Clerk's stamp:

COURT FILE NUMBER:	2301-10358
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C B-3, AS AMENDED
	AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF MANTLE MATERIALS GROUP, LTD.
APPLICANT	**MANTLE MATERIALS GROUP, LTD.**
DOCUMENT	**BOOK OF AUTHORITIES TO THE SUPPLEMENTAL BRIEF OF LAW OF THE APPLICANT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Gowling WLG (Canada) LLP 421 7 Ave SW Suite 1600 Calgary, AB T2P 4K9 **Attn: Tom Cumming, Sam Gabor and Stephen Kroeger** Ph. (403) 298 1938 / (403) 298- /1946 / (403) 298-1018 File No.: A171561

APPLICATION BEFORE THE HONOURABLE JUSTICE COLIN C.J. FEASBY AUGUST 15TH, 2023 AT 2:00 PM. ON THE COMMERCIAL LIST

TABLE OF AUTHORITIES

TAB	AUTHORITY
1.	*Bankruptcy and Insolvency Act,* RSC 1985, c B-3
2.	*Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12
3.	*Conservation and Reclamation Regulation,* AR 115/93
4.	*Orphan Well Association v. Grant Thornton Ltd.,* 2019 SCC 5 (CanLII), [2019] 1 SCR 150
5.	*Newfoundland and Labrador v. AbitibiBowater Inc.,* 2012 SCC 67, [2012] 3 S.C.R. 443
6.	*PanAmericana de Bienes y Servicios v. Northern Badger Oil & Gas Limited,* 1991 ABCA 181
7.	*Nortel Networks Corporation (Re),* 2013 ONCA 599
8.	*Manitok Energy Inc (Re),* 2022 ABCA 117
9.	*Orphan Well Association v Trident Exploration Corp*, 2022 ABKB 839
10.	*Qualex-Landmark Towers Inc v 12-10 Capital Corp*, 2023 ABKB 109

TAB 1

R.S.C. 1985, c. B-3, s. 14.06

s 14.06

Currency

14.06

14.06(1)No trustee is bound to act

No trustee is bound to assume the duties of trustee in matters relating to assignments, bankruptcy orders or proposals, but having accepted an appointment in relation to those matters the trustee shall, until discharged or another trustee is appointed in the trustee's stead, perform the duties required of a trustee under this Act.

14.06(1.1)Application

In subsections (1.2) to (6), a reference to a trustee means a trustee in a bankruptcy or proposal and includes

(a) an interim receiver;

(b) a receiver within the meaning of subsection 243(2); and

(c) any other person who has been lawfully appointed to take, or has lawfully taken, possession or control of any property of an insolvent person or a bankrupt that was acquired for, or is used in relation to, a business carried on by the insolvent person or bankrupt.

14.06(1.2)No personal liability in respect of matters before appointment

Despite anything in federal or provincial law, if a trustee, in that position, carries on the business of a debtor or continues the employment of a debtor's employees, the trustee is not by reason of that fact personally liable in respect of a liability, including one as a successor employer,

(a) that is in respect of the employees or former employees of the debtor or a predecessor of the debtor or in respect of a pension plan for the benefit of those employees; and

(b) that exists before the trustee is appointed or that is calculated by reference to a period before the appointment.

14.06(1.3)Status of liability

A liability referred to in subsection (1.2) is not to rank as costs of administration.

14.06(1.4)Liability of other successor employers

Subsection (1.2) does not affect the liability of a successor employer other than the trustee.

14.06(2)Liability in respect of environmental matters

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

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(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.

14.06(3)Reports, etc., still required

Nothing in subsection (2) exempts a trustee from any duty to report or make disclosure imposed by a law referred to in that subsection.

14.06(4)Non-liability re certain orders

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.

14.06(5)Stay may be granted

The court may grant a stay of the order referred to in subsection (4) on such notice and for such period as the court deems necessary for the purpose of enabling the trustee to assess the economic viability of complying with the order.

14.06(6)Costs for remedying not costs of administration

If the trustee has abandoned or renounced any interest in any real property, or any right in any immovable, affected by the environmental condition or environmental damage, claims for costs of remedying the condition or damage shall not rank as costs of administration.

14.06(7)Priority of claims

Any claim by Her Majesty in right of Canada or a province against the debtor in a bankruptcy, proposal or receivership for costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor is secured by security on the real property or immovable affected by the environmental condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security

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(a) is enforceable in accordance with the law of the jurisdiction in which the real property or immovable is located, in the same way as a mortgage, hypothec or other security on real property or immovables; and

(b) ranks above any other claim, right, charge or security against the property, despite any other provision of this Act or anything in any other federal or provincial law.

14.06(8)Claim for clean-up costs
Despite subsection 121(1), a claim against a debtor in a bankruptcy or proposal for the costs of remedying any environmental condition or environmental damage affecting real property or an immovable of the debtor shall be a provable claim, whether the condition arose or the damage occurred before or after the date of the filing of the proposal or the date of the bankruptcy.

Note:

S.C. 1997, c. 12, s. 15(2), provides as follows:

(2) Application
Subsection (1) [S.C. 1997, c. 12, s. 15(1), which replaced s. 14.06(2) and (3) with s. 14.06(1.1) to (8)] applies to bankruptcies, proposals or receiverships in respect of which proceedings are commenced after that subsection comes into force [September 30, 1997].

Amendment History
1992, c. 27, s. 9(1); 1997, c. 12, s. 15; 2004, c. 25, s. 16; 2005, c. 47, s. 17; 2007, c. 36, s. 9(2), (3)

Currency
Federal English Statutes reflect amendments current to June 7, 2023
Federal English Regulations Current to Gazette Vol. 157:11 (May 24, 2023)

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TAB 2

Alberta Statutes
Environmental Protection and Enhancement Act

R.S.A. 2000, c. E-12, s. 1

s 1. Definitions

Currency

1.Definitions
In this Act,

(a) **"activity"** means an activity or part of an activity listed in the Schedule of Activities;

(b) **"adverse effect"** means impairment of or damage to the environment, human health or safety or property;

(c) **"agricultural operation"** means agricultural operation as defined in the *Agricultural Operation Practices Act*;

(d) **"analyst"** means an analyst designated by the Minister under section 25;

(e) **"animal"** means any animal other than a human;

(f) **"approval"** means an approval issued under this Act in respect of an activity, and includes the renewal of an approval;

(g) **"Board"** means the Environmental Appeals Board;

(h) **"borehole"** means a hole advanced into the ground for the purpose of determining engineering or geological classification and properties or for instrumentation purposes;

(i) **"certificate of qualification"** means a certificate of qualification issued under section 82, including the renewal of such a certificate, and a certificate or other qualification from another jurisdiction that is accepted under the regulations as a certificate of qualification for the purposes of this Act;

(j) **"certificate of title"** includes a document issued under the *Metis Settlements Act* with respect to land in a settlement area under that Act that is similar in nature to a certificate of title within the meaning of the *Land Titles Act*;

(k) **"certificate of variance"** means a certificate of variance issued under section 78;

(k.1) **"code of practice"** means a document governing an activity or activities or a portion of an activity or activities that is adopted or incorporated pursuant to section 38;

(l) **"conservation"** means, except in sections 22 to 24, the planning, management and implementation of an activity with the objective of protecting the essential physical, chemical and biological characteristics of the environment against degradation;

(m) **"Co-ordinating Council"** means the Sustainable Development Co-ordinating Council continued under section 5;

(n) **"council"**, when used with reference to a local authority, includes a settlement council under the *Metis Settlements Act*;

(o) **"Department"** means the Department administered by the Minister;

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that may cause, is causing or has caused an adverse effect or aggravates the adverse effect of the release of a substance into the environment on that parcel, or

(vii) the Minister responsible for the *Unclaimed Personal Property and Vested Property Act*, with respect to a parcel of land to which that Act apllies, unless after the date on which the Minister takes possession of the parcel of land the actions of the Minister or persons under the control of the Minister release on that parcel a new or additional substance into the environment that may cause, is causing or has caused an adverse effect or aggravates the adverse effect of the release of a substance into the environment on that parcel;

(uu) **"pest"** means any injurious, noxious or troublesome plant or animal life and includes any injurious, noxious or troublesome organic function of a plant or animal;

(vv) **"pesticide"** means

(i) a substance that is intended, sold or represented for use in preventing, destroying, repelling or mitigating any insect, nematode, rodent, predatory animal, parasite, bacteria, fungus, weed or other form of plant or animal life or virus, except a virus, parasite, bacteria or fungus in living people or animals,

(ii) any substance that is a pest control product within the meaning of the *Pest Control Products Act* (Canada) or is intended for use as such a pest control product,

(iii) any substance that is a plant growth regulator, a defoliant or a plant desiccant,

(iv) a fertilizer within the meaning of the *Fertilizers Act* (Canada) that contains a substance referred to in subclause (i), (ii) or (iii), and

(v) any other substance designated as a pesticide in the regulations,

but does not include a substance that is intended, sold or represented for use in potable water to prevent or destroy bacteria, parasites or viruses if the substance is not a pest control product within the meaning of the *Pest Control Products Act* (Canada);

(ww) **"pipeline"** means

(i) a pipe for the transmission of any substance and installations in connection with that pipe, or

(ii) a sewer or sewage system and installations in connection with that sewer or sewage system;

(iii) [Repealed 2003, c. 37, s. 2(c).]

(xx) **"pit"** means any opening in, excavation in or working of the surface or subsurface made for the purpose of removing sand, gravel, clay or marl and includes any associated infrastructure, but does not include a mine or quarry;

(yy) **"place"** includes any land, building, structure, machine, aircraft, vehicle or vessel;

(zz) **"potable water"** means water that is supplied by a waterworks system and is used for drinking, cooking, dish washing or other domestic purposes requiring water that is suitable for human consumption;

(aaa) **"private utility"** means a private utility within the meaning of the regulations;

(bbb) **"privately owned development"** means a privately owned development within the meaning of the regulations;

(ccc) **"quarry"** means any opening in, excavation in or working of the surface or subsurface for the purpose of working, recovering, opening up or proving

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(i) any mineral other than coal, a coal bearing substance, oil sands or an oil sands bearing substance, or

(ii) ammonite shell,

and includes any associated infrastructure;

(ddd) **"reclamation"** means any or all of the following:

(i) the removal of equipment or buildings or other structures or appurtenances;

(ii) the decontamination of buildings or other structures or other appurtenances, or land or water;

(iii) the stabilization, contouring, maintenance, conditioning or reconstruction of the surface of land;

(iv) any other procedure, operation or requirement specified in the regulations;

(eee) **"recycle"** means to do anything that results in providing a use for a thing that otherwise would be disposed of or dealt with as waste, including collecting, transporting, handling, storing, sorting, separating and processing the thing, but does not include the application of waste to land or the use of a thermal destruction process;

(fff) **"registered owner"**, with respect to land, means

(i) the person registered in a land titles office as the owner of the fee simple in the land, and

(ii) except for the purposes of section 22, the person registered in a land titles office as the owner of a life estate in the land,

and in the case of patented land within the meaning of the *Metis Settlements Act* includes a person registered in the Metis Settlements Land Registry established under that Act;

(ggg) **"registration"** means, except in sections 23, 24, 34(n), 154(b) and 175(d), a registration issued under this Act in respect of an activity, and includes the renewal of a registration;

(hhh) **"release"** includes to spill, discharge, dispose of, spray, inject, inoculate, abandon, deposit, leak, seep, pour, emit, empty, throw, dump, place and exhaust;

(iii) **"remediation certificate"** means a remediation certificate issued under section 117;

(jjj) [Repealed 2003, c. 2, s. 1(24)(a).]

(kkk) **"storage"** means the holding of a substance or thing for a temporary period at the end of which it is processed, used, transported, treated or disposed of;

(lll) **"storm drainage system"** means any system for collecting, storing and disposing of storm drainage, and includes

(i) the sewers and pumping stations that make up the storm drainage collection system,

(ii) the storm drainage storage, management and treatment facilities that buffer the effects of the peak runoff or improve the quality of the storm water,

(iii) the sewers and pumping stations that transport storm drainage to the location where it is treated or disposed of, and

(iv) the storm drainage outfall structures;

(mmm) **"substance"** means

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R.S.A. 2000, c. E-12, s. 134

s 134. Definitions

Currency

134.Definitions
In this Part,

(a) **"expropriation board"** means the board, person or other body having the power to order termination of a right of entry order as to the whole or part of the land affected by the order;

(b) **"operator"** means

(i) an approval or registration holder who carries on or has carried on an activity on or in respect of specified land pursuant to an approval or registration,

(ii) any person who carries on or has carried on an activity on or in respect of specified land other than pursuant to an approval or registration,

(iii) the holder of a licence, approval or permit issued by the Alberta Energy Regulator or the Alberta Utilities Commission for purposes related to the carrying on of an activity on or in respect of specified land,

(iv) a working interest participant in

(A) a well,

(B) a mine,

(C) a coal processing plant,

(D) an oil sands processing plant, or

(E) a plant or facility that is subject to the Large Facility Liability Management Program administered by the Alberta Energy Regulator

on, in or under specified land,

(v) the holder of a surface lease for purposes related to the carrying on of an activity on or in respect of specified land,

(vi) a successor, assignee, executor, administrator, receiver, receiver-manager or trustee of a person referred to in any of subclauses (i) to (v), and

(vii) a person who acts as principal or agent of a person referred to in any of subclauses (i) to (vi);

(c) **"reclamation certificate"** means a reclamation certificate issued under this Part;

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TAB 3

Alberta Regulations
Environmental Protection and Enhancement Act
Alta. Reg. 115/93 — Conservation and Reclamation Regulation
Division 1 — Conservation and Reclamation

Alta. Reg. 115/93, s. 3.1

s 3.1 Codes of practice

Currency

3.1Codes of practice
3.1(1) The following codes of practice are adopted pursuant to section 38 of the Act and form part of this Regulation:

(a) the *Code of Practice for Exploration Operations*, published by the Department, as amended or replaced from time to time;

(b) the *Code of Practice for Pits*, published by the Department, as amended or replaced from time to time.

3.1(2) A person who, pursuant to a registration or notice, as applicable, carries on an activity referred to in Column A of the Schedule shall comply with the corresponding Code of Practice in Column B of the Schedule in the carrying on of that activity.

3.1(3) Notwithstanding subsection (2), where the Director issues an approval in respect of the activity pursuant to section 6(3) of the *Activities Designation Regulation* (Alta. Reg. 276/2003), the approval holder

(a) is not required to comply with the Code of Practice in the Schedule, and

(b) shall comply with the terms and conditions of the approval.

Amendment History
Alta. Reg. 131/2004, s. 3; 160/2005, s. 2

Currency
Alberta Current to Gazette Vol. 119:6 (March 31, 2023)

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TAB 4

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] 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.)

Counsel: Ken Lenz, Q.C., Patricia Johnston, Q.C., Keely R. Cameron, Brad Gilmour, Michael W. Selnes, for Appellants
Kelly J. Bourassa, Jeffrey Oliver, Tom Cumming, Ryan Zahara, Danielle Maréchal, Brendan MacArthur-Stevens, Chris Nyberg, for Respondents
Josh Hunter, Hayley Pitcher, for Intervener the Attorney General of Ontario
Gareth Morley, Aaron Welch, Barbara Thomson, for Intervener, Attorney General of British Columbia
Richard James Fyfe, for Intervener, Attorney General of Saskatchewan
Robert Normey, Vivienne Ball, for Intervener, Attorney General of Alberta
Adrian Scotchmer, for Intervener, Ecojustice Canada Society
Lewis Manning, Toby Kruger, for Intervener, Canadian Association of Petroleum Producers
Nader R. Hasan, Lindsay Board, for Intervener, Greenpeace Canada
Christine Laing, Shaun Fluker, for Intervener, Action Surface Rights Association
Caireen E. Hanert, Adam Maerov, for Intervener, Canadian Association of Insolvency and Restructuring Professionals
Howard A. Gorman, Q.C., D. Aaron Stephenson, for Intervener, Canadian Bankers' Association

Subject: Civil Practice and Procedure; Environmental; Estates and Trusts; Insolvency; Natural Resources
Related Abridgment Classifications
Bankruptcy and insolvency
X Priorities of claims
  X.7 Unsecured claims
    X.7.b Priority with respect to secured creditors
Bankruptcy and insolvency

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XIV Administration of estate
XIV.2 Trustees
XIV.2.m Miscellaneous
Bankruptcy and insolvency
XIV Administration of estate
XIV.3 Trustee's possession of assets
XIV.3.d Miscellaneous
Natural resources
III Oil and gas
III.3 Constitutional issues
III.3.c Miscellaneous
Natural resources
III Oil and gas
III.8 Statutory regulation
III.8.a General principles

Headnote

Bankruptcy and insolvency --- Priorities of claims — Unsecured claims — Priority with respect to secured creditors

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act and Pipeline Act was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy — "Disclaimer" did not empower trustee to simply walk away from "disclaimed" assets when bankrupt estate had been ordered to remedy any environmental condition or damage — No operational conflict was caused by fact that G Ltd., as licensee, remained responsible for abandoning renounced assets — End-of-life obligations binding on G Ltd. were not claims provable in R Corp. bankruptcy, so they did not conflict with general priority scheme in BIA Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 14.06.

