioners were neither insolvent debtors nor affiliated insolvent debtors, the *Act* was not applicable to them.

[15] He also observed that:

> [52] … If the prospective petitioners could be added, despite their opposition, the court would then become engaged in reorganizing their businesses, perhaps even selling them, and probably imposing the stay

> contemplated by s. 11.02(2) of the *Act*. I do not accept that *Act* is intended to be applied to a company that objects to coming under its constraints.
>
> [Emphasis added.]

[16] No further attempt was made to bring Teliphone Corp. into the *CCAA* proceedings. The appellant Teliphone Corp. relies in part on this judgment, which was not appealed, for the proposition that the *CCAA* court does not have jurisdiction over it or its assets in the *CCAA* proceeding.

[17] Further efforts were made, however, to bring TNW Networks Corp. into the proceeding, primarily because it emerged that the customer contracts, which were a significant asset of the Petitioners' business, had been assigned to TNW Networks Corp. prior to the initial *CCAA* order.

[18] Following further applications and cross-applications, on March 21, 2017, the appellant TNW Networks Corp. provided the Monitor with an Undertaking and Acknowledgement that assigned to the Monitor "all of the assets of TNW Networks Corp. that are used in or necessary for the business of the petitioners, as determined by the Monitor, including without limitation, all customer agreements of the Petitioners and all material supplier contracts, insofar as they are held by TNWN."

[19] On April 6, 2017, Mr. Justice Bowden made a further order providing a detailed process by which the Monitor was authorized to determine which assets of TNW Networks Corp. were derived from the property of the Petitioners and which were not. The Monitor was also given powers to market the property of the Petitioners, including any property of TNW Networks Corp. derived from the property of the Petitioners.

[20] The text of this order is of some consequence to the issues in this appeal. Paragraph 6 is relied on by the Monitor as providing authority for the asset purchase agreement that was ultimately negotiated, and was also referenced by the chambers judge who approved the agreement. Paragraph 6 reads as follows:

> Forthwith, the Monitor shall review, inventory and otherwise investigate the affairs and assets of Networks, and shall determine what Property (as defined below) of Networks was not derived directly or indirectly from the Property of the Petitioners, their subsidiaries, or any other entitles subject to the Applicants' security (the "Networks Property"), and report the same to the Court. Any Property of Networks which the Monitor is unable to determine the origin of shall not be Networks Property, and for greater certainty, until determined as set out herein, none of the Property shall be Networks Property. Any party may challenge the determination of what constitutes Networks Property by application to this Court within 10 business days following the Monitor's report on the same and which matter shall be determined in this proceeding on a summary basis.

[21] Networks is defined in the order as TNW Networks Corp.

[22] The other part of the April 6 order of relevance to this appeal is para. 7(l) which reads in relevant part as follows:

> The Monitor is hereby empowered and authorized, but not obligated, to act at once in respect of all of the assets and undertakings of the Companies (the "Property") and, without in any way limiting the generality of the foregoing, the Monitor is hereby empowered and authorized … to sell, convey, transfer, lease or assign the Property (other than the Networks property) or any part or parts thereof … with the approval of this Court …

[23] Companies is defined collectively in the order as TNW Networks Corp. and the Petitioners.

[24] The effect of these provisions is to provide the Monitor with the authority to sell, subject to the approval of the court, all of the assets of the Petitioners, together with those assets of TNW Networks Corp. that are not excluded by the process established in para. 6. Nothing in the April 6 order authorizes the Monitor to sell any other assets.

[25] In the end, no plan of arrangement was presented to the creditors for approval. Having resolved the problem of the integration of operations between the Petitioners and TNW Networks Corp. through the Undertaking and the April 6 order, the Monitor focussed his efforts on a sale of the Petitioners' assets as a going concern.

[26] The problem of separating out the assets of the Petitioners from other assets of the other companies in the TNW Group remained. On June 7, 2017, if not before, the Monitor became aware that several of these companies were asserting ownership in some of the assets used in the Business of the Petitioners.

[27] In his 7th Report to the Court, issued June 27, 2017, the Monitor outlined the steps he had taken to determine the scope of the Petitioner's assets:

> 111. As indicated in the response of the Monitor's legal counsel to the May 27 Letter, the Monitor, on numerous occasions and over several months, requested of Mr. Laliberte a list of property, including assets, customer agreements, property, plant and equipment or otherwise which were being used in the Business; but were not property of the Petitioners or TWN Networks.
>
> 112. On June 7, 2017, Mr. Laliberte presented the Monitor with a report (the "**Asset Report**") which purported to outline Teliphone Corp. and subsidiaries' interest in various property in the possession of the Petitioners and TNW Networks. …
>
> 113. The Asset Report provided by Mr. Laliberte provides an overview of a series of acquisitions made by Teliphone Corp., the Petitioners and other related parties that sought to segregate the ownership of assets and customer relationships between the various legal entities that were party to those transactions.
>
> …
>
> 115. Notably, the Asset Report asserts that various property in the possession of the Petitioners and TNW Networks are owned by legal entities other than the Petitioners (the "**Outside Property**"), including:
>
> a) 101234472 Saskatchewan Ltd.;
>
> b) Investel Capital Corporation (the parent company of the Petitioners);
>
> c) Teliphone Corp. (a related company); and
>
> d) 8583498 Canada Ltd. (a related company);

[28] The Monitor expressed some skepticism as to the accuracy of this report, but pointed out the difficulty in determining ownership of the assets used in the Petitioners' Business:

> 119. The Monitor is of the view that the assets of the Business are highly integrated in nature and there is no meaningful way to segregate the assets and customer relationships of the Business to various legal entities without a major examination, which would be extremely costly and would likely

> conclude that all of the assets, at minimum, are subject to the security interests of the Secured Creditors. …
>
> 120. The complex organizational structure of the Petitioners and the use of different entities makes it extremely difficult to trace the ownership of assets. …

[29] The Monitor went on to note that the secured creditors had advised that they held security over the entities identified as the owners of the Outside Property.

[30] The Monitor reported on the progress of the Solicitation Plan as follows:

> 129. The Monitor received seven (7) LOIs [Letters of Intent] from Prospective Offerors (collectively, the "**Offerors**") seeking to purchase the assets of the Business. No LOIs were received from parties interested in making an investment in the Business or in the Petitioners.
>
> [Emphasis added.]

[31] On June 28, 2017, an affidavit was filed by Lawry Trevor-Deutsch, the former President of Teliphone Corp. providing details of the assets used in the Petitioners' Business that he asserted belonged to Teliphone Corp. and its subsidiaries, and also details of additional assets that were said to belong to other companies, primarily affiliates of the Petitioners. Copies of source documents substantiating the ownership of these assets were provided as exhibits to this affidavit.

[32] At this point, time was becoming very tight. The stay of proceedings that was protecting the Petitioners was set to expire July 14, 2017. The question of what assets were available for a going concern sale was unresolved.

[33] On July 7, 2017, the Monitor issued his 8th Report to the Court in which he advised the Court of an Asset Purchase Agreement or APA that had been negotiated, subject to the Court's approval, with an affiliate of the Distributel Group of Companies. Once again the subject matter of the sale was referred to as the assets of the Business. The Monitor specifically referred to the ownership dispute in these terms:

> 29. The purchase price (the "Distributel Purchase Price") payable by Distributel for all of the assets of the Business, wherever located, including accounts receivable and other current assets, property plant and equipment, other network assets and all customer agreements and relationships (the

> "Purchased Assets") include assets that the Shareholder Representatives assert are assets of other entities, …

[34] He also commented briefly on the assertion of ownership of assets by Teliphone Corp. in the Trevor-Deutsch affidavit in these terms:

> 39. … (f) … The Monitor has reviewed Exhibit "Y" to the Trevor-Deutsch Affidavit including the categories of assets that are purportedly owned by Teliphone Corp. and has prepared a schedule attached as **Appendix "H"** to this report wherein the Monitor provides its view that those assets were either: (i) acquired directly by 864 in 2013; (ii) owned by one of the Petitioners subsidiaries; (iii) are subject to Secured Creditor's security; or (iv) do not form part of the Purchased Assets.

[35] The Monitor maintained this position before the chambers judge and in his submissions before us. The effect of this position is to assert that even if the assets that are part of the Purchased Assets were not assets of the Petitioners, they may be transferred if they were assets of one of the petitioners' subsidiaries or if the assets are subject to the Secured Creditors security, Secured Creditors being the secured creditors of the Petitioners.

[36] An application was then made to approve the Distributel APA, returnable July 13, 2017. The appellants opposed approval of the sale on the ground that the assets that were subject to the sale included assets belonging to Teliphone Corp. or other companies not part of the *CCAA* process, and accordingly the *CCAA* court did not have jurisdiction to approve the terms of the sale in the Distributel APA. A second ground was advanced relating to the process followed by the Monitor.

[37] The status of the proceedings at the time of the July 13 application was described by the chambers judge in these terms:

> [7] … At this stage, the decision reduces itself to the approval of this one sale, or an alternative outcome, which is difficult to know or define. There is no evidentiary base from which to conclude that the Respondents are in a position to carry on. They are about to run out of money and have no credit. Their business relationships with those they must deal with to carry on business, Telus being a prime example, are damaged beyond repair. The Distributel deal, on the other hand, can likely save the employment of dozens of employees, and allow a business to carry on. I do not see a viable alternative to the requested orders.

[38] I agree with the practical wisdom of these comments, and if what was being sold was the assets of the Petitioners I would agree with the disposition approved by the chambers judge. The impediment to this disposition, however, is the dispute over the ownership of the assets that the Monitor had been unable to resolve.

[39] The chambers judge addressed this jurisdictional question in these terms:

> [19] The Respondents also argue that the Monitor lacked the authority to sell the assets which are the subject of the Distributel agreement. However, para. 6, in one of this Court's orders made on April 26, 2017, contains a presumption against the assets being the property of an entity whose assets the Monitor could not sell. Moreover, the Monitor further addressed the asset question in its seventh report, dated June 27, 2017, at paragraphs 110–123. I quote here paragraphs 122 and 123:
>
> > Based on the foregoing, the Monitor is of the view that it has appropriately and in a cost effective manner carried out the responsibilities pursuant to Paragraph 6 of the Enhanced Monitor Powers Order that directed the Monitor to review, inventory and otherwise investigate the assets of TNW Networks, and determine which assets of TNW Networks, if any, was not derived directly or indirectly from the Property of the Petitioners, their subsidiaries, or any other entities subject to the security interests of the Secured Creditors.
> >
> > If this Honourable Court requires a more in-depth review the Monitor will be required to undertake a full scale forensic examination of the underlying transactions and sourcing of funds. The Monitor is prepared to undertake such a review, but notes that a review of this nature would take significant time and the professional costs included the Seventh Report Forecast does not include a provision for such an undertaking.
>
> [20] In my view, the further work offered by the Monitor in paragraph 123, quoted above, would be wasteful of time and money, and the Court does not require it. The ownership and transfer of assets among the group of companies owned and controlled by the Respondents was unusually complex. I am satisfied from Mr. Collins' detailed factual submissions on the first day of the hearing that the Monitor had the required interest in the sale assets to be able to sell them. I also note Appendix A to the Monitor's eighth report, dated July 7, 2017, which contains an acknowledgment and undertaking on behalf of the Respondents, granting the Monitor an irrevocable assignment of the shares in TNW Networks Corp. and the assets of TNWN as determined by the Monitor.

[40] After commenting on the second ground advanced by the appellants, the chambers judge approved the sale in the terms sought.

[41] In considering the issues before this Court, I note that the chambers judge who heard the application for approval of the APA was the third judge to hear and determine applications in this *CCAA* proceeding. It is unclear how much of the voluminous material presented to us was presented and explained to the chambers judge hearing the application for approval of the sale. I recognize that trial scheduling for an ongoing matter such as this can be very complicated, but if possible, given the complexity of proceedings such as this it would be desirable to have a single judge supervise the proceedings throughout.

[42] On this appeal, the appellants renew their jurisdictional argument that the *CCAA* court did not have the authority to approve this APA because some of the assets included in the sale belonged to parties not within the *CCAA* proceedings. The threshold question on this appeal is whether the APA does in fact purport to sell assets belonging to Teliphone Corp. or the other parties not before the Court. In these reasons I will refer to these assets as third party assets.

[43] The July 18 order on its face does not purport to sell third party assets, but the APA approved by the order does contain asset schedules including both physical assets and intellectual property which the appellants say demonstrably include third party assets. The order approving the sale also includes a provision whereby the "ownership and other adverse claims" of Teliphone Corp. in addition to seven other entities not before the Court are "expunged and discharged".

[44] Because of the basis by which the Monitor sought to support his authority to sell the assets listed in the APA, we do not have the benefit of a finding of fact by the chambers judge on the question of whether the assets to be conveyed in the APA include third party assets. It will be recalled that the Monitor based his authority on the April 6 order and the proposition previously noted that if the assets were assets of the Petitioners' subsidiaries or were subject to the security of the Petitioners' Secured Creditors, that was sufficient to found authority to include them in the sale.

[45] In my view it is necessary to determine this factual point in order to assess whether the jurisdictional issue argued by the appellants arises in this case.

[46] The appellants have identified specific items in the schedules to the Distributel APA that they say belong to Teliphone Corp., its subsidiaries or other entities. They have provided source documentation substantiating their claims to ownership. The Monitor was unable to determine whether the claims are valid due to the complexity of the interrelated business operations of the TNW Group. As a consequence, at the time he appeared before the chambers judge, the Monitor was unable to confirm that all of the scheduled assets belonged to the Petitioners. On a review of the record before the *CCAA* court, the preponderance of evidence is that third party assets are included in the asset schedules attached to the APA.

[47] The fact that the Monitor referred in both his 7th and 8th Reports to the sale of assets of the Business lends support to the conclusion that the Monitor was of the view that he had been authorized to sell the assets of the Business of the Petitioners, whether or not those assets included third party assets, as long as the third party assets were either assets of the Petitioners' subsidiaries or assets over which the Petitioners' Secured Creditors held security.

[48] I then approach this appeal on the footing that the APA does include third party assets. The question is whether the *CCAA* court had the jurisdiction to sell third party assets as part of the assets of the Business of the Petitioners.

[49] The Monitor has advanced three arguments said to support his authority to sell third party assets as part of the sale of the assets of the Petitioners. The first is that the April 6 order conferred that authority. The Monitor expressed this argument in the following way in his factum:

> Paragraph 6 of the Expanded Monitor Powers Order [i.e. the April 6 order] provides the Monitor with authority to sell assets of persons that are not necessarily the assets of the Companies but where such assets are subject to the interests of the Secured Creditors.

[50] The chambers judge interpreted the April 6 order in a similar manner, holding that it contained "a presumption against the assets being the property of an entity whose assets the Monitor could not sell."

[51] In my opinion, the April 6 order does not confer this authority. The April 6 order sets up a mechanism for separating the assets of TNW Networks Corp. that were derived from the Petitioners' Property or other designated entities from those that were not, and authorizing the Monitor to include in the asset sale those assets of TNW Networks Corp. that were in the former category. Paragraph 6 relates solely to the assets of TNW Networks Corp., not to the assets of Teliphone Corp. or any other entity.

[52] These provisions of the April 6 order were based on the irrevocable assignment by TNW Networks Corp. of its assets to the Monitor through the Undertaking and Acknowledgement of March 21, 2017. That Undertaking and Acknowledgement also related solely to the assets of TNW Networks Corp.

[53] The second argument made by the Monitor before the chambers judge and this Court is the proposition set out in his 8th Report in these terms:

> The Monitor has reviewed Exhibit "Y" to the Trevor-Deutsch Affidavit including the categories of assets that are purportedly owned by Teliphone Corp. and has prepared a schedule attached as **Appendix "H"** to this report wherein the Monitor provides its view that those assets were either: (i) acquired directly by 864 in 2013; (ii) owned by one of the Petitioners subsidiaries; (iii) are subject to Secured Creditor's security; or (iv) do not form part of the Purchased Assets.

[54] With respect I cannot agree. The Petitioners and its subsidiaries are separate legal entities. Assets belonging to the subsidiaries of the Petitioners cannot be available for disposition as part of the *CCAA* process unless the subsidiaries have been brought within that process as debtor companies, which they have not.

[55] The fact that the assets of Teliphone Corp. and the other entities may be subject to security held by the secured creditors of the Petitioners cannot provide a basis for authorizing their sale in this transaction. The secured creditors have not taken steps to realize on that security and they cannot do so in this proceeding to which Teliphone and the other entities are not parties. As Affleck J. held in his January 30 reasons for judgment, Teliphone Corp. is not part of the *CCAA* proceedings and there is no basis on which its assets could be sold in that process.

[56] The final argument raised by the Monitor before the chambers judge and briefly addressed before us is that the while the ownership claims of Teliphone Corp. and the other entities were being "expunged and discharged" by the order under appeal, the expungement related to claims to the assets themselves, whereas the order deferred the question of distribution of the proceeds to another day. The suggestion was that Teliphone Corp. and the other entities in question could still advance a claim against the purchase funds. The July 18 order is based on the B.C. Model Approval and Vesting Order under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-83, and the Monitor pointed out that Explanatory Note 6 from the B.C. Model Insolvency Order Committee states that claims being vested out may in some cases include ownership claims.

[57] This submission was not fully argued before us and it would not be appropriate for this Court to embark upon a detailed assessment of whether this Model Order has the meaning suggested in relation to ownership claims or whether such a process is appropriate for a sale under s. 36 of the *CCAA*. I note that even if there was authority to convert third party assets into cash, the claims preserved for further assessment appear to be limited to security interests or other financial or monetary claims, not claims of outright ownership. In any event, it is sufficient for purposes of this appeal to observe that to give effect to this argument would not only be inconsistent with the previous order of Affleck J. refusing to include Teliphone Corp. in these proceedings, but would also require a source of jurisdiction under the *CCAA* that has not been established in this appeal.

[58] In my opinion, the documented evidence of Teliphone Corp. that some of the assets scheduled to the APA belonged to it or other entities not before the Court, in combination with the inability of the Monitor to confirm that the assets were all the property of the Petitioners, precluded the ability of the Court to approve the asset purchase agreement presented for approval. The *CCAA* Court had no jurisdiction to authorize the sale of assets other than the assets of the Petitioners and TNW Networks Corp.

[59] In light of my conclusions concerning the assets that are included in the APA, it is not necessary to consider the appellants' further argument concerning the process of this *CCAA* proceeding.

[60] For these reasons, I would allow the appeals and set aside the order approving the Distributel APA. I would extend the stay of proceedings to August 28, 2017 in order to give interested parties an opportunity to consider the implications of this judgment. Further proceedings in this matter are remitted back to the Supreme Court of British Columbia.

[61] **GOEPEL J.A.**: I agree.

[62] **FITCH J.A.**: I agree.

[submissions by counsel re. costs]

[63] **GOEPEL J.A.**: If the appellants wish to pursue the question of costs, they are at liberty to file written submissions concerning that because, it seems to me, that it raises a somewhat potentially important practice point which we are not going to attempt to deal with summarily. If, as I say, the appellants wish to seek costs, they have liberty to file written submissions. Those submissions should be filed within the next 15 days. The Monitor will have a week to respond to those submissions. If the appellants, upon reflection, decide not to pursue the issue of costs, then there will be no costs of the appeal.

"The Honourable Mr. Justice Hunter"

In the Court of Appeal of Alberta

Citation: PanAmericana de Bienes y Servicios v. Northern Badger Oil & Gas Limited, 1991 ABCA 181

Date: 19910612
Docket: 11698 & 11713
Registry: Calgary

Between:

PanAmericana de Bienes y Servicios, S.A.

Respondent
(Plaintiff)

- and -

Northern Badger Oil & Gas Limited

Respondent
(Defendant)

And Between:

The Energy Resources Conservation Board

Appellant
(Applicant)

- and -

Vennard Johannesen Insolvency Inc., Receiver and Manager of Northern Badger Oil & Gas Limited

Respondent

- and -

Attorney General of Alberta

Appellant
(Intervenor)

The Court:

The Honourable Chief Justice Laycraft
The Honourable Mr. Justice Foisy
The Honourable Mr. Justice Irving

Reasons for Judgment of The Honourable Chief Justice Laycraft
Concurred in by The Honourable Mr. Justice Foisy
And Concurred in by The Honourable Mr. Justice Irving

APPEAL FROM THE ORDER OF THE HONOURABLE MR. JUSTICE MACPHERSON OF THE COURT OF QUEEN'S BENCH OF ALBERTA DATED THE 20TH DAY OF DECEMBER, 1989

COUNSEL:

Stanley H. Rutwind, Esq., for the Appellant (Intervenor) The Attorney General of Alberta

W. J. Major, Q.C. and M. J. Major, Esq., Messrs. Major Caron & Company for the Appellant The Energy Resources Conservation Board

R. C. Wigham, Esq., Messrs. Fenerty Robertson Fraser & Hatch for the Respondent, Panamerlcana de Bienes Y Servlclos, S.A.

T. L. Czechowskyj, Esq. Messrs. McManus Anderson Miles for the Respondent, Vennard Johannesen Insolvency Inc.

J. D. McDonald, Esq., Messrs. Bennett Jones Verchere for Collins Barrow Limited, Trustee in Bankruptcy

REASONS FOR JUDGMENT OF
THE HONOURABLE CHIEF JUSTICE LAYCRAFT

[1] The issue on this appeal is whether the **Bankruptcy Act** (R.S.C. 1980, c. B-3) prevents the court appointed Receiver/Manager of an insolvent and bankrupt oil company from complying with an order of the Energy Resources Conservation Board of the Province of Alberta. The order required the Receiver/Manager, in the interests of environmental safety, to carry out proper abandonment procedures on seven suspended oil wells. In Court of Queen's Bench, Mr. Justice MacPherson held that the order requiring "the abandonment and securing of potentially dangerous well sites is at the expense of the secured creditor's entitlement"

under the Bankruptcy Act and is "beyond the province's constitutional powers". He directed the Receiver/Manager not to comply with the order. For the reasons which follow, I respectfully disagree with that conclusion and would allow the appeal by the Board.

