COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER	2101-0085AC
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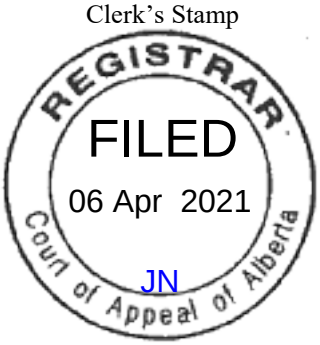

APPLICANT	ALVAREZ & MARSAL CANADA INC. in its capacity as the Court-appointed receiver and manager of MANITOK ENERGY INC.
STATUS ON APPEAL STATUS ON APPLICATION	PROPOSED APPELLANT APPLICANT
RESPONDENTS	PRENTICE CREEK CONTRACTING LTD., RIVERSIDE FUELS LTD. and ALBERTA ENERGY REGULATOR
STATUS ON APPEAL STATUS ON APPLICATION	PROPOSED RESPONDENT RESPONDENT
DOCUMENT	**BOOK OF AUTHORITIES OF THE APPLICANT**
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Tab	Style of Cause/Document Name	Citation and Pinpoint
1	*Manitok Energy Inc (Re)*	2021 ABQB 227 at paras 9, 12 and 39 – 43.
2	*Alberta Rules of Court*	Alta Reg 124/2010 at r 7.1.
3	*Orphan Well Association v Grant Thornton Ltd*	2019 SCC 5 at paras 47 – 48, 50 – 52, 86 – 87, 97 – 98, 108, 123 – 137 and 159 –160.
4	*Bankruptcy and Insolvency Act*	RSC 1985, c B-3 at ss 2 and 193.
5	*Manitok Energy Inc (Re)*	2019 ABQB 520 at paras 13 and 31.
6	*2003945 Alberta Ltd v 1951584 Ontario Inc*	2018 ABCA 48 at paras 11, 41 and 46.
7	*Bankruptcy and Insolvency General Rules*	CRC, c 368 at r 31.
8	*MNP Ltd v Wilkes*	2020 SKCA 66 at paras 24 – 35, 46 – 59 and 61 – 64.
9	*Roman Catholic Episcopal Corporation of St. George's v John Doe*	2007 NLCA 17 at paras 24 – 27 and 30.
10	*Trimor Mortgage Investment Corporation v Fox*	2015 ABCA 44 at para 10.
11	*DGDP-BC Holdings Ltd v Third Eye Capital Corp*	2021 ABCA 33 at paras 14, 18 and 21 – 27.
12	*Decker v Canada*	2009 ABCA 287 at paras 2 and 9.
13	*PricewaterhouseCoopers Inc v Perpetual Energy Inc*	2021 ABCA 16 at paras 87, 90 – 96 and 138 – 139.
14	*Panamericana de Bienes y Servicios SA v. Northern Badger Oil & Gas Ltd*	1991 ABCA 181, 81 DLR (4th) 280 at paras 32 – 34, 63 and 66.

TAB 1

2021 ABQB 227
Alberta Court of Queen's Bench

Manitok Energy Inc (Re)

2021 CarswellAlta 698, 2021 ABQB 227

In the Matter of the Notice of Intention to Make a Proposal of Manitok Energy Inc.

In the Matter of the Notice of Intention to Make a Proposal of Raimount Energy Corp.

In the Matter of the Notice of Intention to Make a Proposal of Corinthian Oil Corp.

Alvarez & Marsal Canada Inc. in its capacity as the Court-appointed receiver and manager of Manitok Energy Inc. (Applicant) and Prentice Creek Contracting Ltd. and Riverside Fuels Ltd. (Respondents)

B.E. Romaine J.

Heard:
Judgment: March 24, 2021
Docket: Calgary B201-332583, B201-332610, B201-335351

Counsel: Howard A. Gorman, Q.C., D. Aaron Stephenson, Meghan Parker, for Receiver / Trustee
Glyn L. Walters, for Prentice Creek Contracting Ltd.
Garrett S.E. Hamilton, for Riverside Fuels Ltd.
Maria Lavelle, for Alberta Energy Regulator

Subject: Insolvency; Natural Resources; Restitution
Headnote
Bankruptcy and insolvency
Natural resources
Restitution and unjust enrichment

***B.E. Romaine J.*:**

I. Introduction

1 The sole issue in this application 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.

2 In the specific circumstances of these proceedings, the respondent lien claimants, if their lien claims are valid, have priority to funds held in trust arising from the sale of certain property by the Receiver.