Bankruptcy and insolvency --- Administration of estate — Trustees — Miscellaneous

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act and Pipeline Act was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy — No operational conflict was caused by fact that G Ltd., as licensee, remained responsible for abandoning renounced assets — Bankruptcy is not licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy.

Bankruptcy and insolvency --- Administration of estate — Trustee's possession of assets — Miscellaneous

Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-

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applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act and Pipeline Act was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy — No operational conflict was caused by fact that G Ltd., as licensee, remained responsible for abandoning renounced assets — Bankruptcy is not licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy — End-of-life obligations binding on G Ltd. were not claims provable in R Corp. bankruptcy, so they did not conflict with general priority scheme in BIA.
Natural resources --- Oil and gas — Constitutional issues — Miscellaneous
Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act (OGCA) and Pipeline Act (PA) was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy by inclusion of trustees in definition of "licensee" in OGCA and PA — Under either branch of paramountcy analysis, Alberta legislation authorizing Regulator's use of its disputed powers would be inoperative to extent that use of those powers during bankruptcy altered or reordered priorities established by BIA — In test set out in 2012 Supreme Court case, court clearly stated that not all environmental obligations enforced by regulator would be claims provable in bankruptcy — On proper understanding of "creditor" step, it was clear that Regulator acted in public interest and for public good and that it was not creditor of R Corp.
Natural resources --- Oil and gas — Statutory regulation — General principles
Provincial legislation imposed environmental obligations with respect to abandonment and remediation of "end of life" oil wells — Trustee-in-bankruptcy G Ltd. sought to disclaim R Corp.'s interest in wells where costs of remediation exceeded wells' value (disclaimed wells), but sought to keep and sell valuable wells to maximize recovery of secured creditor — Orphan Wells Association (OWA) and Regulator applied for declaration that G Ltd.'s disclaimer of licensed wells was void and G Ltd. cross-applied for approval of sales process that excluded renounced wells — Chambers judge dismissed main application and granted cross-application — Appeals by OWA and Regulator were dismissed — Section 14.06 of Bankruptcy and Insolvency Act (BIA) did not exempt environmental claims from general bankruptcy regime, other than super priority in s. 14.06(7) — Role of G Ltd. as "licensee" under Oil and Gas Conservation Act (OGCA) and Pipeline Act (PA) was in operational conflict with provisions of BIA — OWA and Regulator appealed — Appeal allowed — There was no conflict between Alberta's regulatory regime and BIA requiring portions of former to be rendered inoperative in context of bankruptcy by inclusion of trustees in definition of "licensee" in OGCA and PA — In test set out in 2012 Supreme Court case, court clearly stated that not all environmental obligations enforced by regulator would be claims provable in bankruptcy — On proper understanding of "creditor" step, it was clear that Regulator acted in public interest and for public good and that it was not creditor of R Corp.
Faillite et insolvabilité --- Priorité des créances — Réclamations non garanties — Priorité par rapport aux créanciers garantis
Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de

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faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act et de la Pipeline Act engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite — « Renonciation » n'habilitait pas le syndic à tout simplement délaisser les biens « faisant l'objet de la renonciation » quand on l'enjoignait à réparer un fait ou dommage lié à l'environnement — Aucun conflit d'application n'était imputable au fait que G Ltd. demeurait, en qualité de titulaire de permis, tenu d'abandonner les biens faisant l'objet de la renonciation — Obligations de fin de vie incombant à G Ltd. n'étaient pas des réclamations prouvables dans la faillite de R Corp. et n'entraient donc pas en conflit avec le régime de priorité général instauré dans la LFI.

Faillite et insolvabilité --- Administration de l'actif — Syndics — Divers

Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act et de la Pipeline Act engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite — « Renonciation » n'habilitait pas le syndic à tout simplement délaisser les biens « faisant l'objet de la renonciation » quand on l'enjoignait à réparer un fait ou dommage lié à l'environnement — Aucun conflit d'application n'était imputable au fait que G Ltd. demeurait, en qualité de titulaire de permis, tenu d'abandonner les biens faisant l'objet de la renonciation — Faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite.

Faillite et insolvabilité --- Administration de l'actif — Possession de l'actif par le syndic — Divers

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Ressources naturelles --- Pétrole et gaz — Questions d'ordre constitutionnel — Divers

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Ressources naturelles --- Pétrole et gaz — Réglementation statutaire — Principes généraux
Législation provinciale imposait des obligations de fin de vie en matière environnementale relativement à l'abandon et la remise en état de puits de pétrole — Syndic de faillite G Ltd. a voulu renoncer aux intérêts de R Corp. dans des puits lorsque les coûts de remise en état outrepassaient la valeur des puits (les puits ayant fait l'objet d'une renonciation), mais a cherché à conserver et à vendre des puits ayant une valeur afin de maximiser le recouvrement d'un créancier garanti — Association de puits orphelins et un organisme de réglementation ont déposé une requête visant à faire déclarer que la renonciation de G Ltd. à l'égard de puits autorisés était nulle et G Ltd. a déposé une demande reconventionnelle en vue de faire approuver le processus de vente qui excluait les puits ayant fait l'objet d'une renonciation — Juge siégeant en son cabinet a rejeté la requête principale et a accueilli la demande reconventionnelle — Appels interjetés par l'association et l'organisme de réglementation ont été rejetés — Article 14.06 de la Loi sur la faillite et l'insolvabilité (LFI) n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7) — Rôle de G Ltd. en tant que « titulaire de permis » en vertu de l'Oil and Gas Conservation Act (OGCA) et de la Pipeline Act (PA) engendrait un conflit d'application avec les dispositions de la LFI — Association et l'organisme de réglementation ont formé un pourvoi — Pourvoi accueilli — Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite par l'ajout des syndics à la définition légale de « titulaire de permis » dans l'OGCA et la PA — Dans une décision de la Cour suprême rendue en 2012 dans laquelle elle a établi le test applicable, la Cour a clairement déclaré que les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite — D'après le sens qu'il convient de donner à l'étape « créancier », il était clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public et qu'il n'était pas un créancier de R Corp.
In order to exploit oil and gas resources in Alberta, a company needs a property interest in the oil or gas, surface rights and a licence issued by the Alberta Energy Regulator. The Regulator administers the licensing scheme and enforces the abandonment and reclamation obligations of the licensees. The Regulator has delegated to the Orphan Wells Association (OWA) the authority to abandon and reclaim "orphans". On application by a creditor, G Ltd. was appointed receiver for R Corp. G Ltd. informed the Regulator that it was taking possession and control only of R Corp.'s 17 most productive wells, three associated facilities and 12 associated pipelines, and that it was not taking possession or control of any of R Corp.'s other licensed assets. The Regulator issued an order under the Oil and Gas Conservation Act (OGCA) and the Pipeline Act (PA) requiring R Corp. to suspend and abandon the renounced assets. The Regulator and the OWA filed an application for a declaration that G Ltd.'s renunciation of the renounced assets was void, an order requiring G Ltd. to comply with the abandonment orders and an order requiring G Ltd. to fulfill the statutory obligations as licensee in relation to the abandonment, reclamation and remediation of

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all of R Corp.'s licensed properties. G Ltd. brought a cross-application seeking approval to pursue a sales process excluding the renounced assets. A bankruptcy order was issued for R Corp. and G Ltd. was appointed as trustee. G Ltd. sent another letter to the Regulator invoking s. 14.06(4)(a)(ii) of the Bankruptcy and Insolvency Act (BIA) in relation to the renounced assets.

The chambers judge found an operational conflict between s. 14.06 of the BIA and the definition of "licensee" in the OGCA and the PA, and approved the proposed sale procedure. Appeals by the Regulator and the OWA were dismissed. The majority of the court stated that the constitutional issues in the appeals were complementary to the primary issue, which was the interpretation of the BIA. Section 14.06 of the BIA did not exempt environmental claims from the general bankruptcy regime, other than the super priority in s. 14.06(7). Section 14.06(4) of the BIA did not limit the power of the trustee to renounce properties to those circumstances where it might be exposed to personal liability. In terms of constitutional analysis, the majority concluded that the role of G Ltd. as a "licensee" under the OGCA and the PA 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. The dissenting judge would have allowed the appeal on the basis that there was no conflict between Alberta's environmental legislation and the BIA. The dissenting judge was of the view that s. 14.06 of the BIA did not operate to relieve G Ltd. of R Corp.'s obligations with respect to its licensed assets and that the Regulator was not asserting any provable claims, so the priority scheme in the BIA was not upended. The Regulator and the OWA appealed.

Held: The appeal was allowed.

Per Wagner C.J.C. (Abella, Karakatsanis, Gascon, Brown JJ. concurring): 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 G Ltd. remained fully protected from personal liability by federal law, it could not walk away from the environmental liabilities of the bankrupt estate by invoking s. 14.06(4) of the BIA. Section 14.06(4) of the BIA was clear and unambiguous when read on its own. There was no basis on which to read the words "the trustee is not personally liable" in s. 14.06(4) of the BIA as encompassing the liability of the bankrupt estate. "Disclaimer" did not empower a trustee to simply walk away from the "disclaimed" assets when the bankrupt estate had been ordered to remedy any environmental condition or damage. The operational conflicts between the BIA and the Alberta legislation alleged by G Ltd. arose from its status as a "licensee" under the OGCA and the PA. In light of the proper interpretation of s. 14.06(4) of the BIA, no operational conflict was caused by the fact that, under Alberta law, G Ltd. as "licensee" remained responsible for abandoning the renounced assets utilizing the remaining assets of the estate. The burden was on G Ltd. to establish the specific purposes of ss. 14.06(2) and 14.06(4) of the BIA if it wished to demonstrate a conflict. Based on the plain wording of the sections and the Hansard evidence, it was evident that the purpose of these provisions was to protect trustees from personal liability in respect of environmental matters affecting the estates they were administering. This purpose was not frustrated by the inclusion of trustees in the definition of "licensee" in the OGCA and the PA.

Under either branch of the paramountcy analysis, the Alberta legislation authorizing the Regulator's use of its disputed powers would be inoperative to the extent that the use of those powers during bankruptcy altered or reordered the priorities established by the BIA. 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 the test set out in a 2012 Supreme Court case, the court clearly stated that not all environmental obligations enforced by a regulator would be claims provable in bankruptcy. On a proper understanding of the "creditor" step, it was clear that the Regulator acted in the public interest and for the public good and that it was not a creditor of R Corp. No fairness concerns were raised by disregarding the Regulator's concession. The end-of-life obligations binding on G Ltd. were not claims provable in the R Corp. bankruptcy, so they did not conflict with the general priority scheme in the BIA. Requiring R Corp. to pay for abandonment before distributing value to creditors did 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. Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy.

Per Côté J. (dissenting) (Moldaver J. concurring): The appeal should be dismissed. Two aspects of Alberta's regulatory regime conflict with the BIA. First, Alberta's statutes regulating the oil and gas industry define the term "licensee" as including receivers and trustees in bankruptcy. The effect of this definition was that insolvency professionals were subject to the same obligations and liabilities as R Corp. itself, including the obligation to comply with the abandonment orders and the risk of personal liability for failing to do so. G Ltd. validly disclaimed the non-producing assets and the result was that it was no longer subject to the environmental liabilities associated with those assets. Because Alberta's statutory regime did not recognize these disclaimers

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as lawful, there was an unavoidable operational conflict between federal and provincial law. Alberta's legislation governing the oil and gas sector should be held inoperable to the extent that it did not recognize the legal effect of G Ltd.'s disclaimers. Section 14.06 of the BIA, when read as a whole, indicated that s. 14.06(4) did more than merely protect trustees from personal liability. Parliament did not make the disclaimer power in s. 14.06(4) of the BIA conditional on the availability of the Crown's super priority. There was an operational conflict to the extent that Alberta's statutory regime held receivers and trustees liable as "licensees" in relation to disclaimed assets.

Second, the Regulator has required that G Ltd. satisfy R Corp.'s environmental liabilities ahead of the estate's other debts, which contravened the BIA's priority scheme. Because the abandonment orders were "claims provable in bankruptcy" under the three-part test outlined in the 2012 Supreme Court of Canada case, the Regulator could not assert those claims outside of the bankruptcy process. To do so would frustrate an essential purpose of the BIA of distributing the estate's value in accordance with the statutory priority scheme. Nor could the Regulator achieve the same result indirectly by imposing conditions on the sale of R Corp.'s valuable assets. The province's licensing scheme effectively operated as a debt collection mechanism in relation to a bankrupt company. It should be held inoperative as applied to R Corp. under the second prong of the paramountcy test, frustration of purpose. G Ltd. and the creditor had satisfied their burden of demonstrating a genuine inconsistency between federal and provincial law under both branches of the paramountcy test. The Court should continue to apply the "creditor" prong of the test as it was clearly articulated in the 2012 Supreme Court of Canada decision. Under that standard, the Regulator plainly acted as a creditor with respect to the R Corp. estate. It was sufficiently certain that either the Regulator or the OWA would ultimately perform the abandonment and reclamation work and assert a monetary claim for reimbursement.

Pour exploiter des ressources pétrolières et gazières en Alberta, une société a besoin d'un intérêt de propriété sur le pétrole ou le gaz, des droits de surface et d'un permis délivré par un organisme de réglementation, l'Alberta Energy Regulator. Cet organisme administre le régime de délivrance de permis et s'assure du respect des engagements d'abandon et de remise en état des titulaires de permis. L'organisme a délégué une association de puits orphelins, l'Orphan Wells Association, le pouvoir d'abandonner et de remettre en état les « orphelins ». À la demande d'un créancier, G Ltd. a été nommé séquestre de R Corp. G Ltd. a informé l'organisme de réglementation qu'il prenait possession et contrôle seulement des 17 puits les plus productifs de R Corp., ainsi que de trois installations et de 12 pipelines connexes, et qu'il ne prenait pas possession ou contrôle de tous les autres éléments d'actif de R Corp. visés par des permis. L'organisme de réglementation a rendu une ordonnance en vertu de l'Oil and Gas Conservation Act (OGCA) et de la Pipeline Act (PA) enjoignant à R Corp. de suspendre l'exploitation des biens faisant l'objet de la renonciation et de les abandonner. L'organisme de réglementation et l'association ont déposé une demande en vue d'obtenir un jugement déclaratoire portant que l'abandon par G Ltd. des biens faisant l'objet de la renonciation était nul, une ordonnance obligeant G Ltd. à se conformer aux ordonnances d'abandon, de même qu'une ordonnance enjoignant à G Ltd. de remplir les obligations légales en tant que titulaire de permis concernant l'abandon, la remise en état et la décontamination de tous les biens de R Corp. visés par des permis. G Ltd. a présenté une demande reconventionnelle visant à obtenir l'autorisation de poursuivre un processus de vente excluant les biens faisant l'objet de la renonciation. Une ordonnance de faillite a été rendue à l'égard de R Corp., et G Ltd. a été nommé syndic. G Ltd. a envoyé une autre lettre à l'organisme de réglementation dans laquelle il invoquait l'art. 14.06(4)a)(ii) de la Loi sur la faillite et l'insolvabilité (LFI) à l'égard des biens faisant l'objet de la renonciation.

Le juge siégeant en son cabinet a conclu à un conflit d'application entre l'art. 14.06 de la LFI et la définition de « titulaire de permis » que l'on trouve dans l'OGCA et la PA et a approuvé la procédure de vente proposée. Les appels interjetés par l'organisme de réglementation et l'association ont été rejetés. Les juges majoritaires de la cour ont déclaré que les questions constitutionnelles soulevées dans les appels étaient complémentaires à la question principale, soit l'interprétation de la LFI. L'article 14.06 de la LFI n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue à l'art. 14.06(7). L'article 14.06(4) de la LFI n'a pas limité le pouvoir du syndic de renoncer aux biens dans des circonstances où il pourrait s'exposer à une responsabilité personnelle. Sur le plan de l'analyse constitutionnelle, les juges majoritaires ont conclu que le rôle de G Ltd. en tant que « titulaire de permis » au sens de l'OGCA et de la PA était en conflit d'application avec les dispositions de la LFI qui dégageaient les syndics de toute responsabilité personnelle, qui leur permettaient de renoncer à des biens et qui établissaient la priorité des réclamations environnementales. La juge dissidente aurait accueilli l'appel au motif qu'il n'y avait aucun conflit entre la législation albertaine sur l'environnement et la LFI. La juge dissidente était d'avis que l'art. 14.06 de la LFI n'a pas eu pour effet de libérer G Ltd. des obligations de R Corp. à l'égard de ses biens visés par des permis et que l'organisme de réglementation ne faisait valoir aucune réclamation prouvable, de sorte que le régime de priorité de la LFI n'était pas renversé. L'organisme de réglementation et l'association ont formé un pourvoi.

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Arrêt: Le pourvoi a été accueilli.