[2] "Abandonment" and "abandon" are terms with different meanings in the oil industry than when used in their usual legal sense. In the oil industry they refer to the process of sealing a hole which has been drilled for oil or gas, at the end of its useful life, to render it environmentally safe. In general terms, the process requires that the well bore be sealed at various points along its length to prevent cross-flows of liquids or gases between formations, or into aquifers or from the surface. The cost may vary from a few hundred dollars to tens of thousands of dollars depending on the circumstances.

I FACTS

[3] Prior to May, 1987 Northern Badger Oil and Gas Limited carried on business in the exploration for, and the production of, oil and gas in Alberta and Saskatchewan. It was licensed to operate 31 oil and gas wells in Alberta of which 11 were producing wells. The remainder were suspended or standing in a non-producing condition. Northern Badger owned varying interests approximating 10 per cent in each well and was the operator of them on behalf of itself and other working interest owners.

[4] On November 1, 1985, Northern Badger granted floating charge debenture security over certain oil and gas assets, including its interest in the 31 Alberta wells, to the respondent Panamericana. It defaulted under the debenture and in May, 1987, Panamericana applied for and obtained a court order appointing Vennard Johannesen Insolvency Inc. ("the Receiver")

> "…Receiver and Manager of all of the undertaking, property, and assets of the Defendant, Northern Badger Oil and Gas Limited with authority to manage, operate, and carry on the business and undertaking of the Defendant…"

[5] On August 7, 1987, a Receiving Order, effective retroactively to July 7, 1987, placed Northern Badger in Bankruptcy. Collins Barrow Limited was appointed Trustee in Bankruptcy.

[6] On July 20, 1987, the Energy Resources Conservation Board wrote to Northern Badger referring to the insolvency and

> "requiring an undertaking that the wells will continue to be operated in adherence with the regulations and conditions of the well licenses. Also it is essential that the licensee

> be capable of responding to any problems which may occur and properly abandoning the well once production is complete."

[7] The Board further suggested that "the solution to the problem" would be to transfer the wells to a party "who is prepared to take on the responsibilities of the licensee". The Receiver responded to this letter on August 14, 1987. It reported that 21 of the wells had been transferred to other parties, but that 12 wells had not. It then said:

> "The Receivership Manager is presently involved in negotiations to sell all of the assets and liabilities to a number of interested parties. Vennard Johannesen is therefore striving to pass on the obligations to the prospective purchaser." (emphasis added)

[8] The Board wrote again to the Receiver on December 11, 1987, pointing out that their records still showed Northern Badger to be the licensee of the wells. The letter asked the Receiver to confirm that no permits, licenses or approvals would be remaining before they applied for discharge "or alternatively that you give the Board notice of any application to be discharged".

[9] During the interval between these two letters, the Receiver had attempted to sell the Northern Badger properties to various prospective purchasers including Senex Corporation. On November 13, Senex made an offer to purchase the remaining Northern Badger assets held by the Receiver for $1,850,000.00 plus a carried interest of 17.5% on certain undeveloped properties held by Northern Badger. Under this offer Senex would become the licensee of the remaining wells. However, the agreement had a clause which provided:

> "The purchaser may elect to exclude any interest of the Vendor in any lands which has a value less than the costs of abandonment as agreed by the parties, or, failing agreement by Sproule Associates Limited, on or before the closing date."

[10] The Receiver applied to the Court for approval of the sale; the affidavit material filed in support of the application made no express reference to the "back out" clause. The Receiver did not give notice to the Board of the application. The Court approved the transaction on December 18, 1987 and the closing date of the sale was set for January 15, 1988.

[11] Prior to the closing, by an agreement dated on the same day, Senex exercised its rights under the "back out" clause and passed seven wells back to the Receiver. This amending agreement did not vary the purchase price of the remaining assets. All the wells

passed back must now be abandoned; two of them require minor expenditures, but the other five will require expenditures in the range of $40,000.00 each.

[12] The court order of December 18, 1987, set aside five different funds to meet the claims of named claimants against Northern Badger for sums held in trust for them, or where claimants had rights of set-off, or to meet lien claims against the properties themselves. None of these funds made allowance for the abandonment of the wells. The remainder of the moneys were held by the Receiver awaiting the outcome of litigation to determine whether Panamericana was entitled to priority over other creditors.

[13] On January 27, 1988, the Receiver advised the Board that

> "effective January 15, 1988 Vennard Johannesen Insolvency Inc. in its capacity as Receiver and Manager of Northern Badger Oil and Gas Limited has sold all of the assets of the company to Senex corporation.
>
> "Please cancel our account with you effective January 15, 1988. We will not be responsible for any charges or fees incurred after January 15, 1988…." (emphasis added)

[14] After a six day trial in May, 1988, Panamericana obtained judgment against Northern Badger for $1,304,112.00, and also obtained a declaration that it had priority over all other creditors of Northern Badger for the payment of sums due under the debenture. Thereupon, on May 29, 1988, the Receiver applied to Court of Queen's Bench for an order approving its administration of the Receiving order and for a discharge from its responsibilities. The affidavit filed in support detailed the payment or settlement of all claims for which provision had been made by the five funds established in December 1987. It disclosed that, after all assets were distributed to Panamericana, there would still be a substantial deficiency in the payment of the debenture debt.

[15] At the time of this application, the Receiver had approximately $226,000. on hand which it sought to pay to Panamericana after deducting its fees and disbursements. It wished to deliver to Collins Barrow, as Trustee in Bankruptcy, what were termed "minor, unrealized receivables" including the interest of Northern Badger in the seven wells and the well licenses relating to them. The affidavit did not refer specifically to the liability arising from the obligation to abandon the seven wells. An apparent indirect reference to these seven wells is contained in paragraph 18 of the supporting affidavit:

> "The Receiver has determined that certain assets of Northern Badger were not marketable and were excluded by Senex Corporation in its purchase of the assets of

Northern Badger, which assets shall remain with the estate of Northern Badger, subject to any further direction of this Honourable Court."

[16] The record before this court makes only brief reference to events during the next year. However, the application by the Receiver to be discharged remained in abeyance. In December 1988, the Board wrote to the Receiver pointing out that a number of wells were still licensed to Northern Badger. The Receiver did not respond until May 3, 1989. It advised the Board that five of the seven wells which now require to be abandoned, had been deleted from the Senex sale.

[17] The Board's reaction to this information was, apparently, immediate. On June 1, 1989, an Order in Council of the Lieutenant Governor in Council purporting to be issued under Section 7 of the Oil and Gas Conservation Act approved the issuance by the Board of an order respecting the abandonment of those five wells and the two others.

[18] The Board order authorized by the Order in Council was issued on June 6, 1989. It required the Receiver to submit abandonment programs for the seven wells by June 15, 1989 and to abandon them in accordance with an approved program on or before February 28, 1990. On June 13, 1989 the Board moved in Court of Queen's Bench for an order requiring the Receiver to comply with the Board's order and this litigation resulted.

[19] While the Board's motion was pending, an effort was made to obtain contribution toward the cost of abandonment from other working interest owners. Upon the application of the Board, on November 23, 1989, Mr. Justice MacPherson directed the Receiver to take steps to collect from other working interest owners of the seven wells their proportionate share of abandonment costs totalling $202,500.00. The proportion of these costs attributable to the percentage interest of Northern Badger in the wells was estimated at $17,330.00. Nothing in the record before the Court discloses whether, or the extent to which, this effort succeeded.

[20] On this appeal, the respondents objected that a portion of the evidence presented on behalf of the Board was inadmissible. They strongly urged that there was, in the result, no evidence that failure to abandon the wells presented any danger. The evidence in question was the affidavit of Mr. G.J. DeSorcy, Chairman of the Energy Resources Conservation Board. In that affidavit Mr. DeSorcy stated that he is a Professional Engineer and Chairman of the Board. He testified, on information and belief, as to a considerable amount of technical information about the five wells, the formations encountered, and the present condition of

them. He expressed opinions as to the danger of cross flows of liquids and gases, and as to hazards to the environment and to "public health and safety". The information was, apparently, derived from the records of the wells filed with the Board; the expressions of opinion were his own.

[21] In my opinion, it is not necessary to determine whether this information was admissible in this form or to consider the need for a new trial if it was not. Even if the information and expressions of opinion in this affidavit are ignored, there is ample evidence on the record in other affidavits, including those filed on behalf of the Receiver, to establish the probable cost of abandonment of the wells and the need for that process. As will be discussed later in these reasons, the process of abandonment of oil and gas wells is part of the general law of Alberta enacted to protect the environment and for the health and safety of all citizens.

II THE REASONS FOR JUDGMENT

[22] The learned Chambers Judge delivered extensive reasons for Judgment. He held that the Board order sanctioned by the Order in Council was within the Board's jurisdiction under its the general powers contained in sections 4(b), 4(f) and 7 of the Oil and Gas Conservation Act. He held, however, that the Board "is a creditor seeking to have its claim to have the seven wells abandoned, preferred to the claim of the secured creditor and to the scheme of distribution set forth in section 107 of the Bankruptcy Act." He cited Re Rainville [1980] 1 S.C.R. 45 (S.C.C.) and R. v. Henfrey, Samson and Belair Limited [1989] 2 S.C.R. 24 (S.C.C.) and said:

> "The E.R.C.B. Orders-in-council in form relate to a constitutionally valid objective, that is, abandonment of gas wells. The genuine purpose is to do something beyond the province's constitutional powers. It is to take money directed, by the Bankruptcy Act, to be paid to a secured creditor, and apply it to another purpose.
>
> ……..
>
> "Subject to the rights of secured creditors, everything in the nature of property of the bankrupt vests in the Trustee in bankruptcy. The E.R.C.B. has the powers under the Oil and Gas Conservation Act to abandon the wells and collect the costs from the appropriate parties.
>
> This claim, whether done directly or ordered to be done, is a claim provable in bankruptcy.
>
> Section 121 of the Bankruptcy Act:

'All debts and liabilities, present or future, to which the bankrupt is subject'

is surely wide enough to cover this liability.

The proper approach to solving problems such as are raised in the case at bar is prescribed by the Supreme Court of Canada in the Federal Business Development Bank v. Commission de la Sante et de la Securlte du Travail et al. 68 C.B.R. 209 at page 217 and following. A similar case of contest between preserving the secured creditors' rights as opposed to saving the public purse.

The Bankruptcy Act has not been amended to deal with modern social problems of abandonment of contaminated property. Here the abandonment and the securing of potentially dangerous well sites is at the expense of the secured creditors' entitlement if the E.R.C.B. were to succeed.

While I am aware that the Supreme Court of the United States of American split five to four in deciding a similar issue in the matter of Quanta Resources, 474 U.S. 494 (1986), I am of the view that the law of Canada accords with the dissenting view of the Chief Justice of the United States when he said that it was for the legislature to change the law, not the courts, when it came to impairing otherwise valid security for societal purposes. One should see also Lloyd's Bank of Canada v. International Warranty Company Limited et al., an unreported decision of the Alberta Court of Appeal (1989) as to the need for clear legislative statements before destroying property rights.

Accordingly, I must instruct the Receiver/manager that he must not proceed to abandon the several wells directed to be abandoned by the order of the E.R.C.B. out of the monies held for the secured creditors."

III THE REGULATORY REGIME FOR ALBERTA OIL AND GAS WELLS

[23] The regulatory scheme for oil and gas operations in Alberta is contained in the Oil and Gas Conservation Act (R.S.A. 1980 c. 0-5, in the Energy Resources Act (R.S.A. 1980 c. E-11) and in the regulations under those acts. Each statute contains a statement of its purposes. Section 4 of the Oil and Gas Conservation Act provides:

"4. The purposes of this Act are:

(b) to secure the observance of safe and efficient practices in the locating, spacing, drilling, equipping, completing, reworking, operating and abandonment of wells and in operations for oil and gas.

.....

(f) to control pollution above, at or below the surface in the drilling of wells and in operations for the production of oil and gas and in other operations over which the Board has jurisdiction.

[24] The Board is given wide specific powers under the act in the regulation of operations in the exploration for, and production of, oil and gas. Where a specific power is not given to the Board to be exercised on its own volition, it has a wide general power to be exercised with the authorization of the Lieutenant Governor in Council. Section 7 provides:

> 7. The Board, with the approval of the Lieutenant Governor in Council, may make any just and reasonable orders and directions the Board considers necessary to effect the purposes of this Act and that are not otherwise specifically authorized by this Act.

[25] Section 9 provides that a Board order shall override the terms of any contract. Sections 11 to 20 provide for the licensing of oil and gas drilling and producing operations. Section 11 provides that no person shall continue any producing operations unless

> "(b) he is the licensee or is acting under the instructions of the licensee."

[26] Section 13 provides that if it is established that a licensee does not have the right to produce oil or gas from land, the license becomes "void for all purposes except as to the liability of the holder of the license to complete or abandon the well…". Section 3.030 (3) of the regulations also provides, in some circumstances, for the Board to direct a licensee to abandon a well. Section 18 provides that a well license shall not be transferred without the consent of the Board. Section 19 outlines circumstances in which the Board may cancel a license.

[27] By sections 92(1) and (2) the Board is empowered to enter a well site and to perform, itself, work needed for "control, completion, suspension or abandonment of the well". The cost of this work then becomes a "debt payable by the licensee of a well to the Board". Section 95 empowers the Board to enforce any order by taking over the production, management and control of the well.

[28] The Energy Resources Conservation Act (R.S.A. 1980 c. fill), which establishes the Board, has a similar statement of its purposes in Section 2. Among these purposes are:

> "2 (c) to effect the conservation of, and to prevent the waste of, the energy resources of Alberta;
>
> (d) to control pollution and ensure environment conservation in the exploration for, processing, development and transportation of energy resources and energy;
>
> (e) to secure the observance of safe and efficient practices in the exploration for, processing, development and transportation of the energy resources of Alberta;"

[29] It is evident that the regulatory regime contained in these statutes and regulations contemplates that all wells drilled for oil or gas will one day be abandoned. That is so whether the well is unsuccessful or whether it produces large quantities of oil or gas. At some point, when further production is not possible or the cost of production of remaining quantities exceeds the revenue which could be obtained from it, the process of abandonment is required of the well licensee. In those situations where there is no solvent entity able to carry out the abandonment duties the wells become, in the descriptive vernacular of the oil industry, "orphan wells". Thus the direct issue in this litigation, in my opinion, is whether the Bankruptcy Act requires that the assets in the estate of a insolvent well licensee should be distributed to creditors leaving behind the duties respecting environmental safety, which are liabilities, as a charge to the public.

IV DID THE BOARD HAVE A PROVABLE CLAIM IN THE BANKRUPTCY?

[30] A basic premise of the respondents' position in Court of Queen's Bench, and in this court, is that the Board has a provable claim as a creditor in the bankruptcy of Northern Badger. From this it is contended that, in enforcing the requirement for the proper abandonment of oil and gas wells, the Board simply ranks as a creditor. Then, it is said, the scheme of distribution of the Bankruptcy Act gives priority to the secured creditors so that the trustee is unable to obey the law requiring abandonment of oil and gas wells. That is so, it is urged, because the requirement of the provincial legislation cannot subvert the scheme of distribution specified by the Bankruptcy Act. The respondents point to the definition of "creditor" in Section 2 of the Bankruptcy Act and to the elements of a "provable claim" set forth in section 121.

[31] Mr. Justice MacPherson agreed with these contentions saying that the words in sections 2 and 121 of the Bankruptcy Act were "surely wide enough to cover" Northern Badger's liability to abandon the wells. These sections provide:

> "2. In this Act,
>
> "Creditor" means a person having a claim preferred, secured or unsecured, provable as a claim under this Act;"
>
> "121(1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act."

[32] There are two aspects to the question whether the Board had a "provable claim" in the bankruptcy. The first is whether Northern Badger had a liability; the second is whether that liability is to the Board so that it is the Board which is the creditor. I respectfully agree that Northern Badger had a liability, inchoate from the day the wells were drilled, for their ultimate abandonment. It was one of the expenses, inherent in the nature of the properties themselves, taken over for management by the Receiver. With respect, I do not agree, however, that the public officer or public authority given the duty of enforcing a public law thereby becomes a "creditor" of the person bound to obey it.

[33] The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the Province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life. Rules relating to health, or the prevention of fires, or the clearing of ice and snow, or the demolition of unsafe structures are examples which come to mind. But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.

[34] It is true that this Board has the power by statute to create in its own favour a statutory debt if it chooses to do so. It may, under Sections 91(1) and (2) of the Oil and Gas Conservation Act (discussed above) do the work of abandonment itself and become a creditor for the sums expended. But the Board has not done so in this case. Rather it is simply in the course of enforcing observance of a part of the general law of Alberta.

[35] Counsel for Panamericana cited three authorities in support of its argument that the Board is a creditor of Northern Badger: Re Rainville [1980] 1 S.C.R. 45; Deloitte, Haskins & Sells **Ltd.** v. WCB (1985), 19 D.L.R. (4th) 577 (S.C.C.); and R. in Right of British Columbia v. Henfrey Samson Belair Ltd. [1989] 5 W.W.R. 577 (S.C.C.). But in all these cases some actual impost had been levied against the citizen and a sum of money was due and owing to the specific public authority involved. In Rainville, Quebec had registered a "privilege" for $5,474.08 for sales tax which the company had failed to remit; in Deloitte, Haskins & Sells, the sum in dispute was a levy of $3,646.68 made under the Workers' Compensation Act; in

Henry, Samson, Belair Ltd. the company had collected, and failed to remit sales tax of $58,763.23. Thus in each case a specific sum was due to the Crown, or a Crown agency, as a debt. None of the cases is authority for the proposition that a public officer ordering a citizen to obey the general law thereby becomes a creditor for any amount the citizen may ultimately be required to spend in complying.

[36] In my view, the Board is not, at this point, a "creditor" of Northern Badger with a claim provable in its bankruptcy. The problem presented by this case is not to be solved, therefore, by determining whether the Board ranks as a creditor of Northern Badger before or after the secured creditors. Rather it must be determined whether the Receiver, which was the operator of the oil wells in question, had a duty to abandon them in accordance with the law.

V THE DUTIES OF THE RECEIVER

[37] Vennard Johannesen Insolvency Inc. assumed its duties as Receiver in this case as an officer of the court. The nature of its duties has been determined by a long line of cases, now reinforced by the provisions of the Business Corporations Act (R.S.A. 1980 c. B-15). Sections 92 and 93 require the Receiver to act in accordance with the directions of the Court and of the instrument under which the appointment was made. Sections 94 and 95 provide:

> "94 A receiver or receiver-manager of a corporation appointed under an instrument shall
>
> (a) act honestly and in good faith and,
>
> (b) deal with any property of the corporation in his possession or control in a commercially reasonable manner.
>
> 95 On an application by a receiver or receiver-manager, whether appointed by the Court or under an instrument, or on an application by any interested person, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:
>
> (a) an order appointing, replacing or discharging a receiver or receiver-manager and approving his accounts;
>
> (b) an order determining the notice to be given to any person or dispensing with notice to any person;
>
> (c) an order fixing the remuneration of the receiver or receiver-manager;
>
> (d) an order

(i) requiring the receiver or receiver-manager, or a person by or on behalf of whom he is appointed, to make good any default in connection with the receiver's or receiver-manager's custody or management of the property and business of the corporation;

(ii) relieving any of those persons from any default on any terms the Court thinks fit;

(iii) confirming any act of the receiver or receiver-manager;

(d.1) an order that the receiver or receiver-manager make available to the applicant any information from the accounts of his administration that the Court specifies;

(e) an order giving directions on any mater relating to the duties of the receiver or receiver-manager."

[38] A receiver appointed by the court must act fairly and honestly as a fiduciary on behalf of all parties with an interest in the debtor's property and undertaking. The receiver is not the agent of the debtor or the creditor or of any other party, but has the duty of care, supervision and control which a reasonable person would exercise in the circumstances. The receiver may be liable for failure to exercise an appropriate standard of care. These points have been made in many cases starting in 1905 with **Plisson v. Duncan** (1905) 36 S.C.R. 647. The decision of Viscount Haldane in **Parsons et al v. Sovereign Bank of Canada** [1913] A.C.160, which has been frequently quoted, emphasizes the independence of the receiver from those who procured the appointment.

[39] It is also clear that the receiver takes full responsibility for the management, operation and care of the debtor's assets, but does not take legal title to them. That point has been made in a number of decisions including that of Lamer J. (as he then was) speaking for the court in F.B.D.B. v. Commission de Sante et al. (1988) 84 N.R. 308. At page 315 he said:

> "… the immoveable in the case at bar is property of the bankrupt within the meaning of the Bankrupt Act. Even if the trustee takes possession of the immoveable before the bankruptcy, the bankrupt remains owner of his property. The trustee who has seized an encumbered right of ownership over that property: he has only the rights of a creditor under a pledge or hypothec. This Court has ruled this way twice in Laliberte v. Larue, [1931] S.C.R. 7 and Trust general du Canada v. Roland Chalifoux Ltee, [1962] S.C.R. 456."