II. Facts

3 On February 20, 2018, Alvarez & Marsal Canada Inc. was appointed receiver and manager (the "Receiver") of all of the assets and properties, including all proceeds of sale thereof, of Manitok Energy Inc. and its wholly owned subsidiary Raimount Energy Corp. pursuant to section 243(1) of the Bankruptcy and Insolvency Act, RSC 1985, c B–3, as amended and section 13(2) of the Judicature Act, RSA 2000, c J–2.

4 Concurrently, Manitok, Raimount and another subsidiary, Corinthian Oil Corp., were deemed bankrupt and Alvarez & Marsal became the trustee in bankruptcy of each of them.

5 At the time of its insolvency, Manitok was an Alberta Energy Regulator licensee of 907 wells and 137 facilities and pipelines with an associated deemed liability for end-of-life obligations of $72.2 million.

6 Subsequently, the Receiver entered into a purchase and sale agreement with Persist Oil & Gas Inc. for certain property of the debtors. The sale approval and vesting order, filed on January 18, 2019, discharged certain lien registrations, including those of the applicants Prentice Creek Contracting Ltd. and Riverside Fuels Ltd., and required the Receiver to establish separate holdbacks for Prentice and Riverside in the total amount of $581,778.48 to stand in the place and stead of their lien registrations pending further order of the Court. The lien claims arise from services provided prior to the receivership.

7 The sale to Persist had not closed when the Supreme Court decision in Orphan Well Association v Grant Thornton Ltd.,2019 SCC 5 (“ was released on January 31, 2019.

8 The sale of Persist closed on April 15, 2019. Under the purchase and sale agreement, Persist assumed all environmental liabilities with respect to the assets that are the subject of the discharged liens.

9 The purchase and sale agreement includes the following terms:

> 11. For the purposes of determining the nature and priority of Claims, and pending any further or other distribution Order of this Court.
>
> > (a) The net proceeds from the sale of the Purchased Assets (to be held in an interest bearing trust account by the Receiver) shall stand in the place and stead of the Purchased Assets, and from and after the delivery of the Receiver's Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale . . . (emphasis added)
>
> 12 . . . the amount to be [held in trust by the Receiver] shall include at least the following with respect to the following contingent or disputed claims:
>
> > (a) $119,093.08 in relation to builders' lien claims filed by [Riverside] in relation to certain Purchased Assets;
> >
> > (b) $462,685.40 in relation to builders' lien claims filed by [Prentice] in relation to certain Purchased Assets; . . .

10 Although the agreement and the order have been amended, the parties are in agreement that the amendments do not impact the provisions relating to the lien holdbacks.

11 In accordance with a Partial Discharge Order filed July 9, 2019, the Receiver renounced and disclaimed and was discharged over the majority of the remaining unsold oil and gas assets in the Manitok estate. Despite the Receiver's further efforts in collaboration with the AER, many of the retained assets had proved to be unsaleable.

12 The AER issued abandonment and reclamation orders to Manitok on August 1, August 12, August 21 and August 30, 2019, including to its remaining working interest participants. Where there were no remaining responsible parties, the AER designated the sites as "orphan" to enable the abandonment and reclamation work to be conducted by the Orphan Well Association. It is anticipated that end-of-life obligations are in the neighbourhood of $44.5 million, substantially more than the proceeds of sale of the debtors' estates.

13 According to the lienholders, the AER orders do not relate to any of the assets sold to Persist.

14 The Receiver anticipates renouncing and disclaiming the remaining unsold assets. Total realizations from the receivership will be substantially less than the cost of satisfying the end-of-life obligations associated with the discharged assets.

15 Although the parties have agreed to proceed with this application on the basis that the lien claims are valid, the Receiver has concerns about such validity, and reserved the right to dispute that issue if the lien claimants are found to have priority over end-of-life obligations.

16 The most significant stakeholders in the receivership are the National Bank of Canada and the Alberta Energy Regulator. The