Wagner, J.C.C. (Abella, Karakatsanis, Gascon, Brown, JJ., souscrivant à son opinion) : Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la LFI en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite. Bien que G Ltd. demeurait entièrement dégagé de toute responsabilité personnelle par le droit fédéral, il ne peut se soustraire aux engagements environnementaux qui lient l'actif du failli en invoquant l'art. 14.06(4) de la LFI. À la simple lecture de ses termes, l'art. 14.06(4) était clair et sans équivoque. Il n'y avait aucune raison de considérer que les mots « le syndic est [. . .] dégagé de toute responsabilité personnelle » figurant à l'art. 14.06(4) de la LFI visaient la responsabilité de l'actif du failli. La « renonciation » n'habilitait pas le syndic à tout simplement délaisser les biens « faisant l'objet de la renonciation » quand on l'enjoignait à réparer un fait ou dommage lié à l'environnement. Les conflits d'application entre la LFI et la législation albertaine allégués par G Ltd. résultaient de sa qualité de « titulaire de permis » au sens de l'OGCA et de la PA. Vu l'interprétation qu'il convenait de donner à l'art. 14.06(4) de la LFI, aucun conflit d'application n'était imputable au fait que, suivant le droit albertain, G Ltd. demeurait, en qualité de « titulaire de permis », tenu d'abandonner les biens faisant l'objet de la renonciation et d'utiliser les autres éléments de l'actif. Il incombait à G Ltd. d'établir les objectifs précis des art. 14.06(2) et (4) s'il souhaitait démontrer qu'il y avait conflit. Compte tenu du libellé clair des art. 14.06(2) et (4) et des débats parlementaires, l'objectif de ces dispositions était manifestement de dégager les syndics de toute responsabilité personnelle à l'égard de questions environnementales touchant l'actif qu'ils administrent. Cet objectif n'a pas été entravé par l'ajout des syndics à la définition de « titulaire de permis » dans l'OGCA et la PA.

Dans l'un ou l'autre volet de l'analyse relative à la prépondérance, la loi albertaine autorisant l'organisme de réglementation à exercer ses pouvoirs contestés sera inopérante, dans la mesure où l'exercice de ces pouvoirs pendant la faillite modifie ou réarrange les priorités établies par la LFI. On doit faire valoir uniquement les réclamations prouvables en matière de faillite dans le cadre de la procédure unique. Les réclamations non prouvables ne sont pas suspendues à la faillite et elles lient toujours l'actif. Dans une décision de la Cour suprême rendue en 2012 dans laquelle elle a établi le test applicable, la Cour a clairement déclaré que les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite. D'après le sens qu'il convient de donner à l'étape « créancier », il était clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public et qu'il n'était pas un créancier de R Corp. Aucune préoccupation n'a été soulevée en matière d'équité en ne tenant pas compte de la concession faite par l'organisme de réglementation. Les obligations de fin de vie incombant à G Ltd. n'étaient pas des réclamations prouvables dans la faillite de R Corp. et n'entraient donc pas en conflit avec le régime de priorité général instauré dans la LFI. Obliger R Corp. à payer l'abandon avant de répartir la valeur entre les créanciers ne perturbait pas le régime de priorité établi dans la LFI. Au moment d'élaborer ce régime, le Parlement voulait permettre aux organismes de réglementation d'imposer une charge prioritaire sur le bien réel du failli touché par un fait ou dommage lié à l'environnement en vue de financer la décontamination. La faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite.

Côté, J. (dissidente) (Moldaver, J., souscrivant à son opinion) : Le pourvoi devrait être rejeté. Deux aspects du régime de réglementation albertain entraient en conflit avec la LFI. D'abord, les lois albertaines qui règlementent l'industrie pétrolière et gazière précisent que le terme « titulaire de permis » vise les séquestres et syndics de faillite. Cette définition avait pour effet d'assujettir les professionnels de l'insolvabilité aux mêmes obligations et responsabilités que R Corp. elle-même, notamment l'obligation de se conformer aux ordonnances d'abandon et le risque d'engager sa responsabilité personnelle pour ne pas l'avoir fait. G Ltd. ayant valablement renoncé aux biens inexploités, il n'était donc plus assujetti aux engagements environnementaux liés à ces biens. Étant donné que le régime législatif albertain ne reconnaissait pas la légalité de ces renonciations, il y avait un conflit d'application inévitable entre la loi fédérale et la loi provinciale. La loi albertaine régissant l'industrie pétrolière et gazière devrait donc être déclarée inopérante dans la mesure où elle ne reconnaissait pas l'effet juridique des renonciations de G Ltd. Lu dans son ensemble, l'art. 14.06 indiquait que l'art. 14.06(4) ne se bornait pas à dégager les syndics de toute responsabilité personnelle. Le Parlement n'a pas rendu le pouvoir de renonciation prévu à l'art. 14.06(4) conditionnel à la possibilité pour la Couronne de se prévaloir de sa superpriorité. Il y avait un conflit d'application dans la mesure où le régime législatif albertain tenait les séquestres et les syndics responsables en tant que « titulaires de permis » relativement aux biens faisant l'objet d'une renonciation.

Ensuite, l'organisme de réglementation a exigé que G Ltd. acquitte les engagements environnementaux de R Corp. avant les autres dettes de l'actif, ce qui contrevenait au régime de priorité établi par la LFI. Comme les ordonnances d'abandon sont des « réclamations prouvables en matière de faillite » selon le test à trois volets énoncé par la Cour suprême du Canada dans une

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décision rendue en 2012, l'organisme de réglementation ne pouvait faire valoir ces réclamations en dehors du processus de faillite. Agir ainsi entraverait la réalisation d'un objet essentiel de la LFI : le partage de la valeur de l'actif conformément au régime de priorités établi par la loi. L'organisme de réglementation ne pouvait pas non plus atteindre indirectement le même résultat en imposant des conditions à la vente des biens de valeur de R Corp. Le régime provincial de délivrance de permis servait en fait de mécanisme de recouvrement de créances à l'endroit d'une société en faillite. Il devrait être déclaré inopérant en ce qui concernait R Corp., suivant le second volet du critère de la prépondérance, l'entrave à la réalisation d'un objet fédéral. G Ltd. et le créancier se sont acquittés de leur fardeau de démontrer qu'il existait une incompatibilité véritable entre la loi fédérale et la loi provinciale selon les deux volets du test de la prépondérance. La Cour devrait continuer d'appliquer l'analyse relative au « créancier » telle qu'elle a été clairement formulée dans la décision rendue en 2012 par la Cour suprême du Canada. Suivant ce critère, l'organisme de réglementation a clairement agi comme créancier relativement à l'actif de R Corp. Il était suffisamment certain que l'organisme de réglementation ou l'association effectuerait ultimement les travaux d'abandon et de remise en état et ferait valoir une réclamation pécuniaire afin d'obtenir un remboursement.

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Teva Canada Ltd. v. TD Canada Trust (2017), 2017 SCC 51, 2017 CSC 51, 2017 CarswellOnt 16542, 2017 CarswellOnt 16543, 415 D.L.R. (4th) 1, 42 C.C.L.T. (4th) 213, 72 B.L.R. (5th) 1, [2017] 2 S.C.R. 317 (S.C.C.) — considered in a minority or dissenting opinion

Thomson Knitting Co., Re (1925), 5 C.B.R. 489, 56 O.L.R. 625, [1925] 2 D.L.R. 1007, 1925 CarswellOnt 5 (Ont. C.A.) — refered to in a minority or dissenting opinion

Statutes considered by *Wagner C.J.C.*:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

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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.

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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).

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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.

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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).

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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

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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.

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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

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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.

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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

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"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.

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> 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

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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).

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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

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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.

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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

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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

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TAB 5

2012 SCC 67
Supreme Court of Canada

AbitibiBowater Inc., Re

2012 CarswellQue 12490, 2012 CarswellQue 12491, 2012 SCC 67, [2012] 3 S.C.R. 443, [2012] A.C.S. No. 67, [2012] S.C.J. No. 67, 221 A.C.W.S. (3d) 264, 352 D.L.R. (4th) 399, 438 N.R. 134, 71 C.E.L.R. (3d) 1, 95 C.B.R. (5th) 200, J.E. 2012-2270

Her Majesty the Queen in Right of the Province of Newfoundland and Labrador, Appellant and AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc., Ad Hoc Committee of Bondholders, Ad Hoc Committee of Senior Secured Noteholders and U.S. Bank National Association (Indenture Trustee for the Senior Secured Noteholders), Respondents and Attorney General of Canada, Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Alberta, Her Majesty the Queen in Right of British Columbia, Ernst & Young Inc., as Monitor, and Friends of the Earth Canada, Interveners

McLachlin C.J.C., LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis JJ.

Heard: November 16, 2011
Judgment: December 7, 2012
Docket: 33797

Proceedings: affirmed *AbitibiBowater Inc., Re* (2010), 68 C.B.R. (5th) 57, 52 C.E.L.R. (3d) 1, 2010 CarswellQue 4782, 2010 QCCA 965, Chamberland J.A. (C.A. Que.); refused leave to appealdemande d'autorisation d'en appeler refusée *AbitibiBowater Inc., Re* (2010), 68 C.B.R. (5th) 1, 52 C.E.L.R. (3d) 17, 2010 QCCS 1261, 2010 CarswellQue 2812, Clément Gascon J.C.S (C.S. Que.)

Counsel: David R. Wingfield, Paul D. Guy, Philip Osborne, for Appellant
Sean F. Dunphy, Nicholas McHaffie, Joseph Reynaud, Marc B. Barbeau, for Respondents
Christopher Rupar, Marianne Zoric, for Intervener, Attorney General of Canada
Josh Hunter, Robin K. Basu, Leonard Marsello, Mario Faieta, for Intervener, Attorney General of Ontario
R. Richard M. Butler, for Intervener, Attorney General of British Columbia
Roderick Wiltshire, for Intervener, Attorney General of Alberta
Elizabeth J. Rowbotham, for Intervener, Her Majesty The Queen in Right of British Columbia
Robert I. Thornton, John T. Porter, Rachelle F. Moncur, for Intervener, Ernst & Young Inc., as Monitor
William A. Amos, Anastasia M. Lintner, Hugh S. Wilkins, R. Graham Phoenix, for Intervener, Friends of the Earth Canada

Subject: Insolvency; Environmental
Related Abridgment Classifications
Bankruptcy and insolvency
IX Proving claim
  IX.1 Provable debts
    IX.1.c Contingent claims
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
  XIX.2 Initial application
    XIX.2.e Proceedings subject to stay
      XIX.2.e.iv Crown claims
Environmental law
II Liability for environmental harm

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II.1 Nuisance
II.1.b Liability in particular cases
II.1.b.iv Miscellaneous

Headnote

Bankruptcy and insolvency --- Proving claim — Provable debts — Contingent claims

A Inc. experienced financial difficulties and announced closure of mill in province — One year later, A Inc. sought protection under Companies' Creditors Arrangement Act (CCAA), and claims procedure order was issued — Province's Minister of Environment and Conservation issued five orders requiring A Inc. to perform remedial work — Province then brought motion for declaration that claims procedure order did not bar province from enforcing its orders — Trial judge found that province's orders were monetary in nature and, as such, were subject to claims procedure order — Province brought motion for leave to appeal — Court of Appeal held that trial judge had found as fact that orders were monetary in nature and denied leave to appeal — Province appealed to Supreme Court of Canada — Appeal dismissed — There are three requirements orders must meet in order to be considered claims that may be subject to insolvency process: first, there must be creditor; second, debt, liability or obligation must be incurred before debtor becomes bankrupt; and third, it must be possible to attach monetary value to debt, liability or obligation — Here, province identified itself as creditor by resorting to environmental protection enforcement mechanisms — Further, environmental damage had occurred before time of CCAA proceedings — While province had not yet formally exercised its power to ask for payment of money, it was sufficiently certain that province's orders would eventually result in monetary claim — Therefore, trial judge's finding that province was creditor with monetary claim that should be subject to CCAA process was confirmed.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Crown claims

A Inc. experienced financial difficulties and announced closure of mill in province — One year later, A Inc. sought protection under Companies' Creditors Arrangement Act (CCAA), and claims procedure order was issued — Province's Minister of Environment and Conservation issued five orders requiring A Inc. to perform remedial work — Province then brought motion for declaration that claims procedure order did not bar province from enforcing its orders — Trial judge found that province's orders were monetary in nature and, as such, were subject to claims procedure order — Province brought motion for leave to appeal — Court of Appeal held that trial judge had found as fact that orders were monetary in nature and denied leave to appeal — Province appealed to Supreme Court of Canada — Appeal dismissed — There are three requirements orders must meet in order to be considered claims that may be subject to insolvency process: first, there must be creditor; second, debt, liability or obligation must be incurred before debtor becomes bankrupt; and third, it must be possible to attach monetary value to debt, liability or obligation — Here, province identified itself as creditor by resorting to environmental protection enforcement mechanisms — Further, environmental damage had occurred before time of CCAA proceedings — While province had not yet formally exercised its power to ask for payment of money, it was sufficiently certain that province's orders would eventually result in monetary claim — Therefore, trial judge's finding that province was creditor with monetary claim that should be subject to CCAA process was confirmed.

Environmental law --- Liability for environmental harm — Nuisance — Liability in particular cases — Miscellaneous

A Inc. experienced financial difficulties and announced closure of mill in province — One year later, A Inc. sought protection under Companies' Creditors Arrangement Act (CCAA), and claims procedure order was issued — Province's Minister of Environment and Conservation issued five orders requiring A Inc. to perform remedial work — Province then brought motion for declaration that claims procedure order did not bar province from enforcing its orders — Trial judge found that province's orders were monetary in nature and, as such, were subject to claims procedure order — Province brought motion for leave to appeal — Court of Appeal held that trial judge had found as fact that orders were monetary in nature and denied leave to appeal — Province appealed to Supreme Court of Canada — Appeal dismissed — There are three requirements orders must meet in order to be considered claims that may be subject to insolvency process: first, there must be creditor; second, debt, liability or obligation must be incurred before debtor becomes bankrupt; and third, it must be possible to attach monetary value to debt, liability or obligation — Here, province identified itself as creditor by resorting to environmental protection enforcement mechanisms — Further, environmental damage had occurred before time of CCAA proceedings — While province had not yet formally exercised its power to ask for payment of money, it was sufficiently certain that province's orders would eventually

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result in monetary claim — Therefore, trial judge's finding that province was creditor with monetary claim that should be subject to CCAA process was confirmed.

Faillite et insolvabilité --- Preuve de réclamation — Créances prouvables — Réclamations éventuelles

A Inc. éprouvait des difficultés financières et a annoncé la fermeture d'une scierie dans la province — Un an plus tard, A Inc. s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC), et une ordonnance relative à la procédure de réclamations a été émise — Ministre provincial de l'Environnement et de la Conservation a prononcé cinq ordonnances contraignant A Inc. à exécuter des travaux de décontamination — Province a ensuite déposé une requête visant à obtenir une déclaration que l'ordonnance relative à la procédure de réclamations n'empêchait pas la province d'exécuter ses ordonnances — Juge de première instance a conclu que les ordonnances émises par la province demeuraient de nature véritablement financière et pécuniaire et, ainsi, étaient assujetties à l'ordonnance relative à la procédure de réclamations — Province a déposé une requête en permission d'appeler — Cour d'appel a estimé que le juge de première instance avait conclu, comme question de fait, que les ordonnances étaient de nature pécuniaire et a refusé d'autoriser l'appel — Province a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Pour qu'elles constituent des réclamations pouvant être assujetties au processus applicable en matière d'insolvabilité, les ordonnances doivent satisfaire à trois conditions : premièrement, il doit y avoir un créancier; deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance avant que le débiteur ne fasse faillite; et troisièmement, il doit être possible d'attribuer une valeur pécuniaire à cette dette, cet engagement ou cette obligation — En l'espèce, la province s'est présentée comme créancière en ayant recours aux mécanismes d'application en matière de protection de l'environnement — De plus, les dommages environnementaux étaient survenus avant que les procédures en vertu de la LACC ne soient entamées — Enfin, bien que la province n'avait pas encore formellement exercé son pouvoir de demander paiement d'une somme d'argent, il était suffisamment certain que les ordonnances émises par la province mèneraient éventuellement à la présentation d'une réclamation pécuniaire — Par conséquent, la conclusion du juge de première instance selon laquelle la province était une créancière ayant une réclamation pécuniaire qui devrait être assujettie au processus régi par la LACC a été confirmée.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Demande initiale — Procédures assujetties à la suspension — Créances de l'État

A Inc. éprouvait des difficultés financières et a annoncé la fermeture d'une scierie dans la province — Un an plus tard, A Inc. s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC), et une ordonnance relative à la procédure de réclamations a été émise — Ministre provincial de l'Environnement et de la Conservation a prononcé cinq ordonnances contraignant A Inc. à exécuter des travaux de décontamination — Province a ensuite déposé une requête visant à obtenir une déclaration que l'ordonnance relative à la procédure de réclamations n'empêchait pas la province d'exécuter ses ordonnances — Juge de première instance a conclu que les ordonnances émises par la province demeuraient de nature véritablement financière et pécuniaire et, ainsi, étaient assujetties à l'ordonnance relative à la procédure de réclamations — Province a déposé une requête en permission d'appeler — Cour d'appel a estimé que le juge de première instance avait conclu, comme question de fait, que les ordonnances étaient de nature pécuniaire et a refusé d'autoriser l'appel — Province a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Pour qu'elles constituent des réclamations pouvant être assujetties au processus applicable en matière d'insolvabilité, les ordonnances doivent satisfaire à trois conditions : premièrement, il doit y avoir un créancier; deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance avant que le débiteur ne fasse faillite; et troisièmement, il doit être possible d'attribuer une valeur pécuniaire à cette dette, cet engagement ou cette obligation — En l'espèce, la province s'est présentée comme créancière en ayant recours aux mécanismes d'application en matière de protection de l'environnement — De plus, les dommages environnementaux étaient survenus avant que les procédures en vertu de la LACC ne soient entamées — Enfin, bien que la province n'avait pas encore formellement exercé son pouvoir de demander paiement d'une somme d'argent, il était suffisamment certain que les ordonnances émises par la province mèneraient éventuellement à la présentation d'une réclamation pécuniaire — Par conséquent, la conclusion du juge de première instance selon laquelle la province était une créancière ayant une réclamation pécuniaire qui devrait être assujettie au processus régi par la LACC a été confirmée.