[40] A further factor affecting the obligation of a court appointed receiver is the receiver's status as an officer of the court; the standard required because of that status is one of meticulous correctness. In Alta Treasury Branches v. Invictus Financial Corporation Ltd. (1986) 42 Alta L.R. (2d) 181, Stratton J. (as he then was) said that the receiver's obligations

"reach further than merely acting honestly". He quoted with approval the statement of Wilson J. in Fotti v. 777 Mgmt. Inc. [1981]5 W.W.R. 48 at 54:

> "… the receiver is an officer of the court and in his discharge of that office he may not, in the name of the court, lend his power to defeat the proper claims of those on whose behalf those powers are exercised. Clothed as he is with the mantle of this court, his duties are to be approached not as the mere agent of the debenture holder, but as trustee for all parties interested in the fund of which he stands possessed."

[41] The same concern for proper conduct by the court's appointed officer may be seen in the judgment of the Saskatchewan Court of Appeal in Canadian Commercial Bank v. Simmons Drilling Ltd. (1989) 76 C.B.R. 241. In that case the Receiver undertook a lengthy review of the debtor's records, and discovered that some subcontractors, who had not registered liens in time, were unpaid. In some cases, the time for filing liens had expired after the Receiver had been appointed. The Court affirmed the duty of a Receiver to ascertain his obligations within a reasonable time and noted that the Receiver's actions in the discharge of those obligations are the actions of the court which appointed him. It held that, whether by intention or by default, an officer of the court, cannot be permitted to change the relative rights of those for whom he is acting. Sherstobitoff J.A. said at page 249:

> "The receiver, and through it the bank, must bear responsibility for the consequences of the failure to act with sufficient diligence to discover the claims within a reasonable time, thereby permitting lapse of the limitation period.
>
> What is clear is that, when the receiver was appointed, the subcontractors were entitled to payment from the trust fund. The failure to make payment to the subcontractors within a reasonable time thereafter, an obligation imposed by s. 89 of the Business Corporations Act and s. 7 of the Builders' Lien Act taken together, was in default of those statutory obligations. If the receiver had applied to the court for directions for payment out of the moneys on that date or within a reasonable time thereafter, the money would have been ordered paid to the subcontractors. The result is that the default of the receiver in failing to act with sufficient promptness and diligence to discover and pay the claims against the trust before expiration of the limitation period has deprived the subcontractors of the right to realize their claims from the trust fund.
>
> The bank now seeks to benefit from that default and the receiver supports its position. That position is untenable. While it may not be improper for a private debtor to withhold payment of a debt due and owing, whether deliberately or by neglect or oversight, and thereby benefit from an intervening limitation period, the same is not true of a receiver, <u>for he is an officer of the court.</u> The receiver's action is the action of the court and the court will not permit or approve any action on the part of its officer which has the effect of changing the rights of competing creditors, whether deliberately or by default."
>
> (emphasis added)

[42] In the present case it is clear that almost from the commencement of the receivership, the Receiver was aware of the obligation, in law, of Northern Badger to see the oil and gas wells properly abandoned. The correspondence from the Board detailed the obligation for the proper operation of the wells and the ultimate abandonment of them.

[43] As one reviews the sequence of events leading to the sale of the assets to Senex, it is difficult to escape the conclusion that the "back out" clause was deliberately negotiated to achieve the very result for which the respondents now contend. The "back out" clause contemplates the situation that the costs of abandonment of some wells may exceed the revenue to be gained from them. Of course, no matter what wealth a well has produced in the past, there comes a time, in the last days of its life, when little oil remains and the well must be abandoned. At that point it is a liability with the cost of abandonment exceeding the revenue that could be obtained. In this case, the parties even provided for an arbitrator to determine, if need be, whether that moment had arrived. All wells with some value were to be sold; the remainder were to be left in the bankrupt estate when the Receiver obtained a discharge from its duties.

[44] Moreover, whether by accident or design, the Board was not made aware of the developing situation. Despite the correspondence, the Board was not aware that Senex was able to exercise a "back out" clause in the sale agreement. The Board was first told of the effort "to sell all the assets and liabilities". It was then told that "all the assets have been sold". Only the most alert reader would detect the subtle difference in the two quoted portions of the Receiver's letters. On the material filed, it is also difficult to escape the conclusion that the court approved the sale to Senex without being aware of the prospect that some wells were to be left as "orphans".

VI CONCLUSION

[45] In my opinion the Board had the power, when authorized by the Lieutenant Governor in Council, to order the abandonment of the wells by some person. The order was clearly within the general regulatory scheme, and within the expressed purposes, of both of the statutes regulating the oil and gas industry. Indeed, the contrary was not argued. What was contended is that the Board should have directed its order to Northern Badger or to the trustee in bankruptcy rather than to the Receiver. What was further contended is that the receiver or trustee in bankruptcy is unable to obey the general law enacted by the provincial

legislature to govern oil wells because to do so would subvert the scheme Parliament has devised for distribution of assets in a bankruptcy.

[46] The parties referred the court to some cases in the United States and to one in Canada where a debtor's legal duties on environmental matters conflicted with the potential distribution of the estate on insolvency. In each case, however, the response of the court was to some degree determined by statutory provisions. The cases are not easy to reconcile.

[47] In Kovacs v. B & W Enterprises (1984) 469 U.S. 649 a state obtained an injunction ordering an individual to clean up a hazardous site, and later a receiver was appointed to seize property of the debtor and perform the duty. The individual filed for bankruptcy and the issue was whether his subsequent discharge from bankruptcy cleared the obligation. It was held in the Sixth Circuit Court of Appeals that the claim was essentially a monetary "liability on a claim" under the bankruptcy statute, and that the debtor was discharged. The United States Supreme Court affirmed.

[48] In Penn Terra Ltd. V. Dept. of Environmental Resources (1984) 733 F. 2d 267 the Third Circuit Court of Appeals was required to decide whether an exemption clause in the bankruptcy legislation should be construed to exempt from discharge an order requiring the debtor to complete restoration of the sites after coal operations. The court observed that the judgment obtained was not in the form of a traditional money judgment as for a tort or other claim. It then held that the debtor was not discharged and was required to perform the restoration.

[49] In Midlantic National Bank v. New Jersey Department of Environmental Protection (1985) 474 U.S. 494, a corporation filed for bankruptcy after it was discovered to have stored oil contaminated with a carcinogen at a site in New Jersey and another in New York. The trustee proposed to abandon the sites on the ground that they were of "inconsequential value" to the estate. In New Jersey, State environmental officials ordered the site cleaned up. A majority of the United States Supreme Court held that a bankruptcy trustee may not abandon property in contravention of state law. The minority would have held that the abandonment might be barred in emergency conditions, which did not yet exist in the case.

[50] A similar problem arose again after both the above cases had been decided in United States v. Whizco Inc. (1988) 841 F. (2d) 147. The United States sought an injunction to force obedience to a statutory obligation to abandon a worked out coal mine. The Sixth

Circuit Court of Appeals held, following the Kovacs case, that the operator's discharge under the Bankruptcy Act discharged the operator's liability to the extent that it would require the expenditure of money.

[51] One similar case has arisen in Canada. In Canada Trust Company v. Bulora Corporation (1980) 34 C.B.R. 145, the Receiver, as in the present case, had been appointed to receive and manage the company. The Fire Marshall ordered the Receiver to demolish certain housing units which were in a "serious and hazardous" condition. It was urged that, despite the appointment of the Receiver, the company continued to exist and to hold title to its assets. Thus, it was said, the proper recipient of the demolition order was the company, itself, and not the Receiver. Cory J., then a judge of the High Court of Ontario, summarized the argument in these terms at page 151:

> "It was contended that the nature of the position of the receiver, although it might paralyze the power of the company for which it was appointed, did not extinguish the legal existence of that company. Thus Bulora continued to exist and continued as the entity responsible for the required demolition. It was said that, as the Fire Marshal had every right to recover the municipality, the receiver should not and could not be required to undertake the demolition, which would have the effect of reducing the amount recovered by Canada Trust, the secured creditor."

[52] Cory J. then summarized the powers of the Receiver under the order appointing it, which gave it very wide powers of management and control similar to those given the Receiver in this case. He then said at page 152:

> "There remains the major problem of determining who should bear the costs of the demolition. The order of the Fire Marshal is of vital concern for the safety of residents of the units adjacent to and close by the abandoned units. The safety of those persons occupying such units should be of paramount importance. If the receiver is given wide and sweeping powers in the management of the company, surely in the course of such management it has a duty to comply with a demolition order where the safety of individuals is so vitally concerned. It is indeed unfortunate that a creditor must suffer the loss resulting from the demolition. Nevertheless, the asset to be managed by the receiver must, in my opinion, be managed with a view to the safety of those residing in and beside that asset. Receivership cannot and should not be guided solely by the recovery of assets. In my view, there is a social duty to comply with an order such as this which deals with the safety of individuals affected by an asset the receiver is managing.
>
> The direction then will be that the receiver is to comply with the order of the Fire Marshal and proceed with the demolition of the specified units."

[53] The Court of Appeal affirmed the judgment of Cory J. [(1981) 39 C.B.R. 153]. The endorsement on the record was as follows:

> "There was an order made by the fire marshall the legality and appropriateness of which is not challenged by the appellant. We are of the view that under the circumstances it was not only within the jurisdiction of the learned judge to direct that the court-appointed receiver-manager carry out that order but those circumstances necessitated that the receiver-manager be so directed. Although Cory J. referred to a 'social duty' to comply with the order that language, with deference, was inappropriate. The duty involved was a statutory one and it was unnecessary for him to consider the social implications of the order. The appeal is dismissed with costs."

[54] As in Bulora Corporation, it is urged in this case that Northern Badger is the licensee of the wells; the Receiver has never had legal title to them and is not the licensee. Therefore, it is said, the abandonment order should be directed to Northern Badger and not to the Receiver. In my opinion, that contention is not valid.

[55] The Receiver has had complete control of the wells and has operated them since May, 1987, when it was appointed Receiver and Manager of them. It has carried out for more than three years activities with respect to the wells which only a licensee is authorized to do under the provisions of the Oil and Gas Conservation Act. In that position, it cannot pick and choose as to whether an operation is profitable or not in deciding whether to carry it out. If one of the wells of which a receiver has chosen to take control should blow out of control or catch fire, for example, it would be a remarkable rule of law which would permit him to walk away from the disaster saying simply that remedial action would diminish distribution to secured creditors.

[56] While the Receiver was in control of the wells, there was no other entity with whom the Board could deal. An order addressed to Northern Badger would have been fruitless. That is so because, by order of the court, upon the application of the debenture holder, neither Northern Badger nor its trustee in bankruptcy had any right even to enter the well sites or to undertake any operation with respect to them. Moreover, under the regulatory scheme for Alberta oil wells, only a licensee is entitled to produce oil and gas. The Receiver cannot be heard to say that, while functioning as a licensee to produce the wells and to profit from them, it assumed none of a licensee's obligations.

[57] I must also consider the contention, which found favour in the Court of Queen's Bench, that the receiver or bankruptcy trustee managing and operating oil and gas wells need not, and, indeed, is forbidden, to obey the general provincial law governing property of that description. Put another way, this argument states that the general provincial law regulating

the operation of oil and gas wells in Alberta is invalid to the extent that it purports to govern a receiver or bankruptcy trustee in possession of such wells.

[58] Conflict between federal and provincial legislation is, of course, a classic Canadian problem. A number of cases have considered the situation where either a federal or provincial law, validly enacted within the constitutional power reserved to the enacting body, also touches upon or affects a heading of power reserved to the other level of government. These cases have been extensively reviewed and commented upon in the recent decision of the Supreme Court of Canada in **Bank of Montreal v. Hall** [1990] 1 S.C.R. 121.

[59] Provincial legislation has often been upheld despite incidental effects on a subject under the federal power. Where there is direct confrontation (as where one statute says "yes" and the other says "no" -- as Dickson J. (as he then was) expressed it in Multiple Access Ltd. v McCutcheon [1982] 2 S.C.R. 16) the doctrine of paramountcy may force a conclusion of invalidity of the provincial legislation.

[60] That the two statutes affect the same subject matter does not necessarily mean that one or the other of them is invalid. An early case of this type was Canadian Pacific Railway Company v. Notre Dame de Bonsecours [1899] A.C. 367. In that case the Privy Council held that since Parliament has the exclusive right to prescribe regulations for the construction/ repair and alteration of a railway, a provincial legislature could not regulate the structure of a ditch forming part of the works. But it held intra vires a municipal code which prescribed the cleaning of the ditch and the removal of obstructions to prevent flooding.

[61] Similarly in **Royal Bank of Canada v. Workmen's Compensation Board of Nova Scotia** [1936] S.C.R. 560, the Supreme Court of Canada held valid a levy for worker's compensation which adversely affected security granted under the Bank Act. La Forest J., giving the judgment of the court in **Bank of Montreal v. Hall** (supra), quoted the judgment of Davis J. in the Nova Scotia case (at 568-569) as follows (at 148):

> "…I have reached the conclusion that the goods in question, though owned by the bank subject to all the statutory rights and duties attached to the security were property in the province of Nova Scotia
>
> > 'used in or in connection with or produced by the industry with respect to which the employer (was) assessed though not owned by an employer'
>
> and became subject to the lien of the provincial statute the same as the goods of other owners…It is a provincial measure of general application for the benefit of workmen

> employed in industry in the province and is not aimed at the impairment of bank securities though its operations may incidentally in certain cases have that effect."
>
> (emphasis added by La Forest J.)

[62] In **Bank of Montreal v. Hall** (supra) the provincial legislation in conflict with valid federal legislation was forced to give way. The bank sought to enforce security granted to it under the **Bank Act** and the issue was whether it was required to follow the procedures and experience delays prescribed by the Saskatchewan **Limitation of Civil Rights Act.** After a review of the case law and of the two enactments La Forest J. was "led inescapably to the conclusion" that there was an "actual conflict in operation" between them. The provincial legislation was held inoperative in respect of security taken by the bank.

[63] In my view, there is no such direct conflict in this case. The Alberta legislation regulating oil and gas wells in this province is a statute of general application within a valid provincial power. It is general law regulating the operation of oil and gas wells, and safe practices relating to them, for the protection of the public. It is not aimed at subversion of the scheme of distribution under the Bankruptcy Act though it may incidentally affect that distribution in some cases. It does so, not by a direct conflict in operation, but because compliance by the Receiver with the general law means that less money will be available for distribution.

[64] I respectfully agree with the decision in **Bulora Corporation** (supra). In my opinion, the Receiver, the manager of the wells with operating control of them, was bound to obey the provincial law which governed them.

[65] I would not attempt to define the limits of provincial regulatory authority in relation to the federal powers respecting insolvency and bankruptcy. The various levels of government regulate business in a myriad of ways. The extent to which these levels of government may, in the exercise of their powers, affect in an incidental way, the distribution of insolvent estates must depend, to a considerable extent, on the facts of the particular case.

[66] I would allow the appeal and direct the Receiver to comply with the Board Order. The parties may speak to costs.

DATED AT CALGARY, ALBERTA
THIS 12th DAY OF JUNE
A.D. 1991.

2019 SCC 5, 2019 CSC 5
Supreme Court of Canada

Orphan Well Association v. Grant Thornton Ltd.

2019 CarswellAlta 141, 2019 CarswellAlta 142, 2019 SCC 5, 2019 CSC 5, [2019] 1 S.C.R. 150, [2019] 1 R.C.S. 150, [2019] 3 W.W.R. 1, [2019] A.W.L.D. 879, [2019] A.W.L.D. 880, [2019] A.W.L.D. 881, [2019] A.W.L.D. 941, [2019] A.W.L.D. 942, [2019] S.C.J. No. 5, 22 C.E.L.R. (4th) 121, 301 A.C.W.S. (3d) 183, 430 D.L.R. (4th) 1, 66 C.B.R. (6th) 1, 81 Alta. L.R. (6th) 1, 9 P.P.S.A.C. (4th) 293

Orphan Well Association and Alberta Energy Regulator (Appellants) and Grant Thornton Limited and ATB Financial (formerly known as AlbertaTreasury Branches) (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Ecojustice Canada Society, Canadian Association of Petroleum Producers, Greenpeace Canada, Action Surface Rights Association, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers' Association (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown JJ.

Heard: February 15, 2018
Judgment: January 31, 2019
Docket: 37627

Proceedings: reversing *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171, 2017 CarswellAlta 695, 2017 ABCA 124, Frans Slatter J.A., Frederica Schutz J.A., Sheilah Martin J.A. (Alta. C.A.); affirming *Grant Thornton Ltd. v. Alberta Energy Regulator* (2016), 33 Alta. L.R. (6th) 221, 37 C.B.R. (6th) 88, [2016] 11 W.W.R. 716, 2016 CarswellAlta 994, 2016 ABQB 278, Neil Wittmann C.J.Q.B. (Alta. Q.B.)

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Subject: Civil Practice and Procedure; Environmental; Estates and Trusts; Insolvency; Natural Resources

APPEAL from judgment reported at *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 2017 ABCA 124, 2017 CarswellAlta 695, 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171 (Alta. C.A.), dismissing appeal from judgment dismissing application for declaration that trustee-in-bankruptcy's disclaimer of licensed wells was void and granting cross-application for approval of sales process that excluded renounced wells.

POURVOI formé à l'encontre d'une décision publiée à *Orphan Well Assn. v. Grant Thornton Ltd.* (2017), 2017 ABCA 124, 2017 CarswellAlta 695, 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171 (Alta. C.A.), ayant rejeté un appel interjeté à l'encontre d'un jugement ayant rejeté une demande visant à faire déclarer que la renonciation du syndic de faillite à des puits autorisés était nulle et ayant accueilli une demande reconventionnelle visant à obtenir l'approbation d'un processus de vente qui excluait les puits ayant fait l'objet d'une renonciation.

Wagner C.J.C. **(Abella, Karakatsanis, Gascon, Brown JJ. concurring):**

I. Introduction

1 The oil and gas industry is a lucrative and important component of Alberta's and Canada's economy. The industry also carries with it certain unavoidable environmental costs and consequences. To address them, Alberta has established a comprehensive cradle-to-grave licensing regime that is binding on companies active in the industry. A company will not be granted the licences that it needs to extract, process or transport oil and gas in Alberta unless it assumes end-of-life responsibilities for plugging and capping oil wells to prevent leaks, dismantling surface structures and restoring the surface to its previous condition. These obligations are known as "reclamation" and "abandonment" (Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12 (“EPEA”), s. 1(ddd), and Oil and Gas Conservation Act, R.S.A. 2000, c. O-6 (“OGCA”), s. 1(1)(a)).

2 The question in this appeal is what happens to these obligations when a company is bankrupt and a trustee in bankruptcy is charged with distributing its assets among various creditors according to the rules in the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (“BIA”). Redwater Energy Corporation ("Redwater") is the bankrupt company at the centre of this appeal. Its principal assets are 127 oil and gas assets — wells, pipelines and facilities — and their corresponding licences. A few of Redwater's licensed wells are still producing and profitable. The majority of the wells are spent and burdened with abandonment and reclamation liabilities that exceed their value.

3 The Alberta Energy Regulator ("Regulator") and the Orphan Well Association ("OWA") are the appellants in this Court. (For simplicity, I will refer to the Regulator when discussing the appellants' position, unless otherwise noted.) The Regulator administers Alberta's licensing regime and enforces the abandonment and reclamation obligations of licensees. The Regulator has delegated to the OWA, an independent non-profit entity, the authority to abandon and reclaim "orphans", which are oil and gas assets and their sites left behind in an improperly abandoned or unreclaimed state by defunct companies at the close of their insolvency proceedings. The Regulator says that, one way or another, the remaining value of the Redwater estate must be applied to meet the abandonment and reclamation obligations associated with its licensed assets.

4 Redwater's trustee in bankruptcy, Grant Thornton Limited ("GTL"), and Redwater's primary secured creditor, Alberta Treasury Branches ("ATB"), oppose the appeal. (For simplicity, I will refer to GTL when discussing the respondents' position, unless otherwise noted.) GTL argues that, since it has disclaimed Redwater's unproductive oil and gas assets, s. 14.06(4) of the BIA empowers it to walk away from those assets and the environmental liabilities associated with them and to deal solely with Redwater's producing oil and gas assets. Alternatively, GTL argues that, under the priority scheme in the *BIA*, the claims of Redwater's secured creditors must be satisfied ahead of Redwater's environmental liabilities. Relying on the doctrine of paramountcy, GTL says that Alberta's environmental legislation regulating the oil and gas industry is constitutionally inoperative to the extent that it authorizes the Regulator to interfere with this arrangement.

5 The chambers judge (2016 ABQB 278, 37 C.B.R. (6th) 88 (Alta. Q.B.)) and a majority of the Court of Appeal (2017 ABCA 124, 47 C.B.R. (6th) 171 (Alta. C.A.)) agreed with GTL. The Regulator's proposed use of its statutory powers to enforce Redwater's compliance with abandonment and reclamation obligations during bankruptcy was held to conflict with the *BIA* in two ways: (1) it imposed on GTL the obligations of a licensee in relation to the Redwater assets disclaimed by GTL, contrary to s. 14.06(4) of the BIA; and (2) it upended the priority scheme for the distribution of a bankrupt's assets established by the *BIA* by requiring that the "provable claims" of the Regulator, an unsecured creditor, be paid ahead of the claims of Redwater's secured creditors.