Droit de l'environnement --- Responsabilité pour dommages causés à l'environnement — Nuisance — Catégories particulières de responsabilité — Divers

A Inc. éprouvait des difficultés financières et a annoncé la fermeture d'une scierie dans la province — Un an plus tard, A Inc. s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC), et une ordonnance

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relative à la procédure de réclamations a été émise — Ministre provincial de l'Environnement et de la Conservation a prononcé cinq ordonnances contraignant A Inc. à exécuter des travaux de décontamination — Province a ensuite déposé une requête visant à obtenir une déclaration que l'ordonnance relative à la procédure de réclamations n'empêchait pas la province d'exécuter ses ordonnances — Juge de première instance a conclu que les ordonnances émises par la province demeuraient de nature véritablement financière et pécuniaire et, ainsi, étaient assujetties à l'ordonnance relative à la procédure de réclamations — Province a déposé une requête en permission d'appeler — Cour d'appel a estimé que le juge de première instance avait conclu, comme question de fait, que les ordonnances étaient de nature pécuniaire et a refusé d'autoriser l'appel — Province a formé un pourvoi devant la Cour suprême du Canada — Pourvoi rejeté — Pour qu'elles constituent des réclamations pouvant être assujetties au processus applicable en matière d'insolvabilité, les ordonnances doivent satisfaire à trois conditions : premièrement, il doit y avoir un créancier; deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance avant que le débiteur ne fasse faillite; et troisièmement, il doit être possible d'attribuer une valeur pécuniaire à cette dette, cet engagement ou cette obligation — En l'espèce, la province s'est présentée comme créancière en ayant recours aux mécanismes d'application en matière de protection de l'environnement — De plus, les dommages environnementaux étaient survenus avant que les procédures en vertu de la LACC ne soient entamées — Enfin, bien que la province n'avait pas encore formellement exercé son pouvoir de demander paiement d'une somme d'argent, il était suffisamment certain que les ordonnances émises par la province mèneraient éventuellement à la présentation d'une réclamation pécuniaire — Par conséquent, la conclusion du juge de première instance selon laquelle la province était une créancière ayant une réclamation pécuniaire qui devrait être assujettie au processus régi par la LACC a été confirmée.

In 2008, A Inc. experienced financial difficulties and announced the closure of a mill in the province. One year later, A Inc. sought protection under the Companies' Creditors Arrangement Act (CCAA), and a claims procedure order was issued. Province's Minister of Environment and Conservation issued five orders under s. 99 of the Environmental Protection Act (the "EPA orders") requiring A Inc. to submit remediation action plans to the Minister and to complete them. The province then brought a motion for a declaration that the claims procedure order did not bar the province from enforcing the EPA orders.

The trial judge dismissed the province's motion. The trial judge found that the EPA orders remained truly financial and monetary in nature and, as such, were subject to the claims procedure order. The province brought a motion for leave to appeal.

The Court of Appeal held that the appeal had no reasonable chance of success because the trial judge had found as a fact that the orders were financial or monetary in nature, and it denied leave to appeal. The province appealed to the Supreme Court of Canada.

Held: The appeal was dismissed.

Per Deschamps J. (Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis JJ. concurring): The CCAA provides a single proceeding model, which ensures that most claims against a debtor are entertained in a single forum. In light of wording of the CCAA, the legislative history and the purpose of the reorganization process, to exempt environmental orders would be inconsistent with the insolvency legislation. However, courts will not necessarily conclude that all orders will be subject to the CCAA process. Courts must determine whether the facts indicate that the conditions for inclusion in the claims process are met. There are three requirements orders must meet in order to be considered claims that may be subject to the insolvency process. First, there must be a creditor. Here, the province identified itself as a creditor by resorting to environmental protection enforcement mechanisms. Second, the debt, liability or obligation must be incurred before the debtor becomes bankrupt. Here, the environmental damage occurred before the time of the CCAA proceedings. Third, it must be possible to attach a monetary value to the debt, liability or obligation. Here, the province had not yet formally exercised its power to ask for the payment of money. Thus, the question was whether it was sufficiently certain that the EPA orders would eventually result in a monetary claim. The trial judge relied on a unique and inescapable set of facts — including the fact that the province actually intended to perform the remediation work itself and assert a claim against A Inc. — to conclude that it was. The majority held that the trial judge reviewed all the legal principles and facts that needed to be considered in order to make the determination in the case at bar. Therefore, the majority confirmed the trial judge's finding that the province was a creditor with a monetary claim that should be subject to the CCAA process.

The majority noted that subjecting an order to the claims process merely ensures that the creditor's claim will be paid in accordance with insolvency legislation. It does not extinguish the debtor's obligation to pay its debts, it does not exempt the debtor from complying with environmental regulations and it does not invite corporations to restructure in order to rid themselves of their environmental liabilities.

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Per McLachlin C.J.C. (dissenting): The CCAA draws a fundamental distinction between ongoing regulatory obligations owed to the public, which generally survive the restructuring, and monetary claims that can be compromised. Remediation orders made under a province's environmental protection legislation impose ongoing regulatory obligations on the corporation required to clean up the pollution. In narrow circumstances, where a province has done the work or where it is "sufficiently certain" that it will do the work, the regulatory obligation would be extinguished and the province would have a monetary claim for the cost of remediation in the CCAA proceedings. Here, the Minister had neither done the clean-up work nor was it sufficiently certain that he or she would do so. Therefore, the EPA orders were not monetary claims compromisable under the CCAA.

Per LeBel J. (dissenting): The only regulatory orders that can be subject to compromise are those which are monetary in nature. The trial judge's decision was not consistent with the principle that the CCAA does not apply to purely regulatory obligations. Based on the evidence before him, the trial judge could not conclude with "sufficient certainty" that the province would perform the remedial work itself. In fact, it appeared that the trial judge was more concerned with the fact that the arrangement would fail if A Inc. was not released from its regulatory obligations. Therefore, the EPA orders were not monetary claims compromisable under the CCAA.

En 2008, A Inc. éprouvait des difficultés financières et a annoncé la fermeture d'une scierie dans la province. Un an plus tard, A Inc. s'est placée sous la protection de la Loi sur les arrangements avec les créanciers des compagnies (LACC), et une ordonnance relative à la procédure de réclamations a été émise. Le ministre provincial de l'Environnement et de la Conservation a prononcé, en vertu de l'art. 99 de l'Environmental Protection Act, cinq ordonnances (les « ordonnances EPA ») contraignant A Inc. à présenter au ministre des plans de restauration et à les réaliser. La province a ensuite déposé une requête visant à obtenir une déclaration que l'ordonnance relative à la procédure de réclamations n'empêchait pas la province d'exécuter les ordonnances EPA.

Le juge de première instance a rejeté la requête de la province. Le juge de première instance a conclu que les ordonnances EPA demeuraient de nature véritablement financière et pécuniaire et, ainsi, étaient assujetties à l'ordonnance relative à la procédure de réclamations. La province a déposé une requête en permission d'appeler.

La Cour d'appel a estimé que l'appel n'avait aucune chance raisonnable de succès parce que le juge de première instance avait conclu, comme question de fait, que les ordonnances EPA étaient de nature financière ou pécuniaire, et elle a refusé d'autoriser l'appel. La province a formé un pourvoi devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été rejeté.

Deschamps, J. (Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, JJ., souscrivant à son opinion) : La LACC prévoit une procédure unique permettant de traiter la presque totalité des réclamations contre un débiteur devant un même tribunal. Considérant le libellé de la LACC, de l'historique des dispositions législatives et des objectifs du processus de réorganisation, une exemption à l'égard des ordonnances environnementales serait incompatible avec la législation en matière d'insolvabilité. Toutefois, les tribunaux ne vont pas nécessairement conclure que toutes les ordonnances seront assujetties au processus régi par la LACC. Les tribunaux doivent déterminer si le contexte factuel indique que les conditions requises pour que l'ordonnance soit incluse dans le processus de réclamations sont respectées. Pour qu'elles constituent des réclamations pouvant être assujetties au processus applicable en matière d'insolvabilité, les ordonnances doivent satisfaire à trois conditions. Premièrement, il doit y avoir un créancier. En l'espèce, la province s'est présentée comme créancière en ayant recours aux mécanismes d'application en matière de protection de l'environnement. Deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance avant que le débiteur ne fasse faillite. En l'espèce, les dommages environnementaux sont survenus avant que les procédures en vertu de la LACC ne soient entamées. Troisièmement, il doit être possible d'attribuer une valeur pécuniaire à cette dette, cet engagement ou cette obligation. En l'espèce, la province n'avait pas encore formellement exercé son pouvoir de demander paiement d'une somme d'argent. Ainsi, la question était de savoir s'il était suffisamment certain que les ordonnances EPA mèneraient éventuellement à la présentation d'une réclamation pécuniaire. En se fondant sur un contexte factuel unique et dont il ne pouvait pas faire abstraction, y compris le fait que la province avait de fait l'intention d'exécuter les travaux de décontamination elle-même pour ensuite présenter une réclamation contre A Inc., le juge de première instance a conclu que c'était le cas. Les juges majoritaires ont estimé que le juge de première instance a examiné tous les principes juridiques et les faits qu'il était tenu de prendre en compte pour statuer sur la question qui se posait en l'espèce. Par conséquent, les juges majoritaires ont confirmé la conclusion du juge de première instance selon laquelle la province était une créancière ayant une réclamation pécuniaire qui devrait être assujettie au processus régi par la LACC.

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Les juges majoritaires ont fait remarquer que le fait d'assujettir une ordonnance au processus de réclamation vise simplement à faire en sorte que le paiement au créancier sera fait conformément aux dispositions législatives applicables en matière d'insolvabilité. Cela n'éteint pas l'obligation du débiteur de payer ses dettes, ni le dégage de son obligation de respecter la réglementation environnementale, ni n'incite les sociétés à se réorganiser dans le but d'échapper à leurs obligations environnementales.

McLachlin, J.C.C. (dissidente) : La LACC établit une distinction fondamentale entre les exigences réglementaires continues établies en faveur du public, lesquelles continuent de s'appliquer après la restructuration, et les réclamations pécuniaires qui peuvent faire l'objet d'une transaction. Les ordonnances exigeant la décontamination émises aux termes d'une loi provinciale sur la protection de l'environnement imposent des exigences réglementaires continues à la personne morale requise de remédier à la pollution. En certaines circonstances particulières, lorsqu'une province a exécuté les travaux ou lorsqu'il est « suffisamment certain » qu'elle exécutera les travaux, l'exigence réglementaire serait éteinte et la province pourrait produire, dans le cadre de procédures engagées sous le régime de la LACC, une réclamation pécuniaire couvrant le coût des travaux de décontamination. En l'espèce, le ministre n'a pas effectué les travaux de décontamination et il n'était pas suffisamment certain qu'il le ferait. Par conséquent, les ordonnances EPA ne constituaient pas des réclamations pécuniaires pouvant faire l'objet d'une transaction aux termes de la LACC.

LeBel, J. (dissident) : Les seules ordonnances réglementaires pouvant faire l'objet d'une transaction sont celles qui sont de nature pécuniaire. La décision du juge de première instance n'était pas conforme avec le principe selon lequel la LACC ne s'applique pas aux exigences purement réglementaires. En se fondant sur la preuve dont il disposait, le juge de première instance ne pouvait pas conclure avec « suffisamment de certitude » que la province exécuterait les travaux de décontamination elle-même. En fait, il semblait que le juge de première instance était davantage préoccupé par le fait que l'arrangement risquait d'échouer si A Inc. n'était pas libérée de ses exigences réglementaires. Par conséquent, les ordonnances EPA ne constituaient pas des réclamations pécuniaires pouvant faire l'objet d'une transaction aux termes de la LACC.

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APPEAL by province from decision reported at *AbitibiBowater Inc., Re* (2010), 68 C.B.R. (5th) 57, 52 C.E.L.R. (3d) 1, 2010 CarswellQue 4782, 2010 QCCA 965 (C.A. Que.), denying leave to appeal decision dismissing its motion for declaration that claims procedure order issued under *Environmental Protection Act* (Nfld.) did not bar province from enforcing orders requiring debtor to perform remedial work.

POURVOI formé par la province à l'encontre d'une décision publiée à *AbitibiBowater Inc., Re* (2010), 68 C.B.R. (5th) 57, 52 C.E.L.R. (3d) 1, 2010 CarswellQue 4782, 2010 QCCA 965 (C.A. Que.), ayant refusé d'accorder la permission d'interjeter appel à l'encontre d'une décision ayant rejeté sa requête visant à faire déclarer que l'ordonnance relative à la procédure de réclamations émise en vertu de l'*Environmental Protection Act* n'empêchait pas la province d'exécuter les ordonnances enjoignant la débitrice d'exécuter des travaux de décontamination.

***Deschamps J.*:**

1 The question in this appeal is whether orders issued by a regulatory body with respect to environmental remediation work can be treated as monetary claims under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*").

2 Regulatory bodies may become involved in reorganization proceedings when they order the debtor to comply with statutory rules. As a matter of principle, reorganization does not amount to a licence to disregard rules. Yet there are circumstances in which valid and enforceable orders will be subject to an arrangement under the *CCAA*. One such circumstance is where a regulatory body makes an environmental order that explicitly asserts a monetary claim.

3 In other circumstances, it is less clear whether an order can be treated as a monetary claim. The appellant and a number of interveners posit that an order issued by an environmental body is not a claim under the *CCAA* if the order does not require the debtor to make a payment. I agree that not all orders issued by regulatory bodies are monetary in nature and thus provable claims in an insolvency proceeding, but some may be, even if the amounts involved are not quantified at the outset of the proceeding. In the environmental context, the *CCAA* court must determine whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to the regulatory body that issued the order. In such a case, the relevant question is not simply whether the body has formally exercised its power to claim a debt. A *CCAA* court does not assess claims — or orders — on the basis of form alone. If the order is not framed in monetary terms, the court must determine, in light of the factual matrix and the applicable statutory framework, whether it is a claim that will be subject to the claims process.

4 The case at bar concerns contamination that occurred, prior to the *CCAA* proceedings, on property that is largely no longer under the debtor's possession and control. The *CCAA* court found on the facts of this case that the orders issued by Her Majesty the Queen in right of the Province of Newfoundland and Labrador ("Province") were simply a first step towards remediating the contaminated property and asserting a claim for the resulting costs. In the words of the *CCAA* court, "the intended, practical and realistic effect of the *EPA* Orders was to establish a basis for the Province to recover amounts of money to be eventually used for the remediation of the properties in question" (2010 QCCS 1261, 68 C.B.R. (5th) 1 (C.S. Que.), at para. 211). As a result, the *CCAA* court found that the orders were clearly monetary in nature. I see no error of law and no reason to interfere with this finding of fact. I would dismiss the appeal with costs.

I. Facts and Procedural History

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25 *Sections* 121(2) and 135(1.1) of the *BIA* offer additional guidance for the determination of whether an order is 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.

26 These provisions highlight three requirements that are relevant to the case at bar. 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. I will examine each of these requirements in turn.

27 The *BIA*'s definition of a provable claim, which is incorporated by reference into the *CCAA*, requires the identification of a creditor. Environmental statutes generally provide for the creation of regulatory bodies that are empowered to enforce the obligations the statutes impose. Most environmental regulatory bodies can be creditors in respect of monetary or non-monetary obligations imposed by the relevant statutes. At this first stage of determining whether the regulatory body is a creditor, the question whether the obligation can be translated into monetary terms is not yet relevant. This issue will be broached later. The only determination that has to be made at this point is whether the regulatory body has exercised its enforcement power against a debtor. When it does so, it identifies itself as a creditor, and the requirement of this stage of the analysis is satisfied.

28 The enquiry into the second requirement is based on s. 121(1) of the *BIA*, which imposes a time limit on claims. A claim must be founded on an obligation that was "incurred before the day on which the bankrupt becomes bankrupt". Because the date when environmental damage occurs is often difficult to ascertain, s. 11.8(9) of the *CCAA* provides more temporal flexibility for environmental claims:

> **11.8**. . . .
>
> (9) A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

29 The creditor's claim will be exempt from the single proceeding requirement if the debtor's corresponding obligation has not arisen as of the time limit for inclusion in the insolvency process. This could apply, for example, to a debtor's statutory obligations relating to polluting activities that continue after the reorganization, because in such cases, the damage continues to be sustained after the reorganization has been completed.

30 With respect to the third requirement, that it be possible to attach a monetary value to the obligation, the question is whether orders that are not expressed in monetary terms can be translated into such terms. I note that when a regulatory body claims an amount that is owed at the relevant date, that is, when it frames its order in monetary terms, the court does not need to make this determination, because what is being claimed is an "indebtedness" and therefore clearly falls within the meaning of "claim" as defined in s. 12(1) of the *CCAA*.

31 However, orders, which are used to address various types of environmental challenges, may come in many forms, including stop, control, preventative, and clean-up orders (D. Saxe, "Trustees' and Receivers' Environmental Liability Update", 49 C.B.R. (3d) 138, at p. 141). When considering an order that is not framed in monetary terms, courts must look at its substance and apply the rules for the assessment of claims.

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TAB 6

1991 ABCA 181
Alberta Court of Appeal

Panamericana de Bienesy Servicios SA v. Northern Badger Oil & Gas Ltd.

1991 CarswellAlta 315, 1991 ABCA 181, [1991] 5 W.W.R. 577, [1991] A.W.L.D. 525, [1991] A.J. No. 575, 117 A.R. 44, 27 A.C.W.S. (3d) 563, 2 W.A.C. 44, 7 C.E.L.R. (N.S.) 66, 81 D.L.R. (4th) 280, 81 Alta. L.R. (2d) 45, 8 C.B.R. (3d) 31

PANAMERICANA DE BIENES Y SERVICIOS, S.A. v. NORTHERN BADGER OIL & GAS LIMITED; ENERGY RESOURCES CONSERVATION BOARD v. VENNARD JOHANNESEN INSOLVENCY INC. (Receiver and Manager of NORTHERN BADGER OIL AND GAS LIMITED); ATTORNEY GENERAL OF ALBERTA (Intervenor)

Laycraft C.J.A., Foisy and Irving JJ.A.

Judgment: June 12, 1991 *

Judgment: December 20, 1991 **
Docket: Docs. Calgary Appeal 11698, Calgary Appeal 11713

Counsel: *Stanley H. Rutwind*, for appellant (intervenor) Attorney General of Alberta.
W.J. Major, Q.C., and *M.J. Major*, for appellant Energy Resources Conservation Board.
R.C. Wigham, for respondent Panamericana de Bienes y Servicios, S.A.
T.L. Czechowskyj, for respondent Vennard Johannesen Insolvency Inc.
J.D. McDonald, for Collins Barrow Limited, trustee in bankruptcy.

Subject: Corporate and Commercial; Insolvency; Environmental; Estates and Trusts; Constitutional; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency
I Bankruptcy and insolvency jurisdiction
I.1 Constitutional jurisdiction of Federal government and provinces
I.1.b Provincial jurisdiction
I.1.b.i General principles
Bankruptcy and insolvency
X Priorities of claims
X.1 Secured claims
X.1.d Dealings with security after bankruptcy
X.1.d.i By secured creditor
X.1.d.i.A Realization of security
Bankruptcy and insolvency
XIV Administration of estate
XIV.2 Trustees
XIV.2.l Discharge of trustee
Bankruptcy and insolvency
XIV Administration of estate
XIV.2 Trustees
XIV.2.m Miscellaneous
Bankruptcy and insolvency
XIV Administration of estate

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XIV.13 Miscellaneous
Civil practice and procedure
XXIV Costs
XXIV.6 Effect of success of proceedings
XXIV.6.a General principles
Constitutional law
VII Distribution of legislative powers
VII.4 Areas of legislation
VII.4.a Commercial regulation
VII.4.a.ii Licensing
VII.4.a.ii.C Oil and gas

Headnote

Bankruptcy --- Bankruptcy and insolvency jurisdiction — Constitutional jurisdiction of Dominion and provinces — Provincial jurisdiction — General

Bankruptcy --- Priorities of claims — Secured claims — Dealings with security after bankruptcy — By secured creditor — Realization of security

Bankruptcy --- Administration of estate — Trustees

Bankruptcy --- Administration of estate

Constitutional Law --- Distribution of legislative powers — Areas of legislation — Commercial regulation — Licensing — Oil and gas

Practice --- Costs — Effect of success of proceedings — General

Receivers — Court-appointed receiver-manager producing oil and gas from wells of bankrupt oil company — Only licensee of well legally permitted to produce oil and gas — Bankruptcy of oil company not permitting receiver-manager to ignore order of Energy Resources Conservation Board to abandon wells.

Constitutional law — Constitution Act, 1867 — Distribution of legislative powers — Bankruptcy Act not overriding provincial legislation permitting Energy Resources Conservation Board to order abandonment of oil and gas wells — Doctrine of paramountcy not applying — Constitutional Act, 1867 (U.K.), 30 & 31 Vict., c. 3 — Bankruptcy Act, R.S.C. 1985, c. B-1.

Practice and procedure — Costs — Receiver of oil company denying obligation to comply with order of Energy Resources Conservation Board requiring proper abandonment of wells — Trustee in bankruptcy brought into litigation by court order — Trustee supporting receiver's position — Board losing at first instance and successful on appeal — Board entitled to one set of costs from oil company and receiver only — Trustee's argument not adding significantly to burden of litigation — Trustee choosing to take sides not entitled to costs of unsuccessful argument.

An oil company, which was licensed to operate oil and gas wells in Alberta, granted floating charge debenture security over certain assets, including the wells, to the creditor. When the company defaulted under the debenture, the creditor applied for and obtained a court order appointing a receiver-manager. A receiving order was subsequently made, placing the company in bankruptcy.

The Energy Resources Conservation Board wrote to the company prior to the receiving order, demanding an undertaking that the wells would continue to be operated in accordance with the regulations and the conditions of the well licences, and in particular that the wells could be abandoned when production was complete. The board asked the receiver-manager to confirm that no permits, licences or approvals would remain before they applied to be discharged as receiver-manager, or at least that the board would be notified of any application for discharge.

The receiver-manager agreed to sell the company's remaining assets to S, which would become the licensee of the remaining wells. The agreement allowed S to back out of the sale of any assets that were worth less than the cost of their abandonment. The receiver-manager informed the board that all of the company's assets had been sold, but S had already invoked the back-out clause and passed seven wells back to the receiver-manager.

When the receiver-manager applied for an order approving its administration of the company's affairs and for a discharge from its responsibilities, the board discovered that the seven wells were still licensed to the company; only then was it made aware of the back-out clause and its results. The board ordered the abandonment of the seven remaining wells, having obtained an order in council authorizing it to do so. When the receiver-manager failed to comply, the board applied for an order requiring the

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receiver-manager to obey the board's order and abandon the wells. The application was dismissed. The board and the intervenor Attorney General appealed.

Held:

The appeal was allowed.

The board did not have a claim against the company that was provable in bankruptcy so as to rank as an ordinary creditor and behind the creditor claiming under the debenture. The company had an inchoate liability for the ultimate abandonment of the wells, which liability passed to the receiver-manager. The receiver-manager could not function as a licensee without assuming a licensee's obligations, including the obligation to abandon the wells properly.

Although the expense of abandoning the wells meant less money for distribution in the bankruptcy, the Alberta statutory requirements concerning abandonment did not directly conflict with the scheme of distribution under the *Bankruptcy Act*; the doctrine of paramountcy did not apply and the receiver-manager was required to comply with the provincial requirements.

As the board was successful, it was entitled to its costs, to be payable by the oil company and receiver-manager. The trustee's argument had not added significantly to the burden of the board's litigation costs. However, having chosen to support an unsuccessful argument, the trustee was not entitled to costs.

Table of Authorities

Cases considered:

Alberta Treasury Branches v. Invictus Financial Corp. (1986), 61 C.B.R. (N.S.) 238, 42 Alta. L.R. (2d) 181, 68 A.R. 207 (Q.B.) [affirmed (1986), 61 C.B.R. (N.S.) 254, 47 Alta. L.R. (2d) 94 (C.A.)] — *considered*

Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, [1990] 2 W.W.R. 193, 46 B.L.R. 161, P.P.S.A.C. 177, 65 D.L.R. (4th) 361, 82 Sask. R. 120, 104 N.R. 110 — *applied*

British Columbia v. Henfrey Samson Belair Ltd., [1989] 2 S.C.R. 24, 75 C.B.R. (N.S.) 1, [1989] 5 W.W.R. 577, 83 B.C.L.R. (2d) 145, 34 E.T.R. 1, 59 D.L.R. (4th) 726, 2 T.C.T. 4263, [1989] 1 T.S.T. 2164, 97 N.R. 61 — *distinguished*

Canada Trust Co. v. Bulora Corp. (1980), 34 C.B.R. (N.S.) 145 (Ont. S.C.), affirmed (1981), 39 C.B.R. (N.S.) 152 (Ont. C.A.) — *applied*

Canadian Commercial Bank v. Simmons Drilling Ltd. (1989), 76 C.B.R. (N.S.) 241, 35 C.L.R. 126, 62 D.L.R. (4th) 243, 78 Sask. R. 87 (C.A.) — *considered*

Canadian Pacific Railway v. Notre Dame de Bonsecours (Parish), [1989] A.C. 367 (P.C.) — *considered*

Deloitte, Haskins & Sells Ltd. v. Workers' Compensation Board, [1985] 1 S.C.R. 785, 55 C.B.R. (N.S.) 241, 38 Alta. L.R. (2d) 169, [1985] 4 W.W.R. 481, 19 D.L.R. (4th) 577, 63 A.R. 321, 60 N.R. 81 — *distinguished*

Federal Business Development Bank v. Quebec (Comm. de la santé et de la sécurité du travail), [1988] 1 S.C.R. 1061, 68 C.B.R. (N.S.) 209, 50 D.L.R. (4th) 577, 14 Q.A.C. 140, 84 N.R. 308 — *considered*

Fotti v. 777 Management Inc., [1981] 5 W.W.R. 48, 2 P.P.S.A.C. 32, 9 Man. R. (2d) 142 (Q.B.) — *considered*

Midlantic National Bank v. New Jersey Department of Environmental Protection; Quanta Resources Corp. v. New York (City), 474 U.S. 494, 88 L. Ed. 2d 859, 106 S. Ct. 755 (1986) [rehearing denied (sub nom. *O'Neil v. New York (City); O'Neill v. New Jersey Department of Environmental Protection*) 475 U.S. 1091, 89 L. Ed. 736, 106 S. Ct. 1482 (1986)] — *considered*

Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, 18 B.L.R. 138, 138 D.L.R. (3d) 1, 44 N.R. 181 — *referred to*

Ohio v. Kovacs, 469 U.S. 274, 83 L. Ed. 2d 649, 105 S. Ct. 705 (1985) — *considered*

Parsons v. Sovereign Bank of Canada, [1913] A.C. 160, 9 D.L.R. 476 (P.C.) — *referred to*

Penn Terra Ltd. v. Department of Environmental Resources, 733 F. 2d 267 (C.A. 3rd Circ., 1984) — *considered*

Plisson v. Duncan (1905), 36 S.C.R. 647 — *referred to*

Quebec (Deputy Minister of Revenue) v. Rainville, [1980] 1 S.C.R. 35, (sub nom. *Re Bourgault; Deputy Minister of Revenue Quebec v. Rainville)* 33 C.B.R. (N.S.) 301, 105 D.L.R. (3d) 270, (sub nom. *Bourgaul's Estate v. Deputy Minister of Revenue of Quebec)* 30 N.R. 24 — *distinguished*

Royal Bank v. Nova Scotia (Workmen's Compensation Board), [1936] S.C.R. 560, [1936] 4 D.L.R. 9 — *considered*

United States v. Whizco Inc., 841 F. 2d 147 (C.A. 6th Circ., 1988) — *considered*

Statutes considered:

Bank Act, R.S.C. 1927, c. 12.

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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 an 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 s. 2 of the *Bankruptcy Act* and to the elements of a "provable claim" set forth in s. 121.

31 Mr. Justice MacPherson agreed with these contentions, saying that the words in ss. 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 s. 92(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: *Quebec (Deputy Minister of Revenue) v. Rainville*, supra; *Deloitte, Haskins & Sells Ltd. v. Workers' Compensation Board*, [1985] 1 S.C.R. 785, 55 C.B.R. (N.S.) 241, 38 Alta. L.R. (2d) 169, [1985] 4 W.W.R. 481, 19 D.L.R. (4th) 577, 63 A.R.

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TAB 7

2013 ONCA 599
Ontario Court of Appeal

Nortel Networks Corp., Re

2013 CarswellOnt 13651, 2013 ONCA 599, [2013] O.J. No. 4458, 235 A.C.W.S. (3d) 391, 311 O.A.C. 101, 368 D.L.R. (4th) 122, 6 C.B.R. (6th) 159, 78 C.E.L.R. (3d) 43

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

In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

S.T. Goudge, J.C. MacPherson, R.G. Juriansz JJ.A.

Heard: June 19, 2013
Judgment: October 3, 2013
Docket: CA C55682

Proceedings: reversing *Nortel Networks Corp., Re* (2012), 66 C.E.L.R. (3d) 310, 2012 ONSC 1213, 2012 CarswellOnt 3153, 88 C.B.R. (5th) 111 (Ont. S.C.J. [Commercial List])

Counsel: Leonard F. Marsello, William R. MacLarkey, for Appellant, Her Majesty the Queen in right of Ontario as represented by the Ministry of the Environment
David W. DeMille, for City of Belleville and the Algonquin and Lakeshore Catholic District School Board
Alan B. Merskey, and Vasuda Sinha, for Respondents, Nortel Networks Corp., Nortel Networks Ltd., Nortel Networks Global Corp., Nortel Networks International Corp. and Nortel Networks Technology Corp.
Joseph Pasquariello, for Monitor, Ernst & Young Inc.
Adam Hirsh, for Former Directors and Officers of Nortel Networks Corp. and Nortel Networks Ltd.
Jane Dietrich, for Unsecured Creditors' Committee of Nortel Networks Inc.
Adam Slavens, for Nortel Networks Inc.
Gavin H. Finlayson, for Informal Committee of Noteholders

Subject: Insolvency; Environmental
Related Abridgment Classifications
Bankruptcy and insolvency
IX Proving claim
  IX.1 Provable debts
    IX.1.m Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
  XIX.2 Initial application
    XIX.2.e Proceedings subject to stay
      XIX.2.e.vi Miscellaneous
Environmental law
I Constitutional issues
  I.2 Jurisdiction to enact environmental legislation
    I.2.d Conflicting legislation

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Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Miscellaneous

Respondents engaged in liquidating insolvency and had no operations — Sites where respondents once conducted manufacturing operations were largely disposed of and remediation was conducted on sites — Respondents filed for protection under Companies' Creditors Arrangement Act (CCAA) — After CCAA filing, Minister of Environment (MOE) issued orders pursuant to Environmental Protection Act requiring respondents to remediate environmental contamination remaining on properties they currently or once owned — On respondents' motion, CCAA judge declared that remediation orders were subject to stay granted by initial order and had to be addressed as claims in CCAA process — MOE appealed — Appeal allowed — Ongoing environmental remediation obligations may be reduced to monetary claims that can be compromised in CCAA proceedings only where province has performed remediation work and advances claim for reimbursement, or where obligation may be considered future or contingent claim because it is sufficiently certain that province will do work and then seek reimbursement — CCAA judge did not explicitly or implicitly consider question of whether it was sufficiently certain that MOE would perform remediation work — It was not sufficiently certain that MOE would perform remediation ordered with respect to three of properties — However, with respect to LD site, there was no one to carry out respondents' responsibilities under MOE order and it was sufficiently certain that MOE would ultimately undertake respondents' obligations under order — CCAA judge's declaration that MOE orders were stayed by initial order was to be modified so that it applied only to LD site.

Bankruptcy and insolvency --- Proving claim — Provable debts — Miscellaneous

Respondents engaged in liquidating insolvency and had no operations — Sites where respondents once conducted manufacturing operations were largely disposed of and remediation was conducted on sites — Respondents filed for protection under Companies' Creditors Arrangement Act (CCAA) — After CCAA filing, Minister of Environment (MOE) issued orders pursuant to Environmental Protection Act requiring respondents to remediate environmental contamination remaining on properties they currently or once owned — On respondents' motion, CCAA judge declared that remediation orders were subject to stay granted by initial order and had to be addressed as claims in CCAA process — MOE appealed — Appeal allowed — Ongoing environmental remediation obligations may be reduced to monetary claims that can be compromised in CCAA proceedings only where province has performed remediation work and advances claim for reimbursement, or where obligation may be considered future or contingent claim because it is sufficiently certain that province will do work and then seek reimbursement — CCAA judge did not explicitly or implicitly consider question of whether it was sufficiently certain that MOE would perform remediation work — It was not sufficiently certain that MOE would perform remediation ordered with respect to three of properties — However, with respect to LD site, there was no one to carry out respondents' responsibilities under MOE order and it was sufficiently certain that MOE would ultimately undertake respondents' obligations under order — CCAA judge's declaration that MOE orders were stayed by initial order was to be modified so that it applied only to LD site.

Environmental law --- Constitutional issues — Jurisdiction to enact environmental legislation — Conflicting legislation

Respondents engaged in liquidating insolvency and had no operations — Sites where respondents once conducted manufacturing operations were largely disposed of and remediation was conducted on sites — Respondents filed for protection under Companies' Creditors Arrangement Act (CCAA) — After CCAA filing, Minister of Environment (MOE) issued orders pursuant to Environmental Protection Act requiring respondents to remediate environmental contamination remaining on properties they currently or once owned — On respondents' motion, CCAA judge declared that remediation orders were subject to stay granted by initial order and had to be addressed as claims in CCAA process — MOE appealed — Appeal allowed — Ongoing environmental remediation obligations may be reduced to monetary claims that can be compromised in CCAA proceedings only where province has performed remediation work and advances claim for reimbursement, or where obligation may be considered future or contingent claim because it is sufficiently certain that province will do work and then seek reimbursement — CCAA judge did not explicitly or implicitly consider question of whether it was sufficiently certain that MOE would perform remediation work — It was not sufficiently certain that MOE would perform remediation ordered with respect to three of properties — However, with respect to LD site, there was no one to carry out respondents' responsibilities under MOE order and it was sufficiently certain that MOE would ultimately undertake respondents' obligations under order — CCAA judge's declaration that MOE orders were stayed by initial order was to be modified so that it applied only to LD site.