6 Martin J.A., as she then was, dissented. She would have allowed the Regulator's appeal on the basis that there was no conflict between Alberta's environmental legislation and the *BIA*. Martin J.A. was of the view that: (1) s. 14.06 of the BIA did not operate to relieve GTL of Redwater's obligations with respect to its licensed assets; and (2) the Regulator was not asserting any provable claims, so the priority scheme in the *BIA* was not upended.

7 For the reasons that follow, I would allow the appeal. Although my analysis differs from hers in some respects, I agree with Martin J.A. that the Regulator's use of its statutory powers does not create a conflict with the *BIA* so as to trigger the doctrine of federal paramountcy. Section 14.06(4) is concerned with the personal liability of trustees, and does not empower a trustee to walk away from the environmental liabilities of the estate it is administering. The Regulator is not asserting any claims provable in the bankruptcy, and the priority scheme in the *BIA* is not upended. Thus, no conflict is caused by GTL's status as a licensee under Alberta legislation. Alberta's regulatory regime can coexist with and apply alongside the *BIA*.

II. Background

A. Alberta's Regulatory Regime

8 The resolution of the constitutional questions and the ultimate outcome of this appeal depend on a proper understanding of the complex regulatory regime which governs Alberta's oil and gas industry. I will therefore describe that regime in considerable detail.

9 In order to exploit oil and gas resources in Alberta, a company needs three things: a property interest in the oil or gas, surface rights and a licence issued by the Regulator. In Alberta, mineral rights are typically reserved from ownership rights in land. About 90 percent of Alberta's mineral rights are held by the Crown on behalf of the public.

10 A company's property interest in the oil or gas it seeks to exploit typically takes the form of a mineral lease with the Crown (but occasionally with a private owner). The company also needs surface rights so it can access and occupy the physical land located above the oil and gas and place the equipment needed to pump, store and haul away the oil and gas. Surface rights may be obtained through a lease with the landowner, who is often a farmer or rancher (but is occasionally the Crown). Where a landowner does not voluntarily grant surface rights, Alberta law authorizes the Surface Rights Board to issue a right of entry order in favour of an "operator", that is, the person having the right to a mineral or the right to work it (Surface Rights Act, R.S.A. 2000, c. S-24, ss. 1(h) and 15).

11 Canadian courts characterize a mineral lease that allows a company to exploit oil and gas resources as a *profit à prendre*. It is not disputed that a *profit à prendre* is a form of real property interest held by the company (*Berkheiser v. Berkheiser*, [1957] S.C.R. 387 (S.C.C.)). A *profit à prendre* is fully assignable and has been defined as "a non-possessory interest in land, like an easement, which can be passed on from generation to generation, and remains with the land, regardless of changes in ownership" (F. L. Stewart, "How to Deal with a Fickle Friend? Alberta's Troubles with the Doctrine of Federal Paramountcy", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2017* (2018), 163 ("Stewart"), at p. 193). Solvent and insolvent companies alike will often hold *profits à prendre* in both producing and unproductive or spent wells. There are a variety of potential "working interest" arrangements whereby several parties can share an interest in oil and gas resources.

12 The third thing a company needs in order to access and exploit Alberta's oil and gas resources, and the one most germane to this appeal, is a licence issued by the Regulator. The *OGCA* prohibits any person without a licence from commencing to drill a well or undertaking any operations preparatory or incidental to the drilling of a well, and from commencing to construct or operate a facility (ss. 11(1) and 12(1)). The Pipeline Act, R.S.A. 2000, c. P-15, similarly prohibits the construction of pipelines without a licence (s. 6(1)). The *profit à prendre* in an oil and gas deposit may be bought and sold without regulatory approval. However, it is of little practical use on its own, as, without the licence associated with a well, the purchaser cannot "continue any drilling operations, any producing operations or any injecting operations" (OGCA, s. 11(1)), and, without the licence associated with a facility, the purchaser cannot "continue any construction or operation" (OGCA, s. 12(1)).

13 The three relevant licensed assets in the Alberta oil and gas industry are wells, facilities and pipelines. A "well" is defined, *inter alia*, as "an orifice in the ground completed or being drilled ... for the production of oil or gas" (OGCA, s. 1(1)(eee)). A "facility" is broadly defined and includes any building, structure, installation or equipment that is connected to or associated with the recovery, development, production, handling, processing, treatment or disposal of oil and gas resources (OGCA, s. 1(1)(w)). A "pipeline" is defined as "a pipe used to convey a substance or combination of substances", including associated installations (Pipeline Act, s. 1(1)(t)).

14 The licences a company needs to recover, process and transport oil and gas are issued by the Regulator. The Regulator is not an agent of the Crown. It is established as a corporation by s. 3(1) of the Responsible Energy Development Act, S.A. 2012, c. R-17.3 ("REDA"). It exercises a wide range of powers under the *OGCA* and the *Pipeline* Act. It also acts as the regulator in respect of energy resource activities under the *EPEA*, Alberta's more general environmental protection legislation (REDA, s. 2(2)(h)). The Regulator's mandate is set out in the *REDA* and includes "the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta" (s. 2(1)(a)). The Regulator is funded almost entirely by the industry it regulates, and it collects its budget through an administration fee (Stewart, at p. 219; REDA, ss. 28 and 29; Alberta Energy Regulator Administration Fees Rules, Alta. Reg. 98/2013).

15 The Regulator has a wide discretion when it comes to granting licences to operate wells, facilities and pipelines. On receiving an application for a licence, the Regulator may grant the licence subject to any conditions, restrictions and stipulations, or it may refuse the licence (OGCA, s. 18(1); Pipeline Act, s. 9(1)). Licences to operate a well, facility or pipeline are granted subject to obligations that will one day arise to abandon the underlying asset and reclaim the land on which it is situated.

16 "Abandonment" refers to "the permanent dismantlement of a well or facility in the manner prescribed by the regulations or rules" made by the Regulator (OGCA, s. 1(1)(a)). Specifically, the abandonment of a well has been defined as "the process of sealing a hole which has been drilled for oil or gas, at the end of its useful life, to render it environmentally safe" (*Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 Alta. L.R. (2d) 45 ("*Northern Badger*"), at para. 2). The abandonment of a pipeline refers to its "permanent deactivation ... in the manner prescribed by the rules" (Pipeline Act, s. 1(1)(a)). "Reclamation" includes "the removal of equipment or buildings", "the decontamination of buildings ... land or water", and the "stabilization, contouring, maintenance, conditioning or reconstruction of the surface of the land" (EPEA, s. 1(ddd)). A further duty binding on those active in the Alberta oil and gas industry is remediation, which arises where a harmful or potentially harmful substance has been released into the environment (EPEA, ss. 112 to 122). As the extent of any remediation obligations that may be associated with Redwater assets is unclear, I will not refer to remediation separately from reclamation, unless otherwise noted. As has been done throughout this litigation, I will refer to abandonment and reclamation jointly as end-of-life obligations.

17 A licensee must abandon a well or facility when ordered to do so by the Regulator or when required by the rules or regulations. The Regulator may order abandonment when "the Regulator considers that it is necessary to do so in order to protect the public or the environment" (OGCA, s. 27(3)). Under the rules, a licensee is required to abandon a well or facility, *inter alia*, on the termination of the mineral lease, surface lease or right of entry, where the Regulator cancels or suspends the licence, or where the Regulator notifies the licensee that the well or facility may constitute an environmental or safety hazard (Oil and Gas Conservation Rules, Alta. Reg. 151/71, s. 3.012). Section 23 of the *Pipeline Act* requires licensees to abandon pipelines in similar situations. The duty to reclaim is established by s. 137 of the EPEA. This duty is binding on an "operator", a broader term which encompasses the holder of a licence issued by the Regulator (EPEA, s. 134(b)). Reclamation is governed by the procedural requirements set out in regulations (Conservation and Reclamation Regulation, Alta. Reg. 115/93).

18 The Licensee Liability Rating Program, which was, at the time of Redwater's insolvency, set out in *Directive 006: Licensee Liability Rating (LLR) Program and License Transfer Process* (March 12, 2013) ("Directive 006") is one means by which the Regulator seeks to ensure that end-of-life obligations will be satisfied by licensees rather than being offloaded onto the Alberta public. As part of this program, the Regulator assigns each company a Liability Management Rating ("LMR"), which is the ratio between the aggregate value attributed by the Regulator to a company's licensed assets and the aggregate liability attributed by the Regulator to the eventual cost of abandoning and reclaiming those assets. For the purpose of calculating the LMR, all the

licences held by a given company are treated as a package, without any segregation or parcelling of assets. A licensee's LMR is calculated on a monthly basis and, where it dips below the prescribed ratio (1.0 at the time of Redwater's insolvency), the licensee is required to pay a security deposit. The security deposit is added to the licensee's "deemed assets" and must bring its LMR back up to the ratio prescribed by the Regulator. If the required security deposit is not paid, the Regulator may cancel or suspend the company's licences (OGCA, s. 25). As an alternative to posting security, the licensee can perform end-of-life obligations or transfer licences (with approval) in order to bring its LMR back up to the prescribed level.

19 Licences can be transferred only with the Regulator's approval. The Regulator uses the Licensee Liability Rating Program to ensure that end-of-life obligations will not be negatively affected by licence transfers. Upon receipt of an application to transfer one or more licences, the Regulator assesses how the transfer, if approved, would affect the LMR of both the transferor and the transferee. At the time of Redwater's insolvency, if both the transferor and the transferee would have a post-transfer LMR equal to or exceeding 1.0, the Regulator would approve the transfer, absent other concerns. Following the chambers judge's decision in this case, the Regulator implemented changes to its policies, including the requirement that transferees have an LMR of 2.0 or higher immediately following any licence transfer: Alberta Energy Regulator, *Licensee Eligibility — Alberta Energy Regulator Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision*, June 20, 2016 (online). For the purposes of this appeal, I will be referring to the regulatory regime as it existed at the time of Redwater's insolvency.

20 As discussed in greater detail below, if either the transferor or the transferee would have a post-transfer LMR below 1.0, the Regulator would refuse to approve the licence transfer. In such a situation, the Regulator would insist on certain remedial steps being taken to ensure that neither LMR would drop below 1.0. Although Directive 006, as it was in the 2013 version, required both the transferee and transferor to have a post transfer LMR of at least 1.0, during this litigation, the Regulator stated that, when licensees are in receivership or bankruptcy, its working rule is to approve transfers as long as they do not cause a deterioration in the transferor's LMR, even where its LMR will remain below 1.0 following the transfer. The explanation for this working rule is that it helps to facilitate purchases. The Regulator's position is that the Licensee Liability Rating Program continues to apply to the transfer of licences as part of insolvency proceedings.

21 The *OGCA*, the *Pipeline Act* and the *EPEA* all contemplate that a licensee's regulatory obligations will continue to be fulfilled when it is subject to insolvency proceedings. The *EPEA* achieves this by including the trustee of a licensee in the definition of "operator" for the purposes of the duty to reclaim (s. 134(b)(vi)). The *EPEA* also specifically provides that an order to perform reclamation work (known as an "environmental protection order") may be issued to a trustee (ss. 140 and 142(1)(a)(ii)). The *EPEA* imposes responsibility for carrying out the terms of an environmental protection order on the person to whom the order is directed (ss. 240 and 245). However, absent gross negligence or wilful misconduct, a trustee's liability in relation to such an order is expressly limited to the value of the assets in the bankrupt estate (s. 240(3)). The *OGCA* and the *Pipeline Act* take a more generic approach to applying the various obligations of licensees to trustees in the insolvency context: they simply include trustees in the definition of "licensee" (OGCA, s. 1(1)(cc); Pipeline Act, s. 1(1)(n)). As a result, every power which these Acts give the Regulator against a licensee can theoretically also be exercised against a trustee.

22 Despite this, Alberta's regulatory regime does contemplate the possibility that some of a licensee's end-of-life obligations will remain unfulfilled when the insolvency process has run its course. The Regulator may designate wells, facilities, and their sites as "orphans" (OGCA, s. 70(2)(a)). A pipeline is defined as a "facility" for the purposes of the orphan regime (OGCA, s. 68(d)). Directive 006 stated that "a well, facility, or pipeline in the LLR program is eligible to be declared an orphan where the licensee of that licence becomes insolvent or defunct" (s. 7.1). An "orphan fund" has been established for the purpose of paying for, *inter alia*, the abandonment and reclamation of orphans (OGCA, s. 70(1)). The orphan fund is financed by an annual industry-wide levy paid by licensees of wells, facilities and unreclaimed sites (s. 73(1)). The amount of the levy is prescribed by the Regulator based on the estimated cost of abandoning and reclaiming orphans in a given fiscal year (s. 73(2)).

23 The Regulator has delegated its statutory authority to abandon and reclaim orphans to the OWA (Orphan Fund Delegated Administration Regulation, Alta. Reg. 45/2001), a non-profit organization overseen by an independent board of directors. It is funded almost entirely through the industry-wide levy described above, 100 percent of which is remitted to it by the Regulator. The OWA has no power to seek reimbursement of its costs. However, once it has completed its environmental work, it may be

reimbursed up to the value of any security deposit held by the Regulator to the credit of the licensee of the orphans. In recent years, the number of orphans in Alberta has increased rapidly. For example, the number of new orphan wells increased from 80 in the 2013-14 years to 591 in the 2014-15 years.

24 At issue in this appeal is the applicability during bankruptcy of two powers conferred on the Regulator by the provincial legislation. Both are designed to ensure that licensees satisfy their end-of-life obligations.

25 The first power at issue in this appeal is the Regulator's power to order a licensee to abandon licensed assets, which is accompanied by statutory powers for the enforcement of such orders. Where a well or facility has not been abandoned in accordance with a direction of the Regulator or the rules or regulations, the Regulator may authorize any person to abandon the well or facility or may do so itself (OGCA, s. 28). Where the Regulator or the person it has designated performs the abandonment, the costs of doing so constitute a debt payable to the Regulator. An order of the Regulator showing these costs may be filed with and entered as a judgment of the Alberta Court of Queen's Bench and then enforced according to the ordinary procedure for enforcement of judgments of that court (OGCA, s. 30(6)). A similar scheme applies with respect to pipelines (Pipeline Act, ss. 23 to 26).

26 A licensee that contravenes or fails to comply with an order of the Regulator, or that has an outstanding debt to the Regulator in respect of abandonment or reclamation costs, is subject to a number of potential enforcement measures. The Regulator may suspend operations, refuse to consider licence applications or licence transfer applications (OGCA, s. 106(3)(a), (b) and (c)), or require the payment of security deposits, generally or as a condition of granting any further licences, approvals or transfers (OGCA, s. 106(3)(d) and (e)). Where a licensee contravenes the Act, regulations or rules, any order or direction of the Regulator, or any condition of a licence, the Regulator may prosecute the licensee for a regulatory offence and a fine may be imposed as a penalty, although the licensee can raise a due diligence defence (OGCA, ss. 108 and 110). A similar scheme applies with respect to pipelines (Pipeline Act, ss. 51 to 54) and the *EPEA* contains similar debt-creating provisions with respect to environmental protection orders. The *EPEA* also provides for the prosecution of regulatory offences in cases of non-compliance, with an available due diligence defence. However, as noted, a trustee's liability in relation to environmental protection orders is capped at estate assets, unless the trustee is guilty of gross negligence or wilful misconduct (EPEA, ss. 227 to 230, 240 and 245).

27 The second power at issue in this appeal is the Regulator's power to impose conditions on a licensee's transfer of its licence(s). As when it initially grants a licence, the Regulator has broad powers to consent to the transfer of a licence subject to any conditions, restrictions and stipulations or to reject the transfer (OGCA, s. 24(2)). Under Directive 006 and its 2016 replacement, the Regulator can reject a transfer even where both parties would have the required LMR after the transfer or where a security deposit is available to be posted in compliance with LMR requirements. In particular, the Regulator may determine that it is not in the public interest to approve the licence transfer based on the compliance history of one or both parties or their directors, officers or security holders, or based on the risk posed by the transfer to the orphan fund.

28 Where a proposed transaction would cause the transferor's LMR to deteriorate below 1.0 (or simply to deteriorate, in the case of an insolvent transferor), the Regulator insists that one of the following conditions be met before it will approve the transaction: (i) that the transferor perform abandonment, reclamation, or both, thus reducing its deemed liabilities, or (ii) that the transferor post a security deposit, thus increasing its deemed assets. Alternatively, the transaction may be structured to avoid any deterioration of the transferor's LMR by "bundling" the licences for spent wells with the licences for producing wells. A transaction in which the licenses for spent wells are retained while the licences for producing wells are transferred will almost always cause a considerable deterioration in a company's LMR.

29 During this appeal, there was significant discussion of other regulatory regimes which Alberta *could* have adopted to prevent environmental costs associated with the oil and gas industry from being offloaded onto the public. What Alberta *has* chosen is a licensing regime which makes such costs an inherent part of the value of the licensed assets. This regime has the advantage of aligning with the polluter-pays principle, a well-recognized tenet of Canadian environmental law. This principle assigns polluters the responsibility for remedying environmental damage for which they are responsible, thereby incentivizing companies to pay attention to the environment in the course of their economic activities (*Imperial Oil Ltd. v. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624 (S.C.C.) , at para. 24). The Licensee Liability Rating Program essentially

requires licensees to apply the value derived from oil and gas assets during the productive portions of the life cycle of the assets to the inevitable cost of abandoning those assets and reclaiming their sites at the end of those life cycles.

30 Ultimately, it is not the role of this Court to decide the best regulatory approach to the oil and gas industry. What is not in dispute is that, in adopting its current regulatory regime, Alberta has acted within its constitutional authority over property and civil rights in the province and over the "development, conservation and management of non-renewable natural resources ... in the province" (Constitution Act, 1867, ss. 92(13) and 92A(1)(c)). Alberta has devised a complex regulatory apparatus to address important policy questions concerning when, by whom and in what manner the inevitable environmental costs associated with oil and gas extraction are to be paid. Its solution is a licensing regime that depresses the value of key industry assets to reflect environmental costs, backstopped by a levy on industry in the form of the orphan fund. Alberta intended that apparatus to continue to operate when an oil and gas company is subject to insolvency proceedings.

31 However, the insolvency of an oil and gas company licensed to operate in Alberta also engages the *BIA*. The *BIA* is federal legislation that governs the administration of a bankrupt's estate and the orderly and equitable distribution of property among its creditors. It is validly enacted pursuant to Parliament's constitutional authority over bankruptcy and insolvency (Constitution Act, 1867, s. 91(21)). Just as Alberta's regulatory regime reflects its considered choice about how to address the important policy questions raised by the environmental risks of oil and gas extraction, the *BIA* reflects Parliament's considered choice about how to balance important policy objectives when a bankrupt's assets are, by definition, insufficient to meet all of its various obligations. To the extent that there is an operational conflict between the Alberta regulatory regime and the *BIA*, or that the Alberta regulatory regime frustrates the purpose of the *BIA*, the doctrine of paramountcy dictates that the *BIA* must prevail.

B. The Relevant Provisions of the BIA

32 Here, I simply wish to note the sections of the *BIA* at issue in this appeal. These sections will determine whether the doctrine of paramountcy applies. I will discuss the purposes of the *BIA* and the various issues raised by s. 14.06 in greater detail below.

33 The central concept of the *BIA* is that of a "claim provable in bankruptcy". Several provisions of the *BIA* form the basis for delineating the scope of provable claims. The first is the definition provided in s. 2:

> ***claim provable in bankruptcy, provable claim*** or ***claim provable*** includes any claim or liability provable in proceedings under this Act by a creditor...

34 "Creditor" is defined in s. 2 as "a person having a claim provable as a claim under this Act".

35 The definition of "claim provable" is completed by s. 121(1):

> All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

36 A claim may be provable in a bankruptcy proceeding even if it is a contingent claim. A "contingent claim is 'a claim which may or may not ever ripen into a debt, according as some future event does or does not happen'" (*Peters v. Remington*, 2004 ABCA 5, 49 C.B.R. (4th) 273 (Alta. C.A.), at para. 23, quoting *Gardner v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.) , at p. 281). Sections 121(2) and 135(1.1) provide guidance on when a contingent claim will be a provable claim:

> **121 (2)** The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135.
>
> . . . . .
>
> **135 (1.1)** The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

37 In *AbitibiBowater Inc., Re*, 2012 SCC 67, [2012] 3 S.C.R. 443 (S.C.C.) ("*Abitibi*"), at para. 26, this Court interpreted the foregoing provisions of the *BIA* and articulated a three-part test for determining when an environmental obligation imposed by a regulator will be a provable claim for the purposes of the BIA and the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"):

> 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. [Emphasis in original.]

38 I will address the *Abitibi* test in greater detail below.

39 Once bankruptcy has been declared, creditors of the bankrupt must participate in one collective bankruptcy proceeding if they wish to enforce their provable claims. Section 69.3(1) of the BIA thus provides for an automatic stay of enforcement of provable claims outside the bankruptcy proceeding, effective as of the first day of bankruptcy.

40 The *BIA* establishes a comprehensive priority scheme for the satisfaction of the provable claims asserted against the bankrupt in the collective proceeding. Section 141 sets out the general rule, which is that all creditors rank equally and share rateably in the bankrupt's assets. However, the rule set out in s. 141 applies "[s]ubject to [the *BIA*]". Section 136(1) lists the claims of preferred creditors and the order of priority for their payment. It also states that this order of priority is "[s]ubject to the rights of secured creditors". Under s. 69.3(2), the stay of proceedings does not prevent secured creditors from realizing their security interest. The *BIA* therefore sets out a priority scheme for paying claims provable in bankruptcy, with secured creditors being paid first, preferred creditors second and unsecured creditors last (see *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 (S.C.C.) , at paras. 32-35).