The respondents were engaged in a liquidating insolvency and had no operations. The sites where the respondents and its predecessors once conducted manufacturing operations were largely disposed of in the late 1990s. At that time, the respondents

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identified environmental impacts that arose from its past operations and conducted remediation on those sites. In January 2009 the respondents filed for protection under the Companies' Creditors Arrangement Act (CCAA). The respondents spent $28.5 million in remediation of the sites before filing under the CCAA. After the CCAA filing, the Minister of the Environment (MOE) issued orders pursuant to the Environmental Protection Act (EPA) requiring the respondents to remediate environmental contamination remaining on properties they currently or once owned. The respondents estimated it would require a further $18 million to remediate the sites.

The respondents brought a motion before the CCAA judge seeking an order declaring that the relief the MOE orders sought was financial and monetary in nature, that the initial order stayed the MOE orders and an order staying all related proceedings before the Environmental Review Tribunal. The CCAA judge determined that where operations had ceased on a particular property and a company could only comply with the MOE or EPA orders by expending funds, the environmental liabilities involved amounted to financial obligations to pay. The CCAA judge declared that the remediation orders were subject to the stay granted by the initial order and had to be addressed as claims in the CCAA process. The MOE appealed.

Held: The appeal was allowed.

In a recent decision, the Supreme Court of Canada decided that a CCAA court could determine whether an environmental order that was not framed in monetary terms was a provable claim. The CCAA court should consider the substance of an order rather than its form. If the province's actions indicated that, in substance, it was asserting a provable claim, then the claim could be subjected to the insolvency process. There were three requirements for establishing a provable claim. First, there must be a debt, liability or obligation to a creditor. Second, a claim must be based on an obligation that fell within the time limit for claims. Third, it must be possible to attach a monetary value to the obligation. The CCAA court must assess whether it was sufficiently certain that the regulatory body would perform the remediation work and have a monetary claim as a result.

In determining whether a regulatory order was a provable claim, a CCAA court had to apply the general rules that applied to future or contingent claims. The Supreme Court's recent decision was 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 might be considered a future or contingent claim because it is sufficiently certain that the province would do the work and then seek reimbursement. The respondents' approach was too broad and would result in almost all regulatory environmental orders being forced to be provable claims. A company might engage in activities that carried risks. A risk that resulted in an environmental obligation only became subject to the insolvency process when it was in substance monetary and a provable claim.

The CCAA judge did not have the benefit of the Supreme Court decision and did not explicitly consider the question of whether it was sufficiently certain that the MOE would perform the remediation work that was ordered. The reasons of the CCAA judge could not be read as implicitly addressing the question of whether it was sufficiently certain that the MOE would perform the remediation work. It could not be said that the MOE had no realistic alternative but to perform the remediation work itself.

It was not sufficiently certain that the MOE would perform the remediation ordered. The MOE orders respecting the BL, BR and KS properties were directed to the respondents, as well as other current and former owners of the properties. Pursuant to s. 18 of the EPA, the MOE had the power to make orders against subsequent or past owners for anything it ordered the respondents to do. However, with respect to the LD site, there was no one to carry out the respondents' responsibilities under the MOE order. It was sufficiently certain that the MOE would ultimately undertake the respondents' obligations under the order.

The MOE orders in relation to the impacted sites, other than the LD site, had not been established to be provable claims that must be included in the insolvency process. The CCAA judge's declaration that the MOE orders were stayed by the initial order was to be modified so that it applied only to the LD site.

Table of Authorities

Cases considered by *R.G. Juriansz J.A.*:

AbitibiBowater Inc., Re (2012), 352 D.L.R. (4th) 399, 71 C.E.L.R. (3d) 1, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* 438 N.R. 134, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* [2012] 3 S.C.R. 443, 2012 SCC 67, 2012 CarswellQue 12490, 2012 CarswellQue 12491, 95 C.B.R. (5th) 200 (S.C.C.) — distinguished

Confederation Treasury Services Ltd., Re (1997), 43 C.B.R. (3d) 4, (sub nom. *Confederation Treasury Services Ltd. (Bankrupt), Re)* 96 O.A.C. 75, 1997 CarswellOnt 31 (Ont. C.A.) — referred to

Confederation Treasury Services Ltd., Re (1997), (sub nom. *Confederation Treasury Services Ltd. (Bankrupt), Re)* 104 O.A.C. 160 (note) (S.C.C.) — referred to

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in *AbitibiBowater Inc., Re* the court used this language because it was particularly apt for the circumstances in the case. They claim that a careful reading of the reasons makes evident that the test the court established is less specific.

27 The respondents point to the more general language in Deschamps J.'s reasons. They highlight the various factors that Deschamps J. indicated could be relevant depending on the circumstances of each case to determine whether remediation orders will be subject to a CCAA stay: at para. 38. They argue that as long as the order requires an expenditure of funds its nature is monetary. In setting out the three basic requirements to determine whether an environmental order is a "claim", Deschamps J. said with respect to the third requirement, "that it be possible to attach a monetary value to the obligation, the question is whether orders that are not expressed in monetary terms can be translated into such terms" (at para. 30).

28 Instead, the respondents posit that in *AbitibiBowater Inc., Re*, the Supreme Court set out the policy approach to be followed in determining whether nonmonetary orders can be translated into monetary terms. This approach, as Deschamps J. emphasized, concerns: the importance of the single proceeding model of insolvency in Canada; the necessity of examining the substance, not only the form, of an environmental remediation order; the balance struck by Parliament between enforcement of environmental regulation and the interests of insolvency stakeholders; and the need to have regard to the interests of third-party creditors.

29 Turning to this case, the respondents submit that it was sufficiently certain that compliance with the orders would require the expenditure of a minimum of $18 million. Whether the money is paid to the MOE as reimbursement for the costs of performing the remediation, or paid to third parties retained to perform the remediation should make no difference. The environmental problems at the impacted sites were long-standing; the soil had been contaminated decades earlier. In fact, the Brockville site was already contaminated when Nortel bought it. Historical environmental problems, the respondents argue, should be distinguished from current ones, where the debtor is polluting at the time.

30 Finally, the respondents stress that the CCAA court should be mindful of the impact on the debtor and the stakeholders and avoid giving the MOE a super-priority it would not have under the BIA. Under the BIA there is no debtor-in-possession, only a trustee, and the trustee could abandon the contaminated property. In a liquidating reorganization there was no good reason why the MOE should do better under the CCAA than under the BIA.

E. Analysis

31 I cannot accept the respondents' proposed interpretation of *AbitibiBowater Inc., Re*. In determining whether a regulatory order is a provable claim, a CCAA court must apply the general rules that apply to future or contingent claims. 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.

32 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.

33 Parliament has struck a balance between the interests of the stakeholders and that of the public in designing the CCAA process. Parliament, in s. 11.8(8) of the CCAA, granted the MOE's claims with respect to remediation costs the security of a charge on the contaminated property. And Parliament, in s. 11.1(3), made it clear that a CCAA court has the discretion to stay regulatory orders on specified criteria.

F. Is It Implicit That the CCAA Judge Applied the Correct Test?

34 The CCAA judge in this case, without the benefit of the *AbitibiBowater Inc., Re* decision, did not explicitly consider the question whether it was sufficiently certain that the MOE would perform the remediation work ordered. In these circumstances

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TAB 8

2022 ABCA 117
Alberta Court of Appeal

Manitok Energy Inc (Re)

2022 CarswellAlta 806, 2022 ABCA 117, [2022] 6 W.W.R. 1, [2022]
A.W.L.D. 1734, 2022 A.C.W.S. 680, 468 D.L.R. (4th) 434, 98 C.B.R. (6th) 1

Alvarez & Marsal Canada Inc. in its capacity as the Court-appointed receiver and manager of Manitok Energy Inc. (Appellant) and Prentice Creek Contracting Ltd., Riverside Fuels Ltd. and Alberta Energy Regulator (Respondents) and Stettler County, Woodlands County and Orphan Well Association (Intervenors)

Frans Slatter, Ritu Khullar, Jolaine Antonio JJ.A.

Heard: March 10, 2022
Judgment: March 30, 2022
Docket: Calgary Appeal 2101-0085AC

Proceedings: reversing *Manitok Energy Inc (Re)* (2021), 25 Alta. L.R. (7th) 412, 87 C.B.R. (6th) 255, 2021 ABQB 227, [2021] 7 W.W.R. 557, 2021 CarswellAlta 698, B.E. Romaine J. (Alta. Q.B.)

Counsel: H.A.Gorman, Q.C., M Parker, D.A. Stephenson, for Appellant
G.L. Walters, for Respondent, Prentice Creek Contracting Ltd.
G.S.E. Hamilton, for Respondent, Riverside Fuels Ltd.
M.E. Lavelle, for Respondent, Alberta Energy Regulator
G.G. Plester, for Intervenors, Stettler County and Woodlands County
R. Gurofsky, G.J. Finegan, for Intervenor, Orphan Well Association

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
X Priorities of claims
  X.1 Secured claims
    X.1.b Forms of secured interests
      X.1.b.i Liens
        X.1.b.i.D Miscellaneous

Headnote

Bankruptcy and insolvency --- Priorities of claims — Secured claims — Forms of secured interests — Liens — Miscellaneous

At time of its insolvency, company was Alberta Energy Regulator licensee of wells and facilities with associated deemed liability for end-of-life obligations (EOL obligations) — Two companies filed builders' liens prior to company's bankruptcy — Company's receiver entered into purchase and sale agreement with P Inc. for certain property — Sale approval and vesting order discharged lien registrations, including those of lien claimants, and required receiver to establish separate holdbacks for lien claimants to stand in place of their lien registrations pending further court order — In accordance with partial discharge order, receiver renounced and disclaimed and was discharged over majority of remaining unsold oil and gas assets in company's estate — Receiver anticipated renouncing and disclaiming remaining unsold assets — Total realizations from receivership would be substantially less than cost of satisfying EOL obligations associated with discharged assets — Lien claimants brought application to determine whether EOL obligations had to be satisfied by receiver from estate in preference to satisfying first-ranking builders' lien claims based on services provided by lien claimants before receivership date — Chambers judge concluded that Supreme Court of Canada case law was distinguishable and that builders' lien claimants were entitled to payment out of

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proceeds of sale to P Inc. — Receiver appealed — Appeal allowed — If proceeds of sale of bankrupt corporation's valuable assets cannot be used to reclaim "unrelated assets" there would never be any proceeds available to satisfy public EOL obligations — There was nothing in Alberta regulatory scheme, Bankruptcy and Insolvency Act, or binding SCC decision permitting licensee to avoid its EOL obligations by converting valuable licensed assets into cash before enforcement order can be issued — Neither existence of enforcement orders nor sequence in which enforcement action is taken is relevant to receiver's duty to discharge public environmental obligations — That proceeds of P Inc. sale were placed into trust by virtue of court order did not distinguish instant case from SCC decision.

Table of Authorities

Cases considered:

AbitibiBowater Inc., Re (2012), 2012 SCC 67, 2012 CarswellQue 12490, 2012 CarswellQue 12491, 352 D.L.R. (4th) 399, 71 C.E.L.R. (3d) 1, 95 C.B.R. (5th) 200, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* 438 N.R. 134, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* [2012] 3 S.C.R. 443 (S.C.C.) — considered

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.) — considered

Orphan Well Association v. Grant Thornton Ltd. (2019), 2019 SCC 5, 2019 CSC 5, 2019 CarswellAlta 141, 2019 CarswellAlta 142, 66 C.B.R. (6th) 1, 81 Alta. L.R. (6th) 1, [2019] 3 W.W.R. 1, 430 D.L.R. (4th) 1, 22 C.E.L.R. (4th) 121, 9 P.P.S.A.C. (4th) 293, [2019] 1 S.C.R. 150 (S.C.C.) — followed

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44, 1991 CarswellAlta 315, 1991 ABCA 181 (Alta. C.A.) — referred to

PricewaterhouseCoopers Inc v. Perpetual Energy Inc (2021), 2021 ABCA 16, 2021 CarswellAlta 119, 86 C.B.R. (6th) 9, 20 Alta. L.R. (7th) 23, 14 B.L.R. (6th) 161, 457 D.L.R. (4th) 1 (Alta. C.A.) — referred to

Toronto Dominion Bank v. 1287839 Alberta Ltd. (2021), 2021 ABQB 205, 2021 CarswellAlta 618, 14 P.P.S.A.C. (4th) 121 (Alta. Q.B.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 14.06(7) [en. 1997, c. 12, s. 15] — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

R. 7.1(2) — considered

APPEAL by receiver from judgment reported at *Manitok Energy Inc (Re)* (2021), 2021 ABQB 227, 2021 CarswellAlta 698, 87 C.B.R. (6th) 255, [2021] 7 W.W.R. 557, 25 Alta. L.R. (7th) 412 (Alta. Q.B.), finding that builders' lien claimants were entitled to be paid by receiver from estate in preference to end-of-life obligations associated with abandonment and reclamation obligations for oil and gas property.

***Per curiam*:**

1 The issue underlying this appeal, as stated by consent under R. 7.1(2), is:

> Whether end of life obligations associated with the abandonment and reclamation of unsold oil and gas properties must be satisfied by the Receiver from Manitok's estate in preference to satisfying what may otherwise be first-ranking builders' lien claims based on services provided by the lien claimants before the receivership date.

This issue engages the reach of the Supreme Court of Canada's ***Redwater*** decision: ***Orphan Well Association v Grant Thornton Ltd.***, 2019 SCC 5, [2019] 1 SCR 150.

Facts

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2 Manitok Energy Inc. was an oil and gas company that became insolvent. This appeal deals with the priority in which the Receiver must allocate the remaining funds in the estate.

3 The specific issue relates to two builders' liens filed against property of Manitok. The respondent Prentice Creek Contracting provided equipment and services to Manitok related to the reclamation and cleanup of certain oil and gas well sites. The respondent Riverside Fuels provided fuel and lubricants to Manitok. When they were unpaid, both filed builders' liens prior to Manitok's bankruptcy on February 20, 2018.

4 The essential priority issue in this appeal is between the two builders' liens and Manitok's "abandonment and reclamation" obligations. After an oil and gas well has been fully exploited, the licensee operating it must "abandon" the well, by sealing it off in an environmentally safe way. It must then "reclaim" the surface of the land: *Redwater* at para. 16. These "end of life" obligations, which are mandated by regulation, are inherent in oil and gas properties, and can be very financially onerous and beyond the means of insolvent corporations.

5 Like many insolvent oil and gas companies, Manitok had some assets that had remaining value, but it also had a number of assets that had no remaining net value because they were burdened with inherent and inchoate abandonment and reclamation obligations. The Receiver identified some of the valuable assets and arranged their sale. Four sales were approved by the court and closed. The Receiver then negotiated a sale of a bundle of assets to Persist Oil & Gas, under which Persist was to assume the abandonment and reclamation obligations with respect to the assets it was purchasing. While the Alberta Energy Regulator has subsequently issued abandonment orders to the Receiver, none of those orders relate to the assets that were sold to Persist.

6 The Persist sale was approved by the court. The Sale and Vesting Order provided that the net proceeds would be held "in an interest bearing trust account" by the Receiver, and those sale proceeds would "stand in the place and stead of the Purchased Assets", without affecting in any way the priorities or interests of the various claimants in those assets. The Sale and Vesting Order stipulated particular holdbacks to cover the amounts of the two builders' liens and certain unpaid property taxes. However, before the Persist sale could close, the Supreme Court rendered its *Redwater* decision on January 31, 2019. Because of the *Redwater* decision, the parties amended the Persist sale agreement, but the holdback provisions were not changed. The Persist sale then closed, and the Receiver received the proceeds.

7 After the various sales negotiated by the Receiver, the Manitok estate still owned a number of oil and gas assets with aggregate assumed abandonment and reclamation obligations of about $44.5 million, far in excess of the assets in the estate. The Receiver intended to "disclaim" those assets, that is, it intended to "abandon, dispose of or otherwise release" the bankrupt estate's interest in these properties: *Redwater* at para. 44. As a result, any reclamation obligations would likely fall on the Orphan Well Association.

The Reasons of the Chambers Judge

8 When a dispute arose as to whether the *Redwater* decision was applicable to the facts of the Manitok bankruptcy, the parties stated an issue for the court as set out *supra*, para. 1. The chambers judge concluded that *Redwater* was distinguishable, and that the builders' lien claimants were entitled to be paid out of the proceeds of the Persist sale: Manitok Energy Inc (Re), 2021 ABQB 227 (Alta. Q.B.) , 25 Alta LR (7th) 412.

9 The chambers judge acknowledged the ruling in *Redwater* that end of life obligations are not provable in bankruptcy, and that trustees in bankruptcy are required to respect valid provincial laws of general application. Generally speaking, trustees are not personally liable for environmental obligations, but the bankrupt estate remains liable: reasons at paras. 33-37. The chambers judge, however, distinguished *Redwater* based on comments made in para. 159 of that decision:

> 159 Accordingly, the end-of-life obligations binding on [the Receiver] 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

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34 This issue was identified by the majority of this Court in Grant Thornton Ltd v Alberta Energy Regulator, 2017 ABCA 124 at para. 102, 50 Alta LR (6th) 1:

> 102 Secondly, the Regulator does not insist that all of the assets in the bankrupt estate be applied towards environmental liabilities. It only insists on the oil and gas assets being used for that purpose. Thus, if Redwater had valuable non-oil and gas assets (for example, valuable real estate or shareholdings) the Regulator would not insist that the Receiver or Trustee use those assets to meet Redwater's environmental obligations. But again, if the Regulator is correct in its position, it could insist on all of the assets in the bankrupt estate being applied towards the "public duty" to perform the environmental cleanup. For example, if s. 14.06 only deals with personal liability of trustees, there would be no reason to limit the obligation to discharge environmental liabilities to the oil and gas assets themselves. Resort to all the assets in the estate appears to be authorized by the provisions of the *Environmental Protection and Enhancement Act*, RSA 2000, c. E-12, s. 240(3).

This was the decision overturned by the Supreme Court of Canada in ***Redwater***, but the Supreme Court did not directly address this particular issue.

35 One could read para. 159 of *Redwater* as excluding resort to "unrelated" non-oil and gas assets to cover abandonment and reclamation costs. However, as was pointed out by the Orphan Well Association, the reasons in *Redwater* refer repeatedly to the "assets of the estate", without drawing any such distinction: see for example *Redwater* at paras. 76, 102, 107, 114. Further, there is no clear boundary between licensed assets and other assets. For example, the sale to Persist (like many similar sales) included not only licensed assets but oil and gas rights, royalty rights, intellectual property, seismic data, vehicles and other chattels. *Redwater* gives no support to the municipalities' argument.

36 In the final analysis, the assets sold to Persist appear to be indistinguishable from the type of assets that the trustee in *Redwater* sold. *Redwater* confirms that the proceeds of the sale of those assets must be applied first towards the satisfaction of abandonment and reclamation obligations. To the extent that there is any issue about it, the status of assets completely unrelated to the oil and gas business can be left for another day.

Enforcement Action by the Alberta Energy Regulator

37 Paragraph 159 of *Redwater* states: " . . . the Abandonment Orders and the LMR [Liability Management Rating] replicate s. 14.06(7)'s effect in this case". The respondents argue this means that the outcome in *Redwater* was driven by the fact that the Alberta Energy Regulator had issued Abandonment Orders. The absence or timing of such enforcement orders is said to be critical to the outcome.

38 It is clear, however, that reclamation and abandonment obligations are inherent in oil and gas properties from the minute extraction of the resource commences: *Redwater* at para. 29; PricewaterhouseCoopers Inc v Perpetual Energy Inc, 2021 ABCA 16 at paras. 86–87; Panamericana De Bienes Y Servicios (Receiver of) v Northern Badger Oil & Gas Ltd, 1991 ABCA 181 at para. 32, 81 Alta LR (2d) 45, 117 AR 44. Abandonment and reclamation obligations are inchoate, but that does not mean that they do not arise until enforcement action is taken by the Alberta Energy Regulator. The public duty on the Receiver to use the assets of the Manitok estate to discharge Manitok's abandonment and reclamation obligations existed independently of any enforcement action taken by the Alberta Energy Regulator.

39 The respondents point out that in *Redwater* the Alberta Energy Regulator had issued abandonment orders after the receivership but before the bankruptcy. In the Manitok insolvency, abandonment and reclamation orders were issued in August 2019, after the date of bankruptcy, but that is not a reason to distinguish *Redwater*. Abandonment and reclamation obligations are imposed by statute on all licensees. As noted in *Redwater* at paras. 160, 212:

> . . . a persuasive distinction cannot be drawn between liability for an environmental condition or environmental damage . . . and liability for failure to comply with an order to remedy such a condition or such damage . . . :

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Abandonment and reclamation obligations exist independently of the issuance of abandonment orders, which are merely an enforcement mechanism: ***Redwater*** at para. 92; ***Perpetual Energy*** at para. 87. There is also no reason to think that a receiver or trustee in bankruptcy would not discharge a statutory obligation on the estate in the absence of an enforcement order. It would be artificial to have the outcome of a priority dispute like this depend on whether the Alberta Energy Regulator had sufficient information to issue abandonment orders before, as opposed to after the insolvency event.

40 The use of the word "replicate" in para. 159 can best be understood by comparing the French text "reproduisent l'effet". Read in context, para. 159 is merely saying that recognizing the validity of the Alberta Energy Regulator's enforcement of environmental obligations in an insolvency is no more inconsistent with the *Bankruptcy and Insolvency Act* than s. 14.06(7), which also gives priority to the enforcement of environmental obligations.

41 In summary, neither the existence of enforcement orders nor the sequence in which enforcement action is taken is relevant to the Receiver's duty to discharge public environmental obligations. It is irrelevant that no enforcement orders were ever issued with respect to the Persist assets, because the proceeds of the sale of those assets are still a part of the Manitok bankruptcy estate. Contrary to what is implied in the reasons at paras. 39, 42, the fact that the Persist assets were sold before any enforcement orders were issued is not relevant.

The Effect of the Trust and Holdback

42 The chambers judge reasoned at paras. 41, 44 that the proceeds of the sale to Persist were paid into trust, and therefore were not captured by the *Redwater* decision. It is true that the physical oil and gas assets sold to Persist were no longer a part of the Manitok estate, because they had vested in Persist. This appeal, however, is not concerned with those physical assets, but rather with the proceeds resulting from the sale of those assets. Those proceeds are very much a part of the Manitok estate, even though they are held "in an interest bearing trust account". Under the Sale and Vesting Order they were specifically to stand in place of the physical assets that had been sold, without affecting in any way the priorities and claims of various claimants. The claims of the two respondent builders' lien claimants survive in those proceeds, but they are to be dealt with in accordance with the *Redwater* principles.

43 The respondents argue that this case is distinguishable from *Redwater* because the *Redwater* decision "changed the law". They argue that *Redwater* does not apply, because the Persist assets had been sold effective as of a date prior to the "seismic shift" caused by the reasons in *Redwater*, and the funds were paid into trust by court order. That is not an accurate statement of the legal position. The *Redwater* decision did not change the law. It merely stated what the law had always been, despite the opinions of some in the industry to the contrary. The law was always as stated in the *Bankruptcy and Insolvency Act*, *Northern Badger, Abitibi*, and as confirmed in *Redwater*. The 2019 *Redwater* decision stated the law as of the date that Redwater Energy Corporation became bankrupt four years earlier. The *Redwater* decision also stated the law as it existed on the day that Manitok became bankrupt, and it applies fully to these proceedings.

44 The builders' lien claimants overstate the effect of the "trust" created by the Sale and Vesting Order. The assets of an insolvent corporation belong to the estate of that corporation. Those assets are under the control of the receiver or trustee. The receiver or trustee obviously has no beneficial interest in those assets and would keep them segregated, and in that sense it is not inaccurate to say the assets are held "in trust" or "in an interest bearing trust account". But the "trust" is only to hold the assets for the stakeholders in the insolvency, in the same priority as their interests may appear. Any "trust" does not create any new or enhanced rights in any stakeholder, even if recited in a court order, and even if the assets are sub-segregated into smaller pools of assets. A court cannot by such a "trust order" reorder the priorities in an insolvency.

45 The Receiver was obviously required to hold the Persist proceeds "in an interest bearing trust account" for the bankrupt estate and its stakeholders, because the Receiver had no beneficial interest in them. The Order, however, did not create any new rights or trust beneficiaries or vary the entitlement of any stakeholder; it essentially provided that the funds were to be held in escrow pending a determination of entitlement: Toronto Dominion Bank v 1287839 Alberta Ltd, 2021 ABQB 205 at para. 17. The Order specifically stated that the funds were deemed to replace the sold real estate, and the claims of all stakeholders would

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TAB 9

2022 ABKB 839
Alberta Court of King's Bench

Orphan Well Association v. Trident Exploration Corp

2022 CarswellAlta 3672, 2022 ABKB 839, [2023] A.W.L.D. 259,
[2023] A.W.L.D. 260, 2022 A.C.W.S. 4922, 4 C.B.R. (7th) 258

Orphan Well Association (Applicant) and Trident Exploration Corp., Trident Exploration (WX) Corp., Trident Exploration (Alberta) Corp., Trident Limited Partnership, Trident Exploration (Aurora) Limited Partnership I, Trident Exploration (2006) Limited Partnership I, and Fenergy Corp. (Respondents)

R.A. Neufeld J.

Heard: September 20, 2022
Judgment: December 13, 2022
Docket: Calgary 1901-06244

Counsel: Kelsey J. Meyer, Adam Williams, for Pricewater House Coopers Licence Insolvency Trustee, court appointed receiver and manager of Trident Exploration Corp. and other Trident entities
Kelly J. Bourassa, for ATB Financial
Gregory Plester, Curtis J. Auch, for Woodlands County and Stettler County
Shauna N. Finlay, Moira Lavoie, for Kneehill County
Robyn Gurofsky, Jessica Cameron, Garrett Finegan, for Orphan Well Association
Candice A. Ross, for Alberta Energy Regulator

Subject: Insolvency; Natural Resources; Property; Municipal

Related Abridgment Classifications

Bankruptcy and insolvency
IX Proving claim
  IX.1 Provable debts
    IX.1.a General principles
Bankruptcy and insolvency
X Priorities of claims
  X.3 Claims for municipal taxes and public utilities rates
    X.3.a Secured claims
      X.3.a.i Taxes

Headnote

Bankruptcy and insolvency --- Proving claim — Provable debts — General principles

Post-receivership taxes — Respondents, collectively bankrupt, were group of privately-owned oil and gas exploration and production companies and partnerships — After bankrupt ceased operations and terminated all employees and contractors, its licences were turned back to Alberta Energy Regulator (AER), and its abandonment and reclamation obligations would be assumed by applicant Orphan Well Association (OWA) — OWA applied for order appointing receiver — Receiver made request for advice and directions regarding whether AER or OWA was entitled to call on proceeds of sale of all of bankrupt's assets, including realty, and whether such entitlement took precedence over municipal tax obligations that were incurred post-receivership — AER or OWA was entitled to call on proceeds of sale from all of bankrupt's assets and their entitlement took precedence over municipal tax obligations because of AER or OWA super priority over funds in question — OWA's entitlement was addressed outside of insolvency regime because it was non-monetary obligation which could not be reduced to provable claim through test in Abitibi, not because it was non-provable — Municipal taxes, on other hand, were neither non-monetary

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obligation nor incompatible with Abitibi test — Essence of AER super priority was that it was not subject to prioritization because obligation must have been met before distribution could be made to anyone else — Assets subject to AER super priority were not limited to licenced oil and gas wells, pipelines and production facilities — It made no sense to differentiate real estate assets from other assets used in that business, just as it made no sense in Manitok to carve out economic licensed assets from uneconomic ones.

Bankruptcy and insolvency --- Priorities of claims — Claims for municipal taxes and public utilities rates — Secured claims — Taxes

Post-insolvency taxes — Respondents, collectively bankrupt, were group of privately-owned oil and gas exploration and production companies and partnerships — After bankrupt ceased operations and terminated all employees and contractors, its licences were turned back to Alberta Energy Regulator (AER), and its abandonment and reclamation obligations would be assumed by applicant OWA — OWA applied for order appointing receiver — Receiver made request for advice and directions regarding whether AER or OWA was entitled to call on proceeds of sale of all of bankrupt's assets, including realty, and whether such entitlement took precedence over municipal tax obligations that were incurred post-receivership — AER or OWA was entitled to call on proceeds of sale from all of bankrupt's assets and their entitlement took precedence over municipal tax obligations because of AER or OWA super priority over funds in question — Treatment of municipal taxes was part of sales process presented to and approved by court — Sale of marketable assets without adjustment for municipal taxes, pre- or post-insolvency, was also approved by court as insolvency progressed, with notice to affected municipalities — Municipalities did not oppose sales process application, nor any subsequent application for approval of specific assets sales — It followed that payment of post-insolvency municipal taxes was not necessary to preserve bankrupt's exploration and production assets.

Table of Authorities

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Alberta Treasury Branches v. Invictus Financial Corp. (1986), 42 Alta. L.R. (2d) 181, 68 A.R. 207, 61 C.B.R. (N.S.) 238, 1986 CarswellAlta 434 (Alta. Q.B.) — considered

Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd. (1995), 28 M.P.L.R. (2d) 59, 32 C.B.R. (3d) 303, (sub nom. *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.)* 23 O.R. (3d) 781, 1995 CarswellOnt 374 (Ont. Gen. Div. [Commercial List]) — referred to

Manitok Energy Inc (Re) (2022), 2022 ABCA 117, 2022 CarswellAlta 806, [2022] 6 W.W.R. 1, 98 C.B.R. (6th) 1, 468 D.L.R. (4th) 434 (Alta. C.A.) — considered

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Orphan Well Association v. Grant Thornton Ltd. (2019), 2019 SCC 5, 2019 CSC 5, 2019 CarswellAlta 141, 2019 CarswellAlta 142, 66 C.B.R. (6th) 1, 81 Alta. L.R. (6th) 1, [2019] 3 W.W.R. 1, 430 D.L.R. (4th) 1, 22 C.E.L.R. (4th) 121, 9 P.P.S.A.C. (4th) 293, [2019] 1 S.C.R. 150 (S.C.C.) — referred to

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44, 1991 CarswellAlta 315, 1991 ABCA 181 (Alta. C.A.) — considered

Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492, 1975 CarswellOnt 123 (Ont. C.A.) — considered

Smoky River Coal Ltd., Re (2001), 2001 ABCA 209, 2001 CarswellAlta 1035, [2001] 10 W.W.R. 204, 205 D.L.R. (4th) 94, 28 C.B.R. (4th) 127, 95 Alta. L.R. (3d) 1, 299 A.R. 125, 266 W.A.C. 125 (Alta. C.A.) — considered

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Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

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Manitok insolvency as an example of such payments being made pursuant to the sales process presented to and approved by the court.

60 There is no doubt that municipal governments provide necessary and valuable services to their communities. Many would argue that municipal government is the most efficient and valuable level of all. All community members bear responsibility to support their municipal government by paying property taxes, service levies and the like. But it is not as clear that the payment of municipal property taxes has any higher public interest component than obligations such as paying a farmer surface lease rentals for an expropriated wellsite or pipeline right-or-way post-insolvency, paying trade creditors for pre-insolvency debts, or even paying municipalities for outstanding pre-insolvency municipal taxes.

61 I agree with the OWA that the assertion of a parallel priority based on the public interest as between two holders of non-provable claims is based on a flawed interpretation of *Redwater*, which makes it clear that the OWA's entitlement to the proceeds of sale is not a claim on the estate that is subject to a determination of priorities. That is the essence of a "super priority" as that term has evolved.

62 The OWA's entitlement is addressed outside of the insolvency regime because it is a non-monetary obligation which cannot be not reduced to a provable claim through the test in *Abitibi*, not because it is non-provable. Producers, like Trident, have a legal obligation to ensure their wells are safely abandoned and reclaimed. The OWA acts as a safety net to ensure that those obligations are satisfied by ensuring that reclamation work is ultimately performed. Of course, a dollar figure can be put on end-of-life obligations, but that cost is what is necessary to satisfy the obligations of producers and ensure that wells are safely abandoned and reclaimed. The cost is not levied to generate revenue for the program. That is why the OWA entitlements "define the contours of the bankrupt estate available for distribution": *Redwater* at para 160.

63 Municipal taxes, on the other hand, are neither a non-monetary obligation nor incompatible with the *Abitibi* test. The purpose of municipal taxes is to generate revenue for the municipality: Smoky River Coal Ltd, Re, 2001 ABCA 209 at para 32. The only obligation on the taxpayer is to pay tax. There is no other corresponding regulatory obligation. And, indeed, the *MGA* makes clear that taxes "are recoverable as a debt due to the municipality" and that a taxpayer is a debtor: s. 348, s. 348.1. Taxes are evidently a monetary obligation.

64 Even if I accepted that this case described a competition between claims, the legislation provides instruction about the order in which claims are to be paid. The Municipalities' claims "take priority over the claims of every person except the Crown": *MGA*, s. 348(c). On a plain reading of the *MGA*, the legislature has contemplated where the claims of the Municipalities rank in the priority scheme. And that is second to the Crown.

65 There are those who might characterize the outcome of *Redwater* as shifting liability for environmental remediation in the oil and gas industry from "polluter-pay" to "lender-pay." I disagree.

66 In my view, *Redwater* shifts liability from "polluter-pay" to "everyone pays," starting with all of those who have suffered financial losses in dealing with the insolvent company, and ending with the OWA, which spreads remaining losses between the Province of Alberta and industry. This includes secured creditors who have lent money to the insolvent entity in good faith, trade creditors who have provided goods or services and remain unpaid, landowners who have hosted the wells, pipelines and production facilities, and municipal governments who are owed taxes dating back to pre-insolvency, among many others. The essence of the AER super priority is that it is not subject to prioritization because the obligation must be met before a distribution can be made to anyone else. It defines the contours of the funds that may be available for distribution.