41 Essential to this appeal is s. 14.06 of the BIA, which deals with various environmental matters in the bankruptcy context. I will now reproduce s. 14.06(2) and s. 14.06(4), the two portions of the s. 14.06 scheme that are directly implicated in this appeal. The balance of s. 14.06 can be found in the appendix at the conclusion of these reasons.

42 Section 14.06(2) reads as follows:

> **(2)** Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred
>
> (a) before the trustee's appointment; or
>
> (b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct or, in the Province of Quebec, the trustee's gross or intentional fault.

43 Section 14.06(4) reads as follows:

> **(4)** Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of requiring a trustee to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,
>
> (a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, or during the period of the stay referred to in paragraph (b), the trustee
>
> (i) complies with the order, or

(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property, or any right in any immovable, affected by the condition or damage;

(b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a), within ten days after the order is made or within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the trustee to contest the order, or

(ii) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(c) if the trustee had, before the order was made, abandoned or renounced or been divested of any interest in any real property, or any right in any immovable, affected by the condition or damage.

44 As I will discuss, a main point of contention between the parties is the very different interpretations they ascribe to s. 14.06(4) of the BIA. I note that s. 14.06(4)(a)(ii), which is relied upon by GTL, refers to a trustee who "abandons, disposes of or otherwise releases any interest in any real property". The word "disclaim" is used in these reasons, as it has been throughout this litigation, as a shorthand for these terms.

45 I turn now to a brief discussion of the events of the Redwater bankruptcy.

C. The Events of the Redwater Bankruptcy

46 Redwater was a publicly traded oil and gas company. It was first granted licences by the Regulator in 2009. On January 31 and August 19, 2013, ATB advanced funds to Redwater and, in return, was granted a security interest in Redwater's present and after-acquired property. ATB lent funds to Redwater with full knowledge of the end-of-life obligations associated with its assets. In mid-2014, Redwater began to experience financial difficulties. Upon application by ATB, GTL was appointed receiver for Redwater on May 12, 2015. At that time, Redwater owed ATB approximately $5.1 million.

47 Upon being advised of the receivership, the Regulator sent GTL a letter dated May 14, 2015, setting out its position. The Regulator noted that the *OGCA* and the *Pipeline* Act included both receivers and trustees in the definition of "licensee". The Regulator stated that it was not a creditor of Redwater and that it was not asserting a "provable claim in the receivership". Accordingly, notwithstanding the receivership, Redwater remained obligated to comply with all regulatory requirements, including abandonment obligations for all licensed assets. The Regulator stated that GTL was legally obligated to fulfill these obligations prior to distributing any funds or finalizing any proposal to creditors. It warned that it would not approve the transfer of any of Redwater's licences unless it was satisfied that both the transferee and the transferor would be in a position to fulfill all regulatory obligations. It requested confirmation that GTL had taken possession of Redwater's licensed properties and that it was taking steps to comply with all of Redwater's regulatory obligations.

48 At the time it ran into financial difficulties, Redwater was licensed by the Regulator for 84 wells, 7 facilities and 36 pipelines, all in central Alberta. The vast majority of its assets were these oil and gas assets. At the time GTL was appointed receiver, 19 of the wells and facilities were producing and the remaining 72 were inactive or spent. There were working interest participants in several of the wells and facilities. Redwater's LMR did not drop below 1.0 until after it went into receivership, so it never paid any security deposits to the Regulator.

49 By September 2015, Redwater's LMR had dropped to 0.93. The net value of its deemed assets and its deemed liabilities was negative $553,000. The 19 producing wells and facilities for which Redwater was the licensee would have had an LMR of 2.85 and a deemed net value of $4.152 million. The remaining 72 wells and facilities for which Redwater was the licensee would have had an LMR of 0.30 and a deemed net value of negative $4.705 million. Given that Redwater was in receivership, the

Regulator's position was that it would approve the transfer of Redwater's licences only if the transfer did not cause a deterioration in its LMR.

50 In its Second Report to the Alberta Court of Queen's Bench dated October 3, 2015, GTL explained why it had concluded that it could not meet the Regulator's requirements. GTL had concluded that the cost of the end-of-life obligations for the spent wells would likely exceed the sale proceeds for the productive wells. It viewed a sale of the non-producing wells — even if bundled with producing wells — as unlikely. If such a sale were possible, the purchase price would be reduced by the end-of-life obligations, negating the benefit to the estate. Based on this assessment, by letter dated July 3, 2015, GTL informed the Regulator that it was taking possession and control only of Redwater's 17 most productive wells (including a leaking well that was subsequently abandoned), 3 associated facilities and 12 associated pipelines ("Retained Assets"), and that, pursuant to para. 3(a) of the Receivership Order, it was not taking possession or control of any of Redwater's other licensed assets ("Renounced Assets"). GTL's position was that it had no obligation to fulfill any regulatory requirements associated with the Renounced Assets.

51 In response, on July 15, 2015, the Regulator issued orders under the *OGCA* and the *Pipeline* Act requiring Redwater to suspend and abandon the Renounced Assets ("Abandonment Orders"). The orders required abandonment to be carried out immediately where there were no other working interest participants and, by September 18, 2015, where there were other working interest participants. The Regulator stated that it considered the Renounced Assets an environmental and safety hazard and that s. 3.012(d) of the Oil and Gas Conservation Rules required a licensee to abandon wells or facilities so considered. In issuing the Abandonment Orders, the Regulator also relied on ss. 27 to 30 of the OGCA and ss. 23 to 26 of the Pipeline Act. If the Abandonment Orders were not complied with, the Regulator threatened to abandon the assets itself and to sanction Redwater through the use of s. 106 of the OGCA. The Regulator further stated that, once abandonment had taken place, the surface would need to be reclaimed and reclamation certificates obtained in accordance with s. 137 of the EPEA.

52 On September 22, 2015, the Regulator and the OWA filed an application for a declaration that GTL's renunciation of the Renounced Assets was void, an order requiring GTL to comply with the Abandonment Orders, and an order requiring GTL to "fulfill the statutory obligations as licensee in relation to the abandonment, reclamation and remediation" of all of Redwater's licensed properties (A.R., vol. II, at p. 41). The Regulator did not seek to hold GTL liable for these obligations beyond the assets remaining in the Redwater estate. GTL brought a cross-application on October 5, 2015, seeking approval to pursue a sales process excluding the Renounced Assets. GTL sought a court order directing that the Regulator could not prevent the transfer of the licences associated with the Retained Assets on the basis of, *inter alia*, the LMR requirements, failure to comply with the Abandonment Orders, refusal to take possession of the Renounced Assets or any outstanding debts owed by Redwater to the Regulator. GTL did not seek to foreclose the possibility that the Regulator might have some other valid reason to reject a proposed transfer.

53 A bankruptcy order was issued for Redwater on October 28, 2015, and GTL was appointed as trustee. GTL sent another letter to the Regulator on November 2, 2015, this time invoking s. 14.06(4)(a)(ii) of the BIA in relation to the Renounced Assets. The Abandonment Orders remain outstanding.

D. Judicial History

(1) Court of Queen's Bench of Alberta

54 The chambers judge concluded that s. 14.06 of the BIA was designed to permit trustees to disclaim property where this was a rational economic decision in light of the environmental condition affecting the property. Personal liability of the trustee was not a condition precedent to the power to disclaim. The chambers judge accordingly found an operational conflict between s. 14.06 of the BIA and the definition of "licensee" in the *OGCA* and the *Pipeline* Act. Under s. 14.06 of the *BIA*, GTL could renounce assets and not be responsible for the associated environmental obligations. However, under the *OGCA* and the *Pipeline* Act, GTL could not renounce licensed assets because the definition of "licensee" included receivers and trustees, so GTL remained liable for environmental obligations.

55 Applying the test from *Abitibi*, the chambers judge concluded that, although in a "technical sense" it was not sufficiently certain that the Regulator or the OWA would carry out the Abandonment Orders and assert a monetary claim to have its costs reimbursed, the situation met what was intended by the Court in *Abitibi* because the Abandonment Orders were "intrinsically financial" (para. 173). Forcing GTL, as a "licensee", to comply with the Abandonment Orders would therefore frustrate the *BIA*'s overall purpose of equitable distribution of the bankrupt's assets, as the Regulator's claim would be given a super priority to which it was not entitled, ahead of the claims of secured creditors. It would also frustrate the purpose of s. 14.06, by which Parliament had legislated as to environmental claims in bankruptcy and had specifically chosen not to give them a super priority. The conditions imposed by the Regulator on transfers of the licences for the Retained Assets further frustrated s. 14.06 by including the Renounced Assets in the calculation for determining the approval of a sale.

56 The chambers judge approved the sale procedure proposed by GTL. He declared that the *OGCA* and the *Pipeline* Act were inoperative to the extent that they conflicted with the *BIA* by deeming GTL to be the "licensee" of the Renounced Assets; that GTL was entitled to disclaim the Renounced Assets pursuant to s. 14.06(4)(a)(ii) and (c), and was not subject to any obligations in relation to those assets; that the Abandonment Orders were inoperative to the extent that they required GTL to comply or to provide security deposits; and that Directive 006 was inoperative to the extent it conflicted with s. 14.06 of the BIA. Lastly, he declared that the Regulator, in exercising its discretion to approve a transfer of the licences for the Retained Assets, could not consider the Renounced Assets for the purpose of calculating Redwater's LMR before or after the transfer, nor could it consider any other issue involving the Renounced Assets.

(2) Court of Appeal of Alberta

(a) Majority Reasons

57 Slatter J.A., for the majority, dismissed the appeals. He stated that the constitutional issues in the appeals were complementary to the primary issue, which was the interpretation of the BIA. Section 14.06 did not exempt environmental claims from the general bankruptcy regime, other than the super priority in s. 14.06(7), which would rarely, if ever, have any application to oil and gas wells. Section 14.06(4) did not "limit the power of the trustee to renounce ... properties to those circumstances where it might be exposed to personal liability" (para. 68). Additionally, the word "order" in s. 14.06(4) had to be given a wide meaning.

58 Slatter J.A. identified the essential issue as "whether the environmental obligations of Redwater meet the test for a provable claim" (para. 73). He agreed with the chambers judge that the third branch of the *Abitibi* test was met, but concluded that that test had been met "in both a technical and substantive way" (para. 76). The Regulator's policies essentially stripped away from the bankrupt estate enough value to meet environmental obligations. Requiring the depositing of security, or diverting value from the bankrupt estate, clearly met the standard of "certainty". The Regulator's policies required that the full value of the bankrupt's assets be applied first to environmental liabilities, creating a super priority for environmental claims. Slatter J.A. concluded that, "[n]otwithstanding their intended effect as conditions of licensing, the Regulator's policies [had] a direct effect on property, priorities, and the Trustee's right to renounce assets, all of which [were] governed by the *BIA*" (para. 86).

59 In terms of constitutional analysis, Slatter J.A. concluded that the role of GTL as a "licensee" under the *OGCA* and the *Pipeline* Act was "in operational conflict with the provisions of the *BIA*" that exempted trustees from personal liability, allowed them to disclaim assets and established the priority of environmental claims (para. 89). It also frustrated the *BIA*'s purpose of "managing the winding up of insolvent corporations and settling the priority of claims against them" (para. 89). As such, the Regulator could not "insist that the Trustee devote substantial parts of the bankrupt estate in satisfaction of the environmental claims in priority to the claims of the secured creditor" (para. 91).

(b) Dissenting Reasons

60 Martin J.A. dissented. In contrast to the majority, she stressed the constitutional dimensions of the case, in particular the need for co-operative federalism in the area of the environment, and noted that the doctrine of paramountcy should be applied with restraint. She concluded that the Regulator was not asserting a provable claim within the meaning of the *Abitibi* test. It was

not enough for a regulatory order to be "intrinsically financial" for it to be a claim provable in bankruptcy (para. 185, quoting the chambers judge's reasons, at para. 173). There was not sufficient certainty that the ordered abandonment work would be done, either by the Regulator or by the OWA, and there was "no certainty at all that a claim for reimbursement would be made" (para. 184). Martin J.A. was also of the view that the Regulator was not a creditor of Redwater — or, if it was a creditor in issuing the Abandonment Orders, it was at least not one in enforcing the conditions for the transfer of licences. The Regulator had to be able to maintain control over the transfer of licences during a bankruptcy, and there was no reason why such regulatory requirements could not coexist with the distribution of the bankrupt's estate.

61 With regard to s. 14.06, Martin J.A. accepted the Regulator's argument that s. 14.06(4) allowed a trustee to renounce real property in order to avoid personal liability but did not prevent the assets of the bankrupt estate from being used to comply with environmental obligations. However, she went beyond this. In her view, s. 14.06(4) to (8) were enacted together as a statutory compromise. Martin J.A. concluded that a trustee's power to disclaim assets under s. 14.06 simply had no applicability to Alberta's regulatory regime. The ability to renounce under s. 14.06(4) had to be read in conjunction with the other half of the compromise — the Crown's super priority over the debtor's real property established by s. 14.06(7). Licence conditions were not the sort of "order" contemplated by s. 14.06(4), nor were licences the kind of "real property" contemplated by that provision. The balance struck by s. 14.06 was not effective when there was no "real property of the debtor" in which the Crown could take a super priority (para. 210).

62 As there was no entitlement under the *BIA* to renounce the end-of-life obligations imposed by Alberta's regulatory regime, there was no operational conflict in enforcing those obligations under provincial law. Nor was there any frustration of purpose. The Regulator was not asserting any claims provable in bankruptcy: "The continued application of [Alberta's] regulatory regime following bankruptcy did not determine or reorder priorities among creditors, but rather value[d] accurately the assets available for distribution" (para. 240).

III. Analysis

A. The Doctrine of Paramountcy

63 As I have explained, Alberta legislation grants the Regulator wide-ranging powers to ensure that companies that have been granted licences to operate in the Alberta oil and gas industry will safely and properly abandon oil wells, facilities and pipelines at the end of their productive lives and will reclaim their sites. GTL seeks to avoid being subject to two of those powers: the power to order Redwater to abandon the Renounced Assets and the power to refuse to allow a transfer of the licences for the Retained Assets due to unmet LMR requirements. There is no doubt that these are valid regulatory powers granted to the Regulator by valid Alberta legislation. GTL seeks to avoid their application during bankruptcy by virtue of the doctrine of federal paramountcy, which dictates that the Alberta legislation empowering the Regulator to use the powers in dispute in this appeal will be inoperative to the extent that its use of these powers during bankruptcy conflicts with the *BIA*.

64 The issues in this appeal arise from what has been termed the "untidy intersection" of provincial environmental legislation and federal insolvency legislation (*Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111 (Ont. S.C.J. [Commercial List]), at para. 8). Paramountcy issues frequently arise in the insolvency context. Given the procedural nature of the *BIA*, the bankruptcy regime relies heavily on the continued operation of provincial laws. However, s. 72(1) of the BIA confirms that, where there is a genuine conflict between provincial laws concerning property and civil rights and federal bankruptcy legislation, the *BIA* prevails (see Moloney, at para. 40). In other words, bankruptcy is carved out from property and civil rights but remains conceptually part of it. Valid provincial legislation of general application continues to apply in bankruptcy until Parliament legislates pursuant to its exclusive jurisdiction in relation to bankruptcy and insolvency. At that point, the provincial law becomes inoperative to the extent of the conflict (see *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.) , at para. 3).

65 Over time, two distinct forms of conflict have been recognized. The first is *operational conflict*, which arises where compliance with both a valid federal law and a valid provincial law is impossible. Operational conflict arises "where one enactment says 'yes' and the other says 'no', such that 'compliance with one is defiance of the other'" (*Saskatchewan (Attorney*

General) v. Lemare Lake Logging Ltd., 2015 SCC 53, [2015] 3 S.C.R. 419 (S.C.C.), at para. 18, quoting *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.) , at p. 191). The second is *frustration of purpose*, which occurs where the operation of a valid provincial law is incompatible with a federal legislative purpose. The effect of a provincial law may frustrate the purpose of the federal law, even though it does "not entail a direct violation of the federal law's provisions" (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3(S.C.C.) , at para. 73). The party relying on frustration of purpose "must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose" (*Lemare*, at para. 26, quoting *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536 (S.C.C.) , at para. 66).

66 Under both branches of paramountcy, the burden of proof rests on the party alleging the conflict. This burden is not an easy one to satisfy, as the doctrine of paramountcy is to be applied with restraint. Conflict must be defined narrowly so that each level of government may act as freely as possible within its respective sphere of constitutional authority. "[H]armonious interpretations of federal and provincial legislation should be favoured over an interpretation that results in incompatibility ... [i]n the absence of 'very clear' statutory language to the contrary" (*Lemare*, at paras. 21 and 27). "It is presumed that Parliament intends its laws to co-exist with provincial laws" (*Moloney*, at para. 27). As this Court found in *Lemare*, at paras. 22-23, the application of the doctrine of paramountcy should also give due weight to the principle of co-operative federalism. This principle allows for interplay and overlap between federal and provincial legislation. While co-operative federalism does not impose limits on the otherwise valid exercise of legislative power, it does mean that courts should avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with provincial legislation.

67 The case law has established that the *BIA* as a whole is intended to further "two purposes: the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation" (*Moloney*, at para. 32, citing Husky Oil, at para. 7). Here, the bankrupt is a corporation that will never emerge from bankruptcy. Accordingly, only the former purpose is relevant. As I will discuss below, the chambers judge also spoke of the purposes of s. 14.06 as distinct from the broader purposes of the *BIA*. This Court has discussed the purpose of specific provisions of the *BIA* in previous cases — see, for example, Lemare, at para. 45.

68 GTL has proposed two conflicts between the Alberta legislation establishing the disputed powers of the Regulator during bankruptcy and the *BIA*, either of which, it says, would have provided a sufficient basis for the order granted by the chambers judge.

69 The first conflict proposed by GTL results from the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act*. GTL says that s. 14.06(4) releases it from all environmental liability associated with the Renounced Assets after a valid "disclaimer" is made. But as a "licensee", it can be required by the Regulator to satisfy all of Redwater's statutory obligations and liabilities, which disregards the "disclaimer" of the Renounced Assets. GTL further notes the possibility that it may be held personally liable as a "licensee". In response, the Regulator says that s. 14.06(4) is concerned primarily with protecting trustees from personal liability in relation to environmental orders, and does not affect the ongoing responsibilities of the bankrupt estate. Thus, as long as a trustee is protected from personal liability, no conflict arises from its status as a "licensee" or from the fact that the bankrupt estate remains responsible under provincial law for the ongoing environmental obligations associated with "disclaimed" assets.

70 The second conflict proposed by GTL is that, even if s. 14.06(4) is only concerned with a trustee's personal liability, the Regulator's use of its statutory powers effectively reorders the priorities in bankruptcy established by the *BIA*. Such reordering is said to be caused by the fact that the Regulator requires the expenditure of estate assets to comply with the Abandonment Orders and to discharge or secure the environmental liabilities associated with the Renounced Assets before it will approve a transfer of the licences for the Retained Assets (in keeping with the LMR requirements). These end-of-life obligations are said by GTL to be unsecured claims held by the Regulator, which cannot, under the *BIA*, be satisfied in preference over the claims of Redwater's secured creditors. In response, the Regulator says that, on the proper application of the *Abitibi* test, these environmental regulatory obligations are not provable claims in bankruptcy. Accordingly, says the Regulator, the provincial laws requiring the Redwater estate to satisfy these obligations prior to the distribution of its assets to secured creditors do not conflict with the priority scheme in the *BIA*.

71 I will consider each alleged conflict in turn.

B. Is There a Conflict Between the Alberta Regulatory Scheme and Section 14.06 of the BIA?

72 As a statutory scheme, s. 14.06 of the BIA raises numerous interpretive issues. As noted by Martin J.A., the only matter concerning s. 14.06 on which all the parties to this litigation can agree is that it "is not a model of clarity" (C.A. reasons, at para. 201). Given the confusion caused by attempts to interpret s. 14.06 as a coherent scheme during this litigation, Parliament may very well wish to re-examine s. 14.06 during its next review of the *BIA*.

73 At its core, this appeal raises the issue of whether there is a conflict between specific Alberta legislation and the *BIA*. GTL submits that there is such a conflict. It argues that, because it "disclaimed" the Renounced Assets under s. 14.06(4) of the BIA, it should cease to have any responsibilities, obligations or liability with respect to them. And yet, it notes, as a "licensee" under the *OGCA* and the *Pipeline* Act, it remains responsible for abandoning the Renounced Assets. Furthermore, those assets continue to be included in the calculation of Redwater's LMR. GTL suggests an additional conflict with s. 14.06(2) of the BIA based on its possible exposure, as a "licensee", to personal liability for the costs of abandoning the Renounced Assets.

74 I have concluded that there is no conflict. Various arguments were advanced during this appeal concerning the disparate elements of the s. 14.06 scheme. However, the provision upon which GTL in fact relies in arguing that it is entitled to avoid its responsibilities as a "licensee" under the Alberta legislation is s. 14.06(4). As I have noted, GTL and the Regulator propose very different interpretations of s. 14.06(4). However, s. 14.06(4) is clear and unambiguous when read on its own: where it is invoked by a trustee, the result is that "the trustee is not personally liable" for failure to comply with certain environmental orders or for the costs incurred by any person in carrying out the terms of such orders. The provision says nothing about the liability of the "bankrupt" or the "estate" — distinct concepts referenced many times throughout the BIA. Section 14.06(4), on its own wording, does not support the interpretation urged upon this Court by GTL.

75 In my view, s. 14.06(4) sets out the result of a trustee's "disclaimer" of real property when there is an order to remedy any environmental condition or damage affecting that property. Regardless of whether "disclaimer" is understood as a common law power or as a power deriving from some other statutory source, the result of a trustee's "disclaimer" of real property where an environmental order has been made in relation to that property is that the trustee is protected from personal liability, while the ongoing liability of the bankrupt estate is unaffected. The interpretation of s. 14.06(4) as being concerned with the personal liability of the trustee and not with the liability of the bankrupt estate is supported not only by the plain language of the section, but also by the Hansard evidence, a previous decision of this Court and the French version of the section. Furthermore, not only is the plain meaning of the words "personally liable" clear, but the same concept is also found in both s. 14.06(1.2) and s. 14.06(2), which specifically state that the trustee is not personally liable. In particular, in my view, it is impossible to coherently read s. 14.06(2) as referring to personal liability and yet read s. 14.06(4) as somehow referring to the liability of the bankrupt estate.

76 Given that s. 14.06(4) dictates that "disclaimer" only protects trustees from personal liability, then, even assuming that GTL successfully "disclaimed" in this case, no operational conflict or frustration of purpose results from the fact that the Regulator requires GTL, as a "licensee", to expend estate assets on abandoning the Renounced Assets. Furthermore, no conflict is caused by continuing to include the Renounced Assets in the calculation of Redwater's LMR. Finally, given the restraint with which the doctrine of paramountcy must be applied, and given that the Regulator has not attempted to hold GTL personally liable as a "licensee" for the costs of abandonment, no conflict with s. 14.06(2) or s. 14.06(4) is caused by the mere theoretical possibility of personal liability under the OGCA or the Pipeline Act.

77 In what follows, I will begin by interpreting s. 14.06(4) and explaining why, based on its plain wording and other relevant considerations, the provision is concerned solely with the personal liability of the trustee, and not with the liability of the bankrupt estate. I will then explain how, despite their superficial similarity, s. 14.06(4) and s. 14.06(2) have different rationales, and I will demonstrate that, on a proper understanding of the scheme crafted by Parliament, s. 14.06(4) does not affect the liability of the bankrupt estate. To conclude, I will demonstrate that there is no operational conflict or frustration of

purpose between the Alberta legislation and s. 14.06 of the BIA in this case, with particular reference to the question of GTL's protection from personal liability.

(1) The Correct Interpretation of Section 14.06(4)

(a) Section 14.06(4) Is Concerned With the Personal Liability of Trustees

78 I have concluded that s. 14.06(4) is concerned with the personal liability of trustees, and not with the liability of the bankrupt estate. I emphasize here the well-established principle that, "[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes" (*Canadian Western Bank*, at para. 75, quoting *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.), at p. 356).

79 Section 14.06(4) says nothing about the "bankrupt estate" avoiding the applicability of valid provincial law. In drafting s. 14.06(4), Parliament could easily have referred to the liability of the bankrupt estate. Parliament chose instead to refer simply to the personal liability of a trustee. Notably, s. 14.06(7) and s. 14.06(8) both refer to a "debtor in a bankruptcy". Parliament's choice in this regard cannot be ignored. I agree with Martin J.A. that there is no basis on which to read the words "the trustee is not personally liable" in s. 14.06(4) as encompassing the liability of the bankrupt estate. As noted by Martin J.A., it is apparent from the express language chosen by Parliament that s. 14.06(4) was motivated by and aimed at concerns about the protection of trustees, not the protection of the full value of the estate for creditors. Nothing in the wording of s. 14.06(4) suggests that it was intended to extend to estate liability.

80 The Hansard evidence leads to the same conclusion. Jacques Hains, Director, Corporate Law Policy Directorate, Department of Industry Canada, noted the following during the 1996 debates preceding the enactment of s. 14.06(4) in 1997:

> The aim is to provide a better definition of the liability of insolvency professionals and practitioners in order to encourage them to accept mandates where there may be problems related to the environment. It is hoped that this will reduce the number of abandoned sites both for the benefit of the environment and the safeguard of businesses and jobs.
>
> (Standing Committee on Industry, *Evidence*, No. 16, 2nd Sess., 35th Parl., June 11, 1996, at 15:49-15:55, as cited in C.A. reasons, at para. 197.)

Several months later, Mr. Hains stated:

> What Parliament tried to do in 1992 was to provide a relief to insolvency practitioners ... because they were at risk when they accepted a mandate to liquidate an insolvent business. Under environmental laws, therefore, they could have been subject to personal liability to clean up the environment. I am speaking of personal liability here, meaning "out of their own pockets."
>
> (*Proceedings of the Standing Committee on Banking, Trade and Commerce*, No. 13, 2nd Sess., 35th Parl., November 4, 1996, at p. 15)

Mr. Hains proceeded to explain how the 1997 amendments were intended to improve on the 1992 reforms to the *BIA* that had included the original version of s. 14.06(2) (as discussed further below), but he gave no indication that the focus had somehow shifted away from a trustee's "personal liability".

81 Prior to the enactment of the 1997 amendments, G. Marantz, Legal Advisor to the Department of Industry Canada, noted that they were intended to "provide the trustee with protection from being chased with deep-pocket liability" (Standing Committee on Industry, *Evidence*, No. 21, 2nd Sess., 35th Parl., September 25, 1996, at 17:15, as cited in C.A. reasons, at para. 198). I agree with the Regulator that the legislative debates give no hint of any intention by Parliament to immunize bankrupt estates from environmental liabilities. The notion that s. 14.06(4) was aimed at encouraging trustees in bankruptcy to accept mandates, and not at limiting estate liability, is further supported by the fact that the provision was inserted under the general heading "Appointment and Substitution of Trustees".

82 Furthermore, in drafting s. 14.06(4), Parliament chose to use exactly the same concept it had used earlier in s. 14.06(2): by their express wording, where either provision applies, a trustee is not "personally liable". This cannot have been an oversight given that s. 14.06(4) was added to the *BIA* some five years after the enactment of s. 14.06(2). Since both provisions deal expressly with the protection of trustees from being "personally liable", it is very difficult to accept that they could be concerned with different kinds of liability. By their wording, s. 14.06(2) and s. 14.06(4) are clearly both concerned with the same concept. Indeed, if one interprets s. 14.06(4) as extending to estate liability, then there is no principled reason not to interpret s. 14.06(2) in the same way. However, it is undisputed that this was not Parliament's intention in enacting s. 14.06(2).

83 Similarly, Parliament has also chosen to use the same concept found in both s. 14.06(4) and s. 14.06(2) in a third part of the 14.06 scheme, namely s. 14.06(1.2). This provision states that a trustee carrying on the business of a debtor or continuing the employment of a debtor's employees is not "personally liable" in respect of certain enumerated liabilities, including as a successor employer. Although this provision is not directly raised in this litigation, by its own terms, it clearly does not and cannot refer to the liability of the bankrupt estate. Again, it is difficult to conceive of how Parliament could have specified that a trustee is not "personally liable", using the ordinary, grammatical sense of that phrase, in both s. 14.06(1.2) and s. 14.06(2), but then intended the phrase to be read in a completely different and illogical manner in s. 14.06(4). All three provisions refer to the personal liability of a trustee, and all three must be interpreted consistently. Indeed, I note that the concept of a trustee being "not personally liable" is also used consistently in other parts of the *BIA* unrelated to the s. 14.06 scheme — see, for example, s. 80 and s. 197(3).

84 This interpretation of s. 14.06(4) is also bolstered by the French wording of s. 14.06. The French versions of both s. 14.06(2) and s. 14.06(4) refer to a trustee's protection from personal liability "*ès qualités*". This French expression is defined by *Le Grand Robert de la langue française* (2nd ed. 2001) dictionary as referring to someone acting "à cause d'un titre, d'une fonction particulière", which, in English, would mean acting by virtue of a title or specific role. The *Robert & Collins* dictionary (online) translates "*ès qualités*" as in "one's official capacity". In using this expression in s. 14.06(4), Parliament is therefore stating that, where "disclaimer" properly occurs, a trustee, is not personally liable, in its capacity as trustee, for orders to remedy any environmental condition or damage affecting the "disclaimed" property. These provisions are clearly not concerned with the concept of estate liability. The French versions of s. 14.06(2) and s. 14.06(4) thus utilize identical language to describe the limitation of liability they offer trustees. It is almost impossible to conceive of Parliament using identical language in two such closely related provisions and yet intending different meanings. Accordingly, a trustee is not personally liable in its official capacity as representative of the bankrupt estate where it invokes s. 14.06(4).

85 Prior to this litigation, the case law on s. 14.06 was somewhat scarce. However, this Court has considered the s. 14.06 scheme once before, in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123(S.C.C.) . In that case, comments made by both the majority and the dissenting judge support my conclusion that s. 14.06(4) is concerned only with the personal liability of trustees. Abella J., writing for the majority, explained that "where Parliament has intended to confer immunity on trustees or receivers from certain claims, it has done so explicitly" (para. 67). As examples of this principle, she referred to 14.06(1.2) and, most notably for our purposes, to s. 14.06(4), which she described as follows: "trustee immune in certain circumstances from environmental liabilities" (para. 67). In her dissent, Deschamps J. explained that a "trustee is not personally bound by the bankrupt's obligations" (para. 91). She noted that trustees are protected by the provisions that confer immunity upon them, including s. 14.06 (1.2), (2) and (4).

86 Although the dissenting reasons focus on the source of the "disclaimer" power in s. 14.06(4), nothing in this case turns on either the source of the "disclaimer" power or on whether GTL successfully "disclaimed" the Renounced Assets. I would note that, while the dissenting reasons rely on a purported common law power of "disclaimer", the Court has been referred to no cases — and the dissenting reasons have cited none — demonstrating the existence of a common law power allowing trustees to "disclaim" *real property*. In any case, regardless of the source of the "disclaimer" power, nothing in s. 14.06(4) suggests that, where a trustee does "disclaim" real property, the result is that it is simply free to walk away from the environmental orders applicable to it. Quite the contrary — the provision is clear that, where an environmental order has been made, the result of an act of "disclaimer" is the cessation of personal liability. No effect of "disclaimer" on the liability of the bankrupt estate is

specified. Had Parliament intended to empower trustees to walk away entirely from assets subject to environmental liabilities, it could easily have said so.

87 Additionally, as I have mentioned, s. 14.06(4)'s scope is not narrowed to a "disclaimer" in its formal sense. Under s. 14.06(4)(a)(ii), a trustee is not personally liable for an environmental order where the trustee "abandons, disposes of or otherwise releases any interest in any real property". This appeal does not, however, require us to decide what constitutes abandoning, disposing of or otherwise releasing real property for the purpose of s. 14.06(4), and I therefore leave the resolution of this question for another day. Nor does this appeal require us to decide the effects of a successful divestiture under s. 20 of the BIA. Section 20 of the BIA was not raised or relied upon by GTL as providing it with the authority to walk away from all responsibility, obligation or liability regarding the Renounced Assets.

88 The dissenting reasons argue that certain other parts of the s. 14.06 scheme make the most sense if s. 14.06(4) limits estate liability. Other than s. 14.06(2), none of these provisions is in issue in this litigation, and none of them was relied on by GTL. Regardless, in view of the clear and unambiguous wording of s. 14.06(4), less weight should be given to its statutory context. This is particularly so given that the proposed alternative interpretation would require the Court to read words such as "personally" out of the subsection. As has been noted, when the words of a provision are precise and unequivocal, their ordinary meaning plays a dominant role in the interpretive process (*Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.) , at para. 10). Ultimately, the consequences of a trustee's "disclaimer" are clear — protection from personal liability, not from estate liability. There is no ambiguity on the face of s. 14.06(4). This Court has no option other than to accede to the clear intention of Parliament.

89 I turn now to the relationship between s. 14.06(2) and (4).

(b) How Section 14.06(4) Is Distinguishable From Section 14.06(2)

90 In this case, GTL relied solely on s. 14.06(4) in purporting to "disclaim" the Renounced Assets. However, as I will explain, GTL is fully protected from personal liability for the environmental liabilities associated with those assets whether it is understood as having "disclaimed" the Renounced Assets or not. However, it cannot simply "walk away" from the Renounced Assets in either case.

91 Regardless of whether GTL can access s. 14.06(4) (in other words, regardless of whether it has "disclaimed"), it is already fully protected from personal liability in respect of environmental matters by s. 14.06(2). Section 14.06(2) protects trustees from personal liability for "any environmental condition that arose or environmental damage that occurred", unless it is established that the condition arose or the damage occurred after the trustee's appointment and as a result of their gross negligence or wilful misconduct. In this case, it is not disputed that the environmental condition or damage leading to the Abandonment Orders arose or occurred prior to GTL's appointment. Section 14.06(2) provides trustees with protection from personal liability as broad as that provided by s. 14.06(4). Although, on the face of the provisions, there are two ways in which s. 14.06(4) may appear to offer broader protection, neither of them withstands closer examination.

92 First, the Regulator submits that the protection offered by s. 14.06(4) should be distinguished from that offered by s. 14.06(2) on the basis that the former is concerned with orders while the latter is concerned with environmental obligations generally. I agree with the dissenting reasons that a persuasive distinction cannot be drawn between liability for an environmental condition or environmental damage (purportedly covered by s. 14.06(2)) and liability for failure to comply with an order to remedy such a condition or such damage (purportedly covered by s. 14.06(4)). As the dissenting reasons note, "[t]his distinction is entirely artificial" (para. 212). The underlying liability addressed through environmental orders is the liability provided for in s. 14.06(2): an "environmental condition that arose or environmental damage that occurred". Second, on the face of s. 14.06(4), no exceptions are carved out for gross negligence or wilful misconduct post-appointment, unlike in s. 14.06(2). However, s. 14.06(4) is expressly made "subject to subsection (2)". I agree with the dissenting reasons that the only possible interpretation of this proviso is that, where the trustee has caused an environmental condition or environmental damage through its wilful misconduct or gross negligence, the trustee will still be personally liable, regardless of its reliance on s. 14.06(4).

93 It follows that s. 14.06(4) does not provide trustees with protection from personal liability any broader than the protection provided by s. 14.06(2). Despite this, in my view, Parliament had good reasons for enacting s. 14.06(4) in 1997. The first was to make it clear to trustees that they had complete protection from personal liability in respect of environmental conditions and damage (absent wilful misconduct or gross negligence), especially in situations where they have "disclaimed". The Hansard evidence shows that one of the impetuses for the 1997 reforms was the desire of trustees for further certainty. The second was to clarify the effect of a trustee's "disclaimer", on the liability of the *bankrupt estate* for orders to remedy an environmental condition or damage. In other words, s. 14.06(4) makes it clear not just that a trustee who "disclaims" real property is exempt from personal liability under environmental orders applicable to that property, but also that the liability of the bankrupt estate is unaffected by such "disclaimer".

94 In 1992, Parliament turned its attention to the potential liability of trustees in the environmental context and enacted s. 14.06(2). The provision originally stated that trustees were protected from personal liability for any environmental condition that arose or any environmental damage that occurred "(a) before [their] appointment ... or (b) after their appointment except where the condition arose or the damage occurred as a result of their failure to exercise due diligence". The Hansard evidence demonstrates that trustees were unhappy with the original language of s. 14.06(2). As Mr. Hains explained, they complained that the due diligence standard was "too vague. No one knows what it does and it may vary from one case to another. With the vagueness of the standard and what may be required to satisfy it, and with the risk of personal liability, the trustees were not even interested in investigating how they might exercise due diligence" (*Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, No. 13, 2nd Sess., 35th Parl., November 4, 1996, at pp. 15-16).

95 As a result, Parliament made reforms to the *BIA* in 1997. These reforms not only changed the standard of protection offered to trustees by s. 14.06(2) by adopting the current language, but also introduced s. 14.06(4). As is evident from their shared language, the provisions were intended to work together to clarify a trustee's protection from personal liability for any environmental condition or damage. Section 14.06(4) provided the certainty that trustees had been seeking in the years prior to 1997. For the first time, it explicitly linked the concept of "disclaimer" to the scheme protecting trustees from environmental liability. Whether it is understood as a common law power or as a reference to other statutory provisions, the concept of "disclaimer" predates s. 14.06(4) itself, as well as the 1992 version of s. 14.06(2). "Disclaimer" is also applicable in other contexts, such as in relation to executory contracts, as discussed in *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154, 251 D.L.R. (4th) 328 (B.C. C.A.).

96 Prior to 1997, the effects of a "disclaimer" of real property on environmental liability was unclear. In particular, it was unclear what effect "disclaimer" might have on the liability of the bankrupt estate, given that environmental legislation imposed liability based on the achievement of the status of owner, party in control or licensee (see J. Klimek, *Insolvency and Environment Liability* (1994), at p. 4-19). By enacting s. 14.06(4), Parliament clarified that the effect of the "disclaimer" of real property was to limit the personal liability of the trustee for orders to remedy any environmental condition or damage, but not to limit the liability of the bankrupt estate. Parliament could have merely updated the language of s. 14.06(2) in 1997, but this would have left the question of "disclaimer" and estate liability unaddressed. Knowledge of the impact of "disclaimer" could be important to a trustee who is deciding whether to accept a mandate. Section 14.06(4) thus went a considerable way towards resolving the vagueness of which trustees had complained prior to 1997.

97 A notable aspect of the scheme crafted by Parliament is that s. 14.06(4) applies "[n]otwithstanding anything in any federal or provincial law". In enacting s. 14.06(4), Parliament specified the effect of the "disclaimer" of real property solely in the context of *environmental orders*. The effect of "disclaimer" on liability in other contexts was not addressed. Parliament was concerned with orders to remedy any environmental condition or damage, where, liability frequently attaches based on the status of owner, party in control, or licensee. Parliament did not want trustees to think that they could avoid the estate's environmental liability through the act of "disclaiming". Accordingly, it used specific language indicating that the effect of the "disclaimer" of real property on orders to remedy an environmental condition or damage is merely that the trustee is not personally liable. It is possible that the effect of "disclaimer" on the liability of the bankrupt estate might be different in other contexts.

98 Section 14.06(4) thus makes it clear that "disclaimer" by the trustee has no effect on the bankrupt estate's continuing liability for orders to remedy any environmental condition or damage. The liability of the bankrupt estate is, of course, an issue with which s. 14.06(2) is absolutely unconcerned. Thus, it can be seen that s. 14.06(4) and s. 14.06(2) are not in fact the same — they may provide trustees with the same protection from personal liability, but only the former has any relevance to the question of estate liability. Section 14.06(2) protects trustees without having to be invoked by them — it does not speak to the results of a trustee's "disclaimer".

99 Where a trustee has "disclaimed" real property, it is not personally liable under an environmental order applicable to that property, but the bankrupt estate itself remains liable. Of course, the fact that the bankrupt estate remains liable even where a trustee invokes s. 14.06(4) does not necessarily mean that the trustee must comply with environmental obligations in priority to all other claims. The priority of an environmental claim depends on the proper application of the *Abitibi* test, as I will discuss below.

100 Accordingly, regardless of whether GTL is properly understood as having "disclaimed", the result is the same. Given that the environmental condition or damage arose or occurred prior to GTL's appointment, it is fully protected from personal liability by s. 14.06(2). However, "disclaimer" does not empower a trustee to simply walk away from the "disclaimed" assets when the bankrupt estate has been ordered to remedy any environmental condition or damage. The environmental liability of the bankrupt estate remains unaffected.

101 I offer the following brief comment on the balance of the s. 14.06 scheme, although, as mentioned, none of those provision is actually in issue before this Court. The dissenting reasons argue that interpreting s. 14.06(4) as being concerned solely with the personal liability of trustees creates interpretive issues with the balance of the s. 14.06 scheme. In my view, this is not a reason to ignore the plain meaning of s. 14.06(4). No principle of statutory interpretation requires that the plain meaning of a provision be contorted to make its scheme more coherent. This Court has been tasked with interpreting s. 14.06(4), and, in my view, the wording of s. 14.06(4) admits of only one interpretation.

(2) There Is No Operational Conflict or Frustration of Purpose Between Section 14.06(2) and Section 14.06(4) of the BIA and the Alberta Regulatory Scheme

102 The operational conflicts between the *BIA* and the Alberta legislation alleged by GTL arise from its status as a "licensee" under the *OGCA* and the *Pipeline Act*. As I have just demonstrated, s. 14.06(4) does not empower a trustee to walk away from all responsibilities, obligations and liabilities with respect to "disclaimed" assets. Rather, it clarifies a trustee's protection from environmental personal liability and makes it clear that a trustee's "disclaimer" does not affect the environmental liability of the bankrupt estate. Regardless of whether GTL effectively "disclaimed" the Renounced Assets, it cannot walk away from them. In light of the proper interpretation of s. 14.06(4), no operational conflict is caused by the fact that, under Alberta law, GTL, as a "licensee", remains responsible for abandoning the Renounced Assets utilizing the remaining assets of the Redwater estate. Likewise, no operational conflict is caused by the fact that the end-of-life liabilities associated with the Renounced Assets continue to be included in the calculation of Redwater's LMR.

103 Thus, regardless of whether it has effectively "disclaimed", s. 14.06(2) fully protects GTL from personal liability in respect of environmental matters affecting the Redwater estate. GTL notes that, on the face of the *OGCA* and the *Pipeline* Act, there is nothing specifically preventing the Regulator from holding it personally liable as a "licensee" for the costs of carrying out the Abandonment Orders. GTL submits that the mere possibility that it may be held personally liable for abandonment under the Alberta legislation creates an operational conflict with the protection from personal liability provided by s. 14.06(2) of the BIA.