67 I also find that the assets subject to the AER super priority are not limited to licenced oil and gas wells, pipelines and production facilities. Trident had certain real estate assets that were used for office or equipment storage and the like. However, Trident had only one business: exploration and production of oil and gas. It makes no sense to differentiate real estate assets from other assets used in that business, just as it made no sense in *Manitok* to carve out economic licensed assets from uneconomic ones. In either case, the result would be to undermine the policy purposes upon which the super priority principle is based.

B. Are Post Insolvency Municipal Taxes a Necessary Cost of Preservation of Assets?

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TAB 10

2023 ABKB 109
Alberta Court of King's Bench

Qualex-Landmark Towers Inc v. 12-10 Capital Corp

2023 CarswellAlta 523, 2023 ABKB 109, [2023] A.W.L.D. 2154,
[2023] A.W.L.D. 2155, 2023 A.C.W.S. 755, 56 C.E.L.R. (4th) 104

Qualex-Landmark Towers Inc (Plaintiff) and 12-10 Capital Corp and John Doe (Defendants) and Dollar Cleaners (1972) Ltd, Canadian Pacific Railway Company, Teck Metals Ltd, Symcor Inc, Otis Canada, Inc, Sherwin-Williams Canada Inc, Z S K Investments Ltd, Oxford Properties Group Inc, Bank of Montreal, D.K. Management Ltd, Morguard Corporation Corporation Morguard (Third Party)

D.B. Nixon J.

Heard: September 15, 2022
Judgment: February 27, 2023
Docket: Calgary 2001-06911

Counsel: Matti Lemmens, Taylor Kemp, for Plaintiff
Beamer Comfort, for Defendant, 12-10 Capital Corp
Dana Nowak, Carly Toronchuk, for Trez Capital
Bren Cargill, for Peoples Trust Company

Subject: Corporate and Commercial; Environmental; Insolvency; Property

Related Abridgment Classifications

Debtors and creditors
III Garnishment
III.5 Attachability
III.5.a Prejudgment attachment orders
Debtors and creditors
VIII Executions
VIII.13 Priorities among execution creditors
VIII.13.e Miscellaneous

Headnote

Debtors and creditors --- Executions — Priorities among execution creditors — Miscellaneous

Plaintiff purchased lands in 2007 nearby affected land which had contamination concerns discovered in 2006 — Defendant purchased affected land in 2009 and completed further contamination investigations between 2012 and 2015 — In April 2018, Alberta Environment and Parks (AEP) directed defendant to submit environmental site assessment (ESA) in respect of affected lands, which was to include risk management plan — In February 2022, AEP advised they had not received risk management plan from defendant and set revised deadline for July 2022 which was not met — Three outside mortgages were registered against affected lands — As of May 2022, there was aggregate of approximately $17,200,000 in outstanding mortgages and accrued interest — Plaintiff claimed estimated cost to remediate their land was approximately $2,006,500 — Plaintiff sought to add some narrative to engage priority issue concerning environmental remediation obligation — Plaintiff brought application to add mortgagee defendants to action and amend statement of claim — Application granted — Proposed mortgagee defendants were added to pleadings — Plaintiff had reasonable likelihood of establishing that its claim for environmental remediation would rank in priority to mortgages — Due to excessive amount of mortgages evaluated on loan-to-value basis, court found that ordinary business expenses did not include repayment of mortgages in case at hand — Sale of only substantial assets held by defendant would have hindered ability of plaintiff to enforce judgment.

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Debtors and creditors --- Garnishment — Attachability — Prejudgment attachment orders

Plaintiff purchased lands in 2007 nearby affected land which had contamination concerns discovered in 2006 — Defendant purchased affected land in 2009 and completed further contamination investigations between 2012 and 2015 — In April 2018, Alberta Environment and Parks (AEP) directed defendant to submit environmental site assessment (ESA) in respect of affected lands, which was to include risk management plan — In February 2022, AEP advised they had not received risk management plan from defendant and set revised deadline for July 2022 which was not met — Three outside mortgages were registered against affected lands — As of May 2022, there was aggregate of approximately $17,200,000 in outstanding mortgages and accrued interest — Plaintiff claimed estimated cost to remediate their land was approximately $2,006,500 — Plaintiff provided notice to mortgagees of its application in Masters Chambers for attachment order for amount sought for remediation — Master denied application for attachment order — Plaintiff appealed from master's decision declining to grant attachment order — Appeal allowed — Master erred by denying attachment order on basis that it would have affected priorities of secured lenders — Master's decision amounted to determination of issue of priorities — Excessively high loan-to-value ratio merited departure from typical analysis that would apply to normal lending circumstances applied by master — It was just and equitable to grant attachment order as it allowed issue of priorities to be addressed fully at trial — Plaintiff was entitled to attachment order against defendant in amount of $2,006,500 in respect of any sale proceeds arising from affected land — It would have been inappropriate to allow defendant to avoid formal insolvency proceeding so that it could sell its property to satisfy secured lenders and walk away from environmental obligations.

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Alberta (Director, South Saskatchewan Region, Operations Division, Environment & Parks) v. Alberta (Provincial Court) (2017), 2017 ABQB 3, 2017 CarswellAlta 5, 3 C.P.C. (8th) 137, 53 Alta. L.R. (6th) 382, [2017] 9 W.W.R. 148, 23 Admin. L.R. (6th) 146 (Alta. Q.B.) — referred to

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s. 32 — referred to

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s. 17(2)(b) — referred to

s. 17(2)(b)(i) — referred to

Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12

Generally — referred to

Pt. 5 — pursuant to

s. 1(b) "adverse effect" — considered

s. 2 — referred to

s. 2(i) — referred to

s. 107(1)(c)(i) — referred to

s. 112 — referred to

s. 112(1) — referred to

s. 113 — referred to

s. 128 — referred to

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s. 129 — referred to

s. 137 — referred to

s. 210 — referred to

s. 214 — referred to

s. 216 — referred to

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R. 3.65 — referred to

R. 3.74 — referred to

R. 6.14 — pursuant to

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Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12

Conservation and Reclamation Regulation, Alta. Reg. 115/93

Generally — referred to

APPLICATION by plaintiff to add proposed mortgagee defendants and to amend statement of claim; APPEAL by plaintiff from decision of master denying attachment order.

***D.B. Nixon J.*:**

I. Introduction

1 This application touches on the issue of who is responsible for environmental remediation obligations. The challenge is to determine how far the judicial guidelines extend in respect of environmental remediation obligations.

2 The appellate courts in Canada have recently made it clear that one cannot walk away from environmental remediation obligations: see Orphan Well Association v Grant Thornton Ltd 2019 SCC 5 [Redwater]; *Manitok Energy Inc (Re)*, 2022 ABCA 117; PricewaterhouseCoopers Inc v Perpetual Energy Inc 2021 ABCA 16 [Perpetual 2021]; PricewaterhouseCoopers Inc v Perpetual Energy Inc 2022 ABCA 111 [Perpetual 2022]. The question is whether an environmental remediation obligation takes priority over creditors in the circumstances of this case, including secured creditors such as mortgagees.

3 The applicant and appellant in this hearing is Qualex-Landmark Towers Inc ("*QLT*"). QLT is also the Plaintiff in the underlying action (the "*Action*").

4 The Respondents are 12-10 Capital Corp and John Doe (collectively, the "*Respondents*"). There are also a number of Third-Party Defendants.

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being made by "related parties"; and (iii) the underlying business entity has a negative cash outflow. Those "related parties" were entities within the Strategic Group. Also, the aggregate of the Mortgages and the environmental remediation obligations of Capital Corp outweigh the value of the 12-10 Lands, which is the only asset of value held by Capital Corp. In my view, the fact that there is no evidence that Capital Corp has recorded the environmental remediation obligations on its book is irrelevant. My insolvency determination is further supported by the fact that Capital Corp is subject to a total net monthly carrying cost of $265,176.

84 Third, an entity should not be allowed to structure transactions so that it is able to benefit from its valuable assets while coincidentally leaving the environmental liabilities unaddressed: *Manitok* at para 31. Using the January 2022 Sale to illustrate the substantive concern, if Capital Corp had sold the Transaction Property and kept the Retained Property in circumstance in which it applied the net proceeds of sale to pay down the Mortgages, all or substantially all of the environmental liabilities would be unaddressed in the long term. I make this observation because: (i) the 12-10 Lands are the only valuable assets within Capital Corp; (ii) based on the application of the interest rates, I infer that the aggregate amount due on the Mortgages (including accrued interest) currently exceeds the value of the 12-10 Lands; and (iii) I infer the environmental remedial obligations of that entity are material. I make this latter inference by reference to the evidence of QLT that the environmental remedial obligations associated with the QLT Lands are in excess of $2,000,000. Common sense tells me that the environmental remedial obligations associated with the 12-10 Lands are very likely more than the QLT Land amount.

85 Fourth, if this were a formal insolvency proceeding, the environmental remediation obligations imposed on Capital Corp by AEP likely would foist a super priority charge over the real property of the 12-10 Lands: *Redwater* at para 159. Given the development of the common law in this area, I do not agree that the super priority charge would apply only if an insolvent corporation with environmental remediation obligations enters formal insolvency proceedings. As I read the appellate direction, the super priority charge over the real property of the corporation to remediate likely arises coincidental with the Contamination and will hang over the real property like an umbrella until the environmental remediation obligation is satisfied.

86 I acknowledge that there is no evidence that Capital Corp has recorded any obligations for environmental remediation on its books of account. The absence of an accrual of environmental remediation obligations is likely common, especially for smaller corporations that are not directly involved in the oil and gas industry. However, under the current state of the law, the absence of an accounting accrual likely does not matter. Based on the jurisprudence, the obligation to effect environmental remediation exists, and it should be taken into account.

87 Further, it would be inappropriate to allow a corporation to avoid formal insolvency proceedings so that it can sell its property to satisfy its secured lenders and walk away from its environmental remediation obligations. This is even more inappropriate where a corporation has mortgaged the underlying real property in circumstances where the loan-to-value ratio is excessively high. Any such loophole needs to be filled using the common law, perhaps by giving priority to private claims for environmental remediation by displacing the traditional priority to secured lenders. This is the essence of the super priority concept that emanates from *Redwater*. As stated by the Supreme Court of Canada, this is not a mere matter of form, but of substance: *Redwater* at para 159.

88 In summary, I am of the view that the binding principles of *Redwater* and *Manitok* apply at common law where an insolvent corporation has environmental remediation obligations. While I am not making any final determination on the matter other than for purposes of determining whether the tests for an attachment order are met, I am of the view that it is reasonably likely that it does not matter if an insolvent corporation (*i.e.*, Capital Corp) has entered into formal insolvency proceedings or not.

ii. Does QLT need to be a "regulator" for its claim for environmental remediation to rank in priority to the mortgagees?

89 QLT asserts that completing environmental remediation is a public duty owed to fellow citizens: *Redwater* at para 135. When a regulator seeks to enforce that public duty against a corporation in a formal insolvency proceeding, it may obtain a first charge over real property. It would be absurd if the beneficiary of that public duty (such as QLT, in its capacity as a directly affected party) had no recourse against a corporation that is technically insolvent (such as Capital Corp).

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90 The scope of this public duty was touched on in *PanAmericana de Bienes y Servicios v Northern Badger Oil & Gas Limited*, 1991 ABCA 181 and endorsed in *Redwater*. While the following judicial guidance is focused on oil and gas wells, I am of the view that the legislative framework in Alberta expands that context: see *EPEA*. Further, the jurisprudence has indicated that the assets subject to a regulatory super priority are not limited to licenced oil and gas wells, pipelines and production facilities: *Trident Exploration* at para 67. While the reach of the super priority in respect of assets completely unrelated to the oil and gas business is be left for another day, it is likely that it will be addressed to some extent in the context of the QLT claim: *Manitok* at para 36. Taking all that context into account, the instructive judicial comment in this regard is as follows.

> 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 entire 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: ***Redwater*** at para 134.

91 Based on this judicial guidance, QLT asserts that it does not matter that it is not a "regulator". Instead, it asserts that the statutory duty to remediate environmental contamination under the *EPEA* and the common law right of citizens to live free of the nuisance of contamination from neighbouring properties and the negligence of polluters who fail to prevent the release of substances to neighbouring land is part of the general law of Alberta. QLT further asserts that this duty binds every citizen of the province.

92 Capital Corp takes a much different approach to the issue. It does not agree that it is appropriate to characterize the QLT claim as a "duty to the public" or "environmental obligation". Instead, Capital Corp characterizes the QLT claim as just a common law tort action in negligence or nuisance. It characterizes this dispute as a debate between two private real estate developers.

93 Capital Corp further asserts that the mere fact it may have statutory obligations to a regulator does not give the QLT private tort claim any special status or priority. In the view of Capital Corp, only the government regulator enjoys a super priority for the benefit of the public. I disagree.

94 Based on my review of the law, the obligation of the polluter to remediate is a duty owed to its fellow citizens. When a polluter complies, the result is not the recovery of money by AEP or necessarily of a judgment for money. Monetary recovery is not the object of the process. Rather, it is simply the application of the general law for the benefit of the community for the purpose of ensuring that environmental remediation obligations are addressed.

95 As a result, when a polluter is found responsible for nuisance or negligence for failure to remediate environmental contamination in the context of private civil litigation, the nature of the underlying obligation is a public duty to all citizens. If there is a breach, the specific polluter can be held accountable because of the existing legislative framework that invokes environmental remediation obligations.

96 This determination is supported by the fact that the Alberta Court of Appeal has directed obligations to remediate contamination are a creature of the regulation and arise independent of a regulator's enforcement: *Perpetual 2022* at para 50; *Manitok* at para 38. As a result, remediation obligations of contaminated sites in this case arise pursuant to Part 5 of the EPEA, independent of involvement from the AEP.

97 Based on the appellate guidance, Capital Corp is obliged to take remedial measures even if there is no AEP direction and the underlying obligation exists notwithstanding it may not be a *current* liability: EPEA, s 112(1)*; Perpetual 2022* at para 44. That being the case, the environmental remediation obligations of Capital Corp are an intrinsic part of that entity because it is an owner or past owner of the 12-10 Lands. While the extension of its obligations concerning the remediation of the QLT

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Lands is less certain, that boundary still needs to be addressed. That said, it is not unreasonable to assume that Capital Corp will be caught within that boundary for purposes of the QLT Lands.

98 Regardless of regulatory involvement, Capital Corp is accountable for these environmental remediation obligations. The appellate direction in parallel areas of the law is that a corporation such as Capital Corp cannot simply sell the 12-10 Lands and leave the third parties to whom it owes a duty with no recourse against it.

99 As a final comment in this segment of my reasons for judgment, it is my view that regulators exist to enforce public duties. Regulators exist for this purpose because private citizens do not have a responsibility to enforce the environmental remediation obligations of their neighbours. However, when a *bona fide* neighbour seeks civil law recourse for the breach of environmental remediation obligations of a polluter, that neighbour should not be put in a worse position than a regulator to have those obligations fulfilled. This is particularly true of a neighbour, such as QLT, who has been subjected to Contamination that has migrated from the 12-10 Lands to the QLT Lands. That is, QLT should not be prejudiced in the context of environmental remediation obligations just because it is not a regulator.

100 Based on the evidence and my understanding of the law, QLT does not need to be a "regulator" in order to advance its claim in an appropriate hearing concerning the issue as to whether its entitlement to environmental remediation ranks in priority to mortgagees. For purposes of the Appeal, I am of the view that there is a reasonable likelihood that the QLT claim against Capital Corp will be established notwithstanding that QLT is not a regulator. I make this determination because I believe there is a "reasonable likelihood" that the appellate direction in *Redwater* and subsequent cases concerning environmental remediation obligations will be applied to Capital Corp.

iii. The Abitibi Test &- Does QLT have a claim provable in bankruptcy?

101 QLT asserts that since the nature of the obligation breached is one of environmental remediation, its claim should be granted priority over the mortgagees at common law. In making this argument, QLT also asserts the *Abitibi* test has no application in this case because this is not a formal bankruptcy proceeding. Based on the evidence before me and my analysis of the law, I agree that Capital Corp is not under any formal bankruptcy proceeding. For the sake of completeness, and given the parallels between this case and *Redwater*, QLT asserts that Capital Corp does not meet the *Abitibi* test in any event with the result that it does not have a provable claim in bankruptcy.

102 Given the QLT assertions, I turn to address the *Abitibi* test. In *Abitibi*, the Supreme Court of Canada set out the test for determining whether a particular a regulatory obligation equates to a claim provable in bankruptcy.

103 The *Abitibi* test is: "[f]irst, 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": *Abitibi* at para 26; see also *Redwater* at para 119; and *Trident Exploration* at para 37.

104 In *Redwater*, the regulator was acting in a *bona fide* regulatory capacity and did not stand to benefit financially. The regulator in that case had the ultimate goal of having the environmental work actually performed for the benefit of third-party landowners and the public at large: *Redwater* at paras 128 and 135.

105 In this case, QLT is acting as a *bona fide* citizen and beneficiary of the duty that Capital Corp owes to its fellow citizens to remediate. QLT seeks to have Capital Corp protect the QLT Lands from the further migration of the Contamination by: (i) having the QLT Lands remediated; and (ii) implementing a protective barrier around the QLT Lands following full remediation of same. The ultimate goal of QLT is to have the environmental work actually performed and it is seeking legal recourse as a party that is impacted by the Contamination.

106 The second prong of the *Abitibi* test is not relevant because this is not a formal bankruptcy proceeding. I commented on that determination above.

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