104 There is no possibility of trustees facing personal liability for reclamation or remediation — they are specifically protected from such liability by the *EPEA*, absent wilful misconduct or gross negligence. GTL is correct that its potential personal liability for abandonment as a "licensee" is not similarly capped at estate assets under the *OGCA* and the *Pipeline* Act. The Regulator submits that "[w]hile the definition of a licensee does not explicitly provide that the receiver's liability is limited to assets in the insolvency estate, such federal requirements are obviously read in to the provision and [are] explicitly included in other

legislation administered by the [Regulator], namely the [*EPEA*]" (A.F., at para. 104 (footnote omitted)). For its part, GTL says that it is no answer that the Regulator's practice is to impose liability only up to the value of the estate because, as ATB argues, without a specific statutory provision, "[p]ractices can change without notice" (ATB's factum, at para. 106).

105 I reject the proposition that the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline* Act should be rendered inoperative by the mere theoretical possibility of a conflict with s. 14.06(2). Such an outcome would be inconsistent with the principle of restraint which underlies paramountcy, as well as with the principles of cooperative federalism. The inclusion of trustees in the definition of "licensee" is an important part of the Alberta regulatory regime. It confers on them the privilege of operating the licensed assets of bankrupts while also ensuring that insolvency professionals are regulated during the lengthy periods of time when they manage oil and gas assets.

106 Importantly, the situation in this case is completely different from the one before the Court in *Moloney* . In that case, Gascon J. rejected the argument that there was no operational conflict because the bankrupt could voluntarily pay a provincial debt post discharge or could choose not to drive. He noted that "the test for operational conflict cannot be limited to asking whether the respondent can comply with both laws by renouncing the protection afforded to him or her under the federal law or the privilege he or she is otherwise entitled to under the provincial law" (para. 60). In the instant case, GTL retains both the protection afforded to it under the federal law (no personal liability) and the privilege to which it is entitled under the provincial law (ability to operate the bankrupt's assets in a regulated industry). GTL is not being asked to forego doing anything or to voluntarily pay anything. Nor is it urged that the Regulator could avoid conflict by declining to apply the impugned law during bankruptcy, as in Moloney , at para. 69. This is not a situation in which the Regulator might decline to apply the provincial law, but a situation in which the provincial law can be — and has been — applied during bankruptcy without conflict.

107 According to the evidence in this case, the *OGCA* and the *Pipeline* Act have included trustees in the definition of "licensee" for 20 years now, and, in that time, the Regulator has never attempted to hold a trustee personally liable. The Regulator does not look beyond the assets remaining in the bankrupt estate in seeking compliance with the bankrupt's environmental obligations. If the Regulator were to attempt to hold GTL personally liable under the Abandonment Orders, this would create an operational conflict between the *OGCA* and the *Pipeline* Act, and s. 14.06(2) of the *BIA*, rendering the former two Acts inoperative to the extent of the conflict. As it stands, however, GTL can both be protected from personal liability by s. 14.06(2) and comply with the Alberta regime in administering the Redwater estate as a "licensee".

108 The suggestion, in the dissenting reasons, that the Regulator is seeking to hold GTL personally liable is untrue. No one disputes that significant value remains in the Redwater estate. Although the Regulator's entitlement is, of course, dependent on the priorities established by the *BIA*, the history of this regulatory system demonstrates that there are ways for the Regulator to access that value without holding GTL personally liable. It is not this Court's role to mandate a particular mechanism for the Regulator to achieve that end. Even if this was not the case, the fact that Redwater's assets have already been sold and are currently being held in trust means that personal liability is no longer a concern. There is no operational conflict.

109 I turn now to frustration of purpose. The chambers judge identified a number of purposes of s. 14.06 in his reasons. GTL relies on three of them, namely: "limit[ing] the liability of insolvency professionals, so that they will accept mandates despite environmental issues"; "reduc[ing] the number of abandoned sites in the country"; and "permit[ing] receivers and trustees to make rational economic assessments of the costs of remedying environmental conditions, and giv[ing] receivers and trustees the discretion to determine whether to comply with orders to remediate property affected by these conditions" (chambers judge's reasons, at paras. 128-29).

110 The burden is on GTL to establish the specific purposes of s. 14.06(2) and s. 14.06(4) if it wishes to demonstrate a conflict. This has been described as a "high" burden, requiring "[c]lear proof of purpose" (*Lemare*, at para. 26). In my view, based on the plain wording of s. 14.06(2) and s. 14.06(4) (a "trustee is not personally liable") and the Hansard evidence, it is evident that the purpose of these provisions is to protect trustees from personal liability in respect of environmental matters affecting the estates they are administering.

111 This purpose is not frustrated by the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act*. The Regulator's position is that it would never attempt to hold a trustee personally liable. Trustees have been considered licensees under these Acts for over 20 years, and they have yet to face the scourge of personal liability. To find an essential part of Alberta's regulatory regime inoperative based on the theoretical possibility of frustration of purpose would be inconsistent with the principles of paramountcy and cooperative federalism. To date, Alberta's regulatory regime has functioned as intended without frustrating the purpose of s. 14.06(2) or s. 14.06(4) of the BIA.

112 In arguing that s. 14.06 has the broader goals of reducing the number of abandoned sites (in the non-technical sense of "abandoned") and encouraging trustees to accept mandates, GTL relies on what it calls "the available extrinsic evidence and the actual words and structure of that section" (GTL's factum, at para. 91). In my view, the arguments it advances are insufficient for GTL to meet its high burden and demonstrate that the purpose of s. 14.06(2) and s. 14.06(4) should be defined as including these broader objectives. Reducing the number of unaddressed sites and encouraging trustees to accept mandates may be positive side effects of s. 14.06(2) and s. 14.06(4), but it is a stretch to see them as the purpose of the provisions. Like the provision at issue in *Lemare*, it is more plausible that they serve a "simple and narrow purpose" (para. 45).

113 Regardless, even if it is assumed that such broader goals are part of the purpose of s. 14.06(2) and s. 14.06(4), the evidence does not show that they are frustrated by the inclusion of trustees in the statutory definition of "licensee". Relying on statements made by GTL in the Second Report, ATB asserts that, if trustees continue to be considered licensees and if environmental claims continue to be binding on estates, then, in situations akin to that of the Redwater insolvency, trustees will refuse to accept appointments. The fact that, prior to this litigation, it had been settled in Alberta since at least *Northern Badger* that certain ongoing environmental obligations in the oil and gas industry continue to be binding on bankrupt estates must be weighed against this bald allegation. It was also well established that the Regulator would never attempt to hold insolvency professionals personally liable for such obligations. As noted by the Canadian Association of Petroleum Producers, there is nothing to suggest that this well-established state of affairs has led insolvency professionals to refuse to accept appointments or has increased the number of orphaned sites. There is no reason why the Regulator and trustees cannot continue to work together collaboratively, as they have for many years, to ensure that end-of-life obligations are satisfied, while at same time maximizing recovery for creditors.

(3) Conclusion on Section 14.06 of the BIA

114 There is no conflict between the Alberta legislation and s. 14.06 of the BIA that makes the definition of "licensee" in the former inapplicable insofar as it includes GTL. GTL continues to have the responsibilities and duties of a "licensee" to the extent that assets remain in the Redwater estate. Nonetheless, GTL submits that, even if it cannot walk away from the Renounced Assets by invoking s. 14.06(4), the environmental obligations associated with those assets are unsecured claims of the Regulator for the purposes of the *BIA*. GTL says that the order of priorities in the *BIA* requires it to satisfy the claims of Redwater's secured creditors before the Regulator's claims, which rank equally with the claims of other unsecured creditors. According to GTL, the Regulator's attempts to use its statutory powers to prioritize its environmental claims conflict with the *BIA*. I will now consider this alleged conflict, which turns on the *Abitibi* test.

C. The Abitibi Test: Is the Regulator Asserting Claims Provable in Bankruptcy?

115 The equitable distribution of the bankrupt's assets is one of the purposes of the *BIA*. It is achieved through the collective proceeding model. Creditors of the bankrupt wishing to enforce a claim provable in bankruptcy must participate in the collective proceeding. Their claims will ultimately have the priority assigned to them by the *BIA*. This ensures that the bankrupt's assets are distributed fairly. This model avoids inefficiency and chaos, thus maximizing global recovery for all creditors. For the collective proceeding model to be viable, creditors with provable claims must not be allowed to enforce them outside the collective proceeding.

116 It is well established that a provincial law will be rendered inoperative in the context of bankruptcy where the effect of the law is to conflict with, reorder or alter the priorities established by the *BIA*. Both Martin J.A. and the chambers judge

dealt with the altering of bankruptcy priorities under the frustration of purpose branch of paramountcy. In my view, it could also be plausibly advanced that a provincial law that has the effect of reordering bankruptcy priorities is in operational conflict with the *BIA* — such was the conclusion in Husky Oil , at para. 87. For the purposes of this appeal, there is no need to decide which would be the appropriate branch of the paramountcy analysis. Under either branch, the Alberta legislation authorizing the Regulator's use of its disputed powers will be inoperative to the extent that the use of these powers during bankruptcy alters or reorders the priorities established by the *BIA*.

117 GTL says that this is precisely the effect of the obligations imposed on the Redwater estate by the Regulator through the use of its statutory powers, even if it cannot walk away from the Renounced Assets by invoking s. 14.06(4). Parliament has assigned a particular rank to environmental claims that are provable in bankruptcy. It is accepted that the limited super priority for environmental claims created by s. 14.06(7) of the BIA does not apply here, and accordingly, says GTL, the Regulator is an ordinary creditor as regards its environmental claims — in other words, neither a secured nor a preferred creditor. The Regulator's environmental claims are thus to be paid rateably with those of Redwater's other ordinary creditors under s. 141 of the BIA. GTL argues that, to comply with the Abandonment Orders or LMR requirements, the Redwater estate will have to expend funds prior to distributing its assets to the secured creditors, and that this amounts to the Regulator using its statutory powers to create for itself a priority in bankruptcy to which it is not entitled.

118 However, only claims provable in bankruptcy must be asserted within the single proceeding. Other claims are not stayed upon bankruptcy and continue to be binding on the estate. In *Abitibi*, this Court clearly stated that not all environmental obligations enforced by a regulator will be claims provable in bankruptcy. As a matter of principle, bankruptcy does not amount to a licence to disregard rules. The Regulator says that it is not asserting any claims provable in the bankruptcy, so the Redwater estate must comply with its environmental obligations, to the extent that assets are available to do so.

119 The resolution of this issue turns on the proper application of the *Abitibi* test for determining whether a particular regulatory obligation amounts to a claim provable in bankruptcy. To reiterate:

> 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. [Emphasis in original; para. 26.]

120 There is no dispute that in this appeal, the second part of the test is met. Accordingly, I will discuss only the first and the third parts of the test.

121 In this Court, the Regulator, supported by various interveners, raised two concerns about how the *Abitibi* test has been applied, both by the courts below and in general. The first concern is that the "creditor" step of the *Abitibi* test has been interpreted too broadly in cases such as the instant appeal and *Nortel Networks Corp., Re*, 2013 ONCA 599, 368 D.L.R. (4th) 122 (Ont. C.A.) ("*Nortel* CA"), and that, in effect, this step of the test has become so pro forma as to be practically meaningless. The second concern has to do with the application of the "monetary value" step of the *Abitibi* test by the chambers judge and Slatter J.A. This step is generally called the "sufficient certainty" step, based on the guidance provided in *Abitibi*. The argument here is that the courts below went beyond the test established in *Abitibi* by focusing on whether Redwater's regulatory obligations were "intrinsically financial". Under *Abitibi*, the sufficient certainty analysis should have focused on whether the Regulator would ultimately perform the environmental work and assert a monetary claim for reimbursement.

122 In my view, both concerns raised by the Regulator have merit. As I will demonstrate, *Abitibi* should not be taken as standing for the proposition that a regulator is always a creditor when it exercises its statutory enforcement powers against a debtor. On a proper understanding of the "creditor" step, it is clear that the Regulator acted in the public interest and for the public good in issuing the Abandonment Orders and enforcing the LMR requirements and that it is, therefore, not a creditor of Redwater. 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. Although this conclusion is sufficient to resolve this aspect of the appeal, for the sake of completeness, I will also demonstrate that the chambers judge erred in finding that, on these facts, there is sufficient certainty that the Regulator will ultimately perform the environmental work and assert a claim

for reimbursement. To conclude, I will briefly comment on why the *effects* of the end-of-life obligations do not conflict with the priority scheme in the *BIA*.

(1) The Regulator Is Not a Creditor of Redwater

123 The Regulator and the supporting interveners are not the first to raise issues with the "creditor" step of the *Abitibi* test. In the six years since *Abitibi* was decided, concerns about the "creditor" step and the fact that, as it is commonly understood, it will seemingly be satisfied in all — or nearly all — cases have also been expressed by academic commentators, such as A. J. Lund, "Lousy Dentists, Bad Drivers, and Abandoned Oil Wells: A New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law" (2017) 80 Sask. L. Rev. 157, at p. 178, and Stewart. This Court has not had an opportunity to comment on *Abitibi* since it was decided. However, the interpretation of the "creditor" step adopted by lower courts, including the majority of the Court of Appeal in this case, has focused on certain comments found at para. 27 of *Abitibi*, and the "creditor" step has accordingly been found to be satisfied whenever a regulator exercises its enforcement powers against a debtor (see, for example, C.A. reasons, at para. 60; *Nortel* CA, at para. 16).

124 GTL submits that these lower courts have correctly interpreted and applied the "creditor" step. It further submits that, because of *Abitibi*, the 1991 Alberta Court of Appeal decision in *Northern Badger* is of no assistance in analyzing the creditor issue. Conversely, the Regulator forcefully argues that *Abitibi* must be understood in the context of its own unique facts and that it did not overrule *Northern Badger*. Relying on *Northern Badger*, the Regulator argues that a regulator exercising a power to enforce a public duty is not a creditor of the individual or corporation subject to that duty. Like Martin J.A., I agree with the Regulator on this point. If, as GTL urges and the majority of the Court of Appeal concluded, the "creditor" step is satisfied whenever a regulator exercises its enforcement powers against a debtor, then it is hard to imagine a situation in which the "creditor" step would not be satisfied by the actions of an environmental regulator. Stewart was correct to suppose that "[s]urely, the Court did not intend this result" (p. 189). For the "creditor" step to have meaning, "there must be situations where the other two steps could be met... but the order [or obligation] is still not a provable claim because the regulator is not a creditor of the bankrupt" (Attorney General of Ontario's factum, at para. 39).

125 Before further explaining my conclusion on this point, I must address a preliminary issue: the fact that the Regulator conceded in the courts below that it was a creditor. It is well established that concessions of law are not binding on this Court: see *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781(S.C.C.) , at para. 44; *M. v. H.*, [1999] 2 S.C.R. 3 (S.C.C.) , at para. 45; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686 (S.C.C.) , at para. 62. As noted by L'Heureux-Dubé J., in dissent, but not on this point, in *R. v. Elshaw*, [1991] 3 S.C.R. 24 (S.C.C.) , at p. 48, "the fact that an issue is conceded below means nothing in and of itself". Although concessions by the parties are often relied upon, it is ultimately for this Court to determine points of law. For several reasons, no fairness concerns are raised by disregarding the Regulator's concession in this case.

126 First, in a letter to GTL dated May 14, 2015, the Regulator advanced the position that it was "not a creditor of [Redwater]", but, rather, had a "statutory mandate to regulate the oil and gas industry in Alberta" (GTL's Record, vol. 1, at p. 78). I note that this was the initial communication between the Regulator and GTL, only two days after the latter's appointment as receiver of Redwater's property. Second, the issue of whether the Regulator is a creditor was discussed in the parties' factums. Third, during oral arguments before this Court, the Regulator was questioned about its concession. Counsel made the undisputed point that higher courts are not bound by such concessions and took the position that, on the correct interpretation of *Abitibi*, the Regulator was not a creditor. Fourth, when the Regulator's status as a creditor was raised as an issue before this Court, opposing counsel did not argue that they would have adduced further evidence on the issue had it been raised in the courts below. Finally, a proper understanding of the "creditor" step of the *Abitibi* test is of fundamental importance to the proper functioning of the national bankruptcy scheme and of provincial environmental schemes throughout Canada. I conclude that this case is one in which it is appropriate to disregard the Regulator's concession in the courts below.

127 Returning to the analysis, I note that the unique factual matrix of*Abitibi* must be kept in mind. In that case, Newfoundland and Labrador expropriated most of AbitibiBowater's property in the province without compensation. Subsequently, AbitibiBowater was granted a stay under the *CCAA*. It then filed a notice of intent to submit a claim to arbitration

under the *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, Can. T.S. 1994 No. 2 ("NAFTA"), for losses resulting from the expropriation. In response, Newfoundland's Minister of Environment and Conservation ordered AbitibiBowater to remediate five sites pursuant to the Environmental Protection Act, S.N.L. 2002, c. E-14.2 ("EPA"). Three of the five sites had been expropriated by Newfoundland and Labrador. The evidence led to the conclusion that "the Province never truly intended that Abitibi was to perform the remediation work", but instead sought a claim that could be used as an offset in connection with AbitibiBowater's NAFTA claim (*Abitibi*, at para. 54). In other words, the Province sought a financial benefit from the remediation orders.

128 In this appeal, it is not disputed that, in seeking to enforce Redwater's end-of-life obligations, the Regulator is acting in a *bona fide* regulatory capacity and does not stand to benefit financially. The Regulator's ultimate goal is to have the environmental work actually performed, for the benefit of third-party landowners and the public at large. There is no colourable attempt by the Regulator to recover a debt, nor is there an ulterior motive on its part, as there was in*Abitibi*. The distinction between the facts of this appeal and those of*Abitibi* becomes even clearer when one examines the comprehensive reasons of the chambers judge in *Abitibi*. The crux of the findings of Gascon J. (as he then was) is found at paras. 173-76:

> ... the Province stands as the direct beneficiary, from a monetary standpoint, of Abitibi's compliance with the EPA Orders. In other words, the execution in nature of the EPA Orders would result in a definite credit to the Province's own "balance sheet". Abitibi's liability in that regard is an asset for the Province itself.
>
> With all due respect, this is not regulatory in nature; it is rather purely financial in reality. This is, in fact, closer to a debtor-creditor relationship than anything else.
>
> This is quite far from the situation of the detached regulator or public enforcer issuing order for the public good. Here, the Province itself derives the direct pecuniary benefit from the required compliance of Abitibi to the EPA Orders. The Province stands to directly gain in the outcome. None of the cases submitted by the Province bear any similarity to the fact pattern in the present proceedings.
>
> From this perspective, it is the hat of a creditor that best fits the Province, not that of a disinterested regulator.
>
> (*AbitibiBowater inc., Re*, 2010 QCCS 1261, 68 C.B.R. (5th) 1(C.S. Que.))

129 This Court recognized in *Abitibi* that the Province "easily satisfied" the creditor requirement (para 49). It was therefore not necessary to consider at any length how the "creditor" step should be understood or how it would apply in other factual situations. However, even at para. 27 of *Abitibi*, the paragraph relied on by the majority of the Court of Appeal, Deschamps J. made a point of noting that "[m]ost environmental regulatory bodies *can be* creditors in respect of monetary or non-monetary obligations imposed by the relevant statutes" (emphasis added). The interpretation of the "creditor" step adopted by the majority of the Court of Appeal and urged upon this Court by GTL leaves no room for a regulator that enforces obligations not to be a creditor, though this possibility was clearly contemplated by para. 27 of*Abitibi*. As noted above, GTL's interpretation leaves the "creditor" step with no independent work to perform.

130 *Northern Badger* established that a regulator enforcing a public duty by way of non-monetary order is not a creditor. I reject the claim in the dissenting reasons that*Northern Badger* should be interpreted differently. First, I note that whether the Regulator has a contingent claim is relevant to the sufficient certainty test, which presupposes that the Regulator is a creditor. I cannot accept the proposition in the dissenting reasons that *Northern Badger* was concerned with what would become the third prong of the *Abitibi* test. In *Northern Badger*, Laycraft C.J.A. accepted that abandonment was a liability and identified the issue as "whether that liability is to the board so that it is the board which is the creditor" (para. 32). Second, the underlying scenario here with regards to Redwater's end-of-life obligations is exactly the same as in *Northern Badger* — a regulator is ordering an entity to comply with its legal obligations in furtherance of the public good. This reasoning from *Northern Badger* was subsequently adopted in cases such as *Strathcona (County) v. Fantasy Construction Ltd. Estate (Trustee of)*, 2005 ABQB 794, 261 D.L.R. (4th) 221 (Alta. Q.B.), at paras. 23-25, and *Lamford Forest Products Ltd., Re* (1991), 86 D.L.R. (4th) 534 (B.C. S.C.).

131 I cannot agree with the suggestion by the majority of the Court of Appeal in this case that *Northern Badger* "is of limited assistance" in the application of the *Abitibi* test (para. 63). Rather, I agree with Martin J.A. that *Abitibi* did not overturn the reasoning in *Northern Badger*, but instead "emphasized the need to consider the substance of provincial regulation in assessing whether it creates a claim provable in bankruptcy" (para. 164). As Martin J.A. noted, even following *Abitibi*, the law continues to be that "public obligations are not provable claims that can be counted or compromised in the bankruptcy" (para. 174).*Abitibi* clarified the scope of *Northern Badger* by confirming that a regulator's environmental claims will be provable claims under certain circumstances. It does not stand for the proposition that a regulator exercising its enforcement powers is always a creditor. The reasoning in *Northern Badger* was simply not applicable on the facts of *Abitibi*, given the actions of the Province as outlined above.

132 In *Abitibi*, Deschamps J. noted that insolvency legislation had evolved in the years since *Northern Badger*. That legislative evolution did not, however, change the meaning to be ascribed to the term "creditor". In this regard, I agree with the conclusion in Strathcona (County) v. Fantasy Construction Ltd. Estate (Trustee of)2005 ABQB 559256 D.L.R. (4th) 536Alta. Q.B., that the amendments to the *BIA* dealing with environmental matters in the years following *Northern Badger* cannot be interpreted as having overturned the reasoning in that case. As should be clear from the earlier discussion of s. 14.06, the amendments to the *BIA* do not speak to when a regulator enforcing an environmental claim is a creditor.

133 The conclusion that the reasoning in *Northern Badger* continues to be relevant since *Abitibi* and the amendments to insolvency legislation also finds support in the writings of academic commentators. Stewart's position is that, while*Abitibi* discussed*Northern Badger*, it did not overturn it. He urges this Court to clarify that there remains "a distinction between a regulatory body that is a creditor because it is enforcing a debt, and a regulatory body that is not a creditor because it is enforcing the law" (p. 221). Similarly, Lund argues that a court should "consider the importance of the public interests protected by the regulatory obligation when deciding whether the debtor owes a debt, liability or obligation to a creditor" (p. 178).

134 For the foregoing reasons, *Abitibi* cannot be understood as having changed the law as summarized by Laycraft C.J.A. I adopt his comments at para. 33 of *Northern Badger*:

> The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life ... But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed.

135 Based on the analysis in *Northern Badger*, it is clear that the Regulator is not a creditor of the Redwater estate. The end-of-life obligations the Regulator seeks to enforce against Redwater are public duties. Neither the Regulator nor the Government of Alberta stands to benefit financially from the enforcement of these obligations. These public duties are owed, not to a creditor, but, rather, to fellow citizens, and are therefore outside the scope of "provable claims". I do not intend to suggest, however, that a regulator will be a creditor only where it acts exactly as the province did in*Abitibi*. There may very well be situations in which a regulator's actions fall somewhere between those in *Abitibi* and those in the instant case. Notably, unlike some previous cases, the Regulator has performed no environmental work itself. I leave such situations to be addressed in future cases in which there are full factual records. Here, it is clear that the Regulator is seeking to enforce Redwater's public duties, whether by issuing the Abandonment Orders or by maintaining the LMR requirements. The Regulator is not a creditor within the meaning of the *Abitibi* test.

136 I reject the suggestion that the foregoing analysis somehow overrules the first prong of the *Abitibi* test. The facts in *Abitibi* were not comparable to the facts of this appeal. Although this Court discussed*Northern Badger* in *Abitibi*, it merely referenced the subsequent amendments to the *BIA*, and did not overturn the earlier decision. The Court was clear that the ultimate outcome "must be grounded in the facts of each case" (para. 48). The dissenting reasons claim that, given the foregoing analysis, it will

be nearly impossible to find that regulators are ever creditors. *Abitibi* itself shows this not to be the case. Furthermore, as I have said, there may well be cases that fall between *Abitibi* and the present case. However, if *Abitibi* is read as requiring only a determination of whether the regulator has exercised an enforcement power, it will in fact be impossible for a regulator *not* to be a creditor. The dissenting reasons do not seriously deny this, merely suggesting that regulators can publish guidelines or issue licences. The Regulator does both, yet, under the approach taken in the dissenting reasons, it is powerless to take any practical steps in the public interest regarding its guidelines or licences without qualifying as a creditor. As I have explained,*Abitibi* clearly contemplates a place for regulators who are not creditors.

137 Strictly speaking, this is sufficient to dispose of this aspect of the appeal. However, additional guidance on the sufficient certainty analysis may prove helpful in future cases. Accordingly, I turn now to a discussion of the "sufficient certainty" step and of the reasons why the Abandonment Orders and the LMR conditions both fail on this step of the *Abitibi* test.

(2) There Is No Sufficient Certainty That the Regulator Will Perform the Environmental Work and Advance a Claim for Reimbursement

138 The "sufficient certainty" test articulated in paras. 30 and 36 in*Abitibi* essentially does no more than reorganize and restate the requirements of the relevant provisions of the BIA. Section 121(2) provides that contingent claims may be provable claims. In other words, contingent debts or liabilities owed by a bankrupt to a creditor may be, but are not necessarily, provable claims. Section 135(1.1) provides for the valuation of such a claim. A contingent claim must be capable of valuation under s. 135(1.1) — it cannot be too remote or speculative — in order to be a provable claim under s. 121(2).

139 Before the third step of the *Abitibi* test can even be reached, a regulator must already have been shown to be a creditor. I have concluded that, on the facts of this case, the Regulator is not a creditor of Redwater. However, for the purpose of explaining how I differ from the chambers judge on the "sufficient certainty" analysis, I will proceed as if the Regulator were, in fact, a creditor of Redwater in respect of the Abandonment Orders and LMR requirements. These end-of-life obligations do not directly require Redwater to make a payment to the Regulator. Rather, they are obligations requiring Redwater to *do something*. As discussed in *Abitibi*, if the Regulator were in fact a creditor, end-of-life obligations would be its contingent claims.

140 What a court must determine is whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to a regulator. In determining whether a non-monetary regulatory obligation of a bankrupt is too remote or too speculative to be included in the bankruptcy proceeding, the court must apply the general rules that apply to future or contingent claims. It must be sufficiently certain that the contingency will come to pass — in other words, that the regulator will enforce the obligation by performing the environmental work and seeking reimbursement.

141 I will now discuss the Abandonment Orders and the LMR requirements in turn and demonstrate how they fail to satisfy the "sufficient certainty" step of the *Abitibi* test.

(a) The Abandonment Orders

142 The Regulator has issued orders under the *OGCA* and the *Pipeline* Act requiring Redwater to abandon the Renounced Assets. Even if the Regulator were a creditor of Redwater, the Abandonment Orders would still have to be capable of valuation in order to be included in the bankruptcy process. In my view, it is not established either by the chambers judge's factual findings or by the evidence that it is sufficiently certain that the Regulator will perform the abandonments and advance a claim for reimbursement. The claim is too remote and speculative to be included in the bankruptcy process.

143 The chambers judge acknowledged that it was "unclear" whether the Regulator would perform the abandonments itself or would deem the wells subject to the Abandonment Orders to be orphans (para. 173). He stated that, in the latter case, the OWA would probably carry out the abandonments, although it was not clear when they would be completed. Indeed, the chambers judge acknowledged that, given the OWA's resources, it could take as long as 10 years for it to get around to performing the required environmental work on the Redwater property. He nonetheless concluded that — even though the "sufficient certainty" step was not satisfied in a "technical sense" — the situation met what had been intended in*Abitibi*. That conclusion was at least partly based on his finding that the Abandonment Orders were "intrinsically financial" (para. 173).

144 In my view, the chambers judge did not make a finding of fact that the Regulator would carry out the abandonments *itself*. As noted, he acknowledged that it was "unclear" whether the Regulator would perform the abandonments. This can hardly be deemed a finding of fact deserving of deference. In my view, considered as a whole, the evidence in this case leads to the conclusion that the Regulator will not abandon the Renounced Assets itself.

145 The Regulator is not in the business of performing abandonments. It has no statutory duty to do so. Abandonment is instead an obligation of the licensee. The evidence of the Regulator's affiant was that the Regulator very rarely abandons properties on behalf of licensees and virtually never does so where the licensee is in receivership or bankruptcy. The affiant stated that the Regulator had no intention of abandoning Redwater's licensed assets. As noted by the chambers judge, it is true that, in its letter to GTL dated July 15, 2015, the Regulator threatened to perform the abandonments itself, but the Regulator subsequently took no steps to follow up on that threat. Even if this letter should be accorded any weight, the contradiction between it and the Regulator's subsequent affidavits at the very least makes it difficult to say with anything approaching sufficient certainty that the Regulator intends to carry out the abandonments. These facts distinguish this case from *Abitibi*, in which the restructuring judge's findings were based on the premise that the province would most likely perform the remediation work itself.

146 Below, I will explain why the OWA's involvement is insufficient to satisfy the "sufficient certainty" test. First, I note that any reliance the chambers judge placed on the intrinsically financial nature of the Abandonment Orders was an error. In this regard, I am in complete agreement with Martin J.A. Considering whether an order is intrinsically financial is an erroneous interpretation of the third step of the *Abitibi* test. It is too broad and would result in a provable claim being found even where the existence of a monetary claim in bankruptcy is merely speculative. Thus, in *Nortel* CA, Juriansz J.A. rightly rejected the argument that the *Abitibi* test did not require a determination that the regulator would perform the environmental work and claim reimbursement, and that it was sufficient for there to be an environmental order requiring an expenditure of funds by the bankrupt estate. He held the following, at paras. 31-32:

> As I read it, the Supreme Court's decision is clear: ongoing environmental remediation obligations may be reduced to monetary claims that can be compromised in CCAA proceedings only where the province has performed the remediation work and advances a claim for reimbursement, or where the obligation may be considered a contingent or future claim because it is "sufficiently certain" that the province will do the work and then seek reimbursement.
>
> The respondents' approach is not only inconsistent with *AbitibiBowater Inc., Re*, it is too broad. It would result in virtually all regulatory environmental orders being found to be provable claims. As Deschamps J. observed, a company may engage in activities that carry risks. When those risks materialize, the costs are borne by those who hold a stake in the company. A risk that results in an environmental obligation becomes subject to the insolvency process only when it is in substance monetary and is in substance a provable claim.

147 As the chambers judge correctly acknowledged, the fact that the Regulator would not conduct the abandonments itself does not mean that it would wash its hands of the Renounced Assets. Rather, if necessary, it would designate them as orphans pursuant to the *OGCA* and leave them for the OWA. I am not suggesting that a regulator can strategically avoid the "sufficient certainty" test simply by delegating environmental work to an arm's length organization. I would not decide, as the Regulator urges, that the *Abitibi* test *always* requires that the environmental work be performed by the regulator itself. However, the OWA's true nature must be emphasized. There are strong grounds to conclude that, given the particular features of this regulatory context, the OWA is not the regulator.

148 The creation of the OWA was not an attempt by the Regulator to avoid the *BIA* order of priorities in bankruptcy. It is a non-profit organization with its own mandate and independent board of directors, and it operates as a financially independent entity pursuant to legally delegated authority. Although the OWA's board includes a representative of the Regulator and a representative of Alberta Environment and Parks, its independence is not in question. The OWA's 2014-2015 annual report indicates that five out of six voting directors represent industry. The OWA uses a risk assessment tool to prioritize when and how it will perform environmental work on the many hundreds of orphans in Alberta. There is no suggestion that the Regulator has any say in the order in which the OWA chooses to perform environmental work. The 2014-2015 annual report also states

that, since 1992, 87 percent of the money collected and invested to fund OWA activities has been provided by industry via the orphan levy. The Regulator, at para. 99 of its factum, hints obliquely that additional provincial or federal funding may be forthcoming in the future, but even if it materializes, it will be almost entirely in the form of loans. I cannot accept the suggestion in the dissenting reasons that the Regulator and the OWA are "inextricably intertwined" (para. 273).

149 Even assuming that the OWA's abandonment of Redwater's licensed assets could satisfy the "sufficient certainty" test, I agree with Martin J.A. that it is difficult to conclude that there is sufficient certainty that the OWA will in fact perform the abandonments. I also agree with her view that there is no certainty that a claim for reimbursement will be advanced should the OWA ultimately abandon the assets.

150 The dissenting reasons suggest that the facts of this appeal are more akin to those of *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154 (Ont. C.A.), than to those of *Nortel* CA, arguing that the "sufficient certainty" test is satisfied because, as in *Northstar*, there is no purchaser to take on Redwater's assets and the debtor itself is insolvent, so only the OWA can perform the work. In my view, *Northstar* is easily distinguishable. In that case, the bankrupt had been voluntarily carrying out remediation prior to its bankruptcy. After it made its assignment into bankruptcy, the Ministry of the Environment ("MOE") took over the remediation activities itself, purporting to do so on a without prejudice basis. Jurianz J.A. found that the fact that the MOE had already undertaken remediation activities made it sufficiently certain that it would do so. As I will now demonstrate, the facts here are very different.

151 At the beginning of this litigation, the OWA estimated that it would take 10 to 12 years to get through the backlog of orphans. By 2015, that backlog was increasing rapidly, and it may well have continued to increase at the same or an even greater speed in the intervening years, as submitted by the Regulator. If anything, this suggests the possibility of an even larger backlog. There is no indication that the Renounced Assets would have a particularly high priority in the backlog. Even if the potential additional funding materializes, the Regulator submits that it will be a generation or more before the OWA can address its existing inventory of orphans.

152 The dissenting reasons rely on the chambers judge's conclusion that the OWA would "probably" perform the abandonments eventually, while downplaying the fact that he also concluded that this would not "necessarily [occur] within a definite timeframe" (paras. 261 and 278, citing the chambers judge's reasons, at para. 173). Given the most conservative timeline — the 10 years discussed by the chambers judge — it is difficult to predict anything occurring with sufficient certainty. Much could change within the next decade, both in terms of government policy and in terms of the willingness of those in the Alberta oil and gas industry to discharge environmental liabilities. This is not at all the same situation as in *Northstar*, in which the MOE had already commenced environmental work.

153 Perhaps more to the point, this lengthy timeline means that, should it ultimately perform the work, the OWA will not advance a claim for reimbursement. Advancement of a claim is an element of the test that is just as essential as performance of the work. The OWA itself has no ability to seek reimbursement of its costs from licensees and, although the costs of abandonment carried out by a person authorized by the Regulator constitute a debt payable to the Regulator under s. 30(5) of the OGCA, no evidence has been adduced that the Regulator has exercised its power to recover such costs in comparable cases. There is a good reason for this: the reality is that, by the time the OWA got around to abandoning any of Redwater's wells, the estate would be finalized and GTL long since discharged. In sum, the chambers judge erred in failing to consider whether the OWA can be treated as the regulator and in failing to appreciate that, even if it can, it is not sufficiently certain that the OWA will in fact perform the abandonments and advance a claim for reimbursement.

154 Accordingly, even if the Regulator had acted as a creditor in issuing the Abandonment Orders, it cannot be said with sufficient certainty that it would perform the abandonments and advance a claim for reimbursement.

(b) The Conditions for the Transfer of Licenses

155 I will deal briefly with the LMR conditions for the transfer of licences. Much of the foregoing analysis with regard to the Abandonment Orders also applies to these conditions. As noted by Martin J.A., the requirement of regulatory approval for

licence transfers is difficult to compare directly with the remediation orders at issue in *Abitibi*. However, this Court confirmed that the *Abitibi* test applies to a class of regulatory obligations that is broader than "orders" in *Moloney* , at paras. 54-55. The LMR conditions are a "non-monetary obligation" for the Redwater estate, since they must be satisfied before the Regulator will approve the transfer of any of Redwater's licences. However, it is notable that, even apart from the LMR conditions, licences are far from freely transferrable. The Regulator will not approve the transfer of licences where the transferee is not a licensee under the *OGCA*, the *Pipeline Act*, or both. The Regulator also reserves the right to reject a proposed transfer where it determines that the transfer is not in the public interest, such as where the transferee has outstanding compliance issues.

156 In a sense, the factors suggesting an absence of sufficient certainty are even stronger for the LMR requirements than for the Abandonment Orders. There is a debt enforcement scheme under the *OGCA* and the *Pipeline Act* in respect of abandonment, but there is no such scheme for the LMR requirements. The Regulator's refusal to approve licence transfers unless and until the LMR requirements have been satisfied does not give it a monetary claim against Redwater. It is true that compliance with the LMR requirements results in a reduction in the value of the bankrupt estate. However, as discussed earlier, not every obligation that diminishes the value of the bankrupt estate, and therefore the amount available to secured creditors, satisfies the "sufficient certainty" step. The question is not whether an obligation is intrinsically financial.

157 Compliance with the LMR conditions prior to the transfer of licences reflects the inherent value of the assets held by the bankrupt estate. Without licences, Redwater's *profits à prendre* are of limited value at best. All licences held by Redwater were received by it subject to the end-of-life obligations that would one day arise. These end-of-life obligations form a fundamental part of the value of the licensed assets, the same as if the associated costs had been paid up front. Having received the benefit of the Renounced Assets during the productive period of their life cycles, Redwater cannot now avoid the associated liabilities. This understanding is consistent with *Daishowa-Marubeni International Ltd. v. R.*, 2013 SCC 29, [2013] 2 S.C.R. 336 (S.C.C.) , which dealt with the statutory reforestation obligations of holders of forest tenures in Alberta. This Court unanimously held that the reforestation obligations were "a future cost embedded in the forest tenure that serves to depress the tenure's value at the time of sale" (para. 29).

158 The fact that regulatory requirements may cost money does not transform them into debt collection schemes. As noted by Martin J.A., licensing requirements predate bankruptcy and apply to all licensees regardless of solvency. GTL does not dispute the fact that Redwater's licences can be transferred only to other licensees nor that the Regulator retains the authority in appropriate situations to reject proposed transfers due to safety or compliance concerns. There is no difference between such conditions and the condition that the Regulator will not approve transfers where they would leave the requirement to satisfy end-of-life obligations unaddressed. All these regulatory conditions depress the value of the licensed assets. None of them creates a monetary claim in the Regulator's favour. Licensing requirements continue to exist during bankruptcy, and there is no reason why GTL cannot comply with them.

(3) Conclusion on the Abitibi test

159 Accordingly, the end-of-life obligations binding on GTL are not claims provable in the Redwater bankruptcy, so they do not conflict with the general priority scheme in the *BIA*. This is not a mere matter of form, but of substance. Requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the *BIA*. In crafting the priority scheme set out in the *BIA*, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation (see s. 14.06(7)). Thus, the *BIA* explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage. Although the nature of property ownership in the Alberta oil and gas industry meant that s. 14.06(7) was unavailable to the Regulator, the Abandonment Orders and the LMR replicate s. 14.06(7)'s effect in this case. Furthermore, it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* — rather, it facilitates them.

160 Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non-monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the *BIA*, notwithstanding the consequences this may have for the bankrupt's secured creditors. The Abandonment Orders and the LMR requirements are based on valid provincial laws of general application — exactly the kind of valid provincial laws upon which the *BIA* is built. As noted in *Moloney* , the *BIA* is clear that "[t]he ownership of certain assets and the existence of particular liabilities depend upon provincial law" (para. 40). End-of-life obligations are imposed by valid provincial laws which define the contours of the bankrupt estate available for distribution.

161 Finally, as noted earlier, the *BIA*'s general purpose of facilitating financial rehabilitation is not relevant for a corporation such as Redwater. Corporations with insufficient assets to satisfy their creditors will never be discharged from bankruptcy because they cannot satisfy all their creditors' claims in full (BIA, s. 169(4)). Thus, no conflict with this purpose is caused by the conclusion that the end-of-life obligations binding Redwater are not provable claims.

IV. Conclusion

162 There is no conflict between Alberta's regulatory regime and the *BIA* requiring portions of the former to be rendered inoperative in the context of bankruptcy. Although GTL remains fully protected from personal liability by federal law, it cannot walk away from the environmental liabilities of the bankrupt estate by invoking s. 14.06(4). On a proper application of the *Abitibi* test, the Redwater estate must comply with ongoing environmental obligations that are not claims provable in bankruptcy.

163 Accordingly, the appeal is allowed. In *Alberta Energy Regulator v. Grant Thornton Limited*, 2017 ABCA 278, 57 Alta. L.R. (6th) 37 (Alta. C.A.), Wakeling J.A. declined to stay the precedential effect of the Court of Appeal's decision. As he noted, the interests of the Regulator itself were already protected. Pursuant to earlier orders of the Alberta courts, GTL had already sold or renounced all of Redwater's assets, and the sale proceeds were being held in trust. Accordingly, the Regulator's request for an order that the proceeds from the sale of Redwater's assets be used to address Redwater's end-of-life obligations is granted. Additionally, the chambers judge's declarations in paras. 3 and 5-16 of his order are set aside.

164 As the successful party in the appeal, the Regulator would normally be entitled to its costs. However, the Regulator specifically did not seek costs. Accordingly, there will be no order made as to costs.

***Côté J.* (dissenting) (Moldaver J. concurring):**

I. Introduction

165 Redwater Energy Corporation ("Redwater") is a bankrupt oil and gas company. Its estate principally consists of two types of properties or assets: valuable, producing oil wells and facilities that are still capable of generating revenue; and value-negative, non-producing assets, including depleted wells that are subject to onerous environmental liabilities. Redwater's receiver and trustee in bankruptcy, Grant Thornton Limited ("GTL"), purports to have disclaimed ownership of the non-producing assets. It did so in order to sell the valuable, producing wells separately — unencumbered by the liabilities attached to the disclaimed properties — and to distribute the proceeds of that sale to the estate's creditors.

166 However, Alberta law does not recognize GTL's disclaimers as enforceable. Shortly after GTL's appointment as receiver, the Alberta Energy Regulator ("AER") issued "Abandonment Orders" for the disclaimed assets, directing Redwater and its working interest participants to carry out environmental work on those properties. Specifically, the AER sought to have GTL "abandon" the non-producing properties, which meant to render the wells environmentally safe according to the AER's directives. It later notified GTL that it would refuse to approve any sale of Redwater's valuable assets unless GTL did one of three things: sell the disclaimed properties in a single package with the producing wells and facilities; complete the abandonment and reclamation work itself; or post security to cover the environmental liabilities associated with the disclaimed properties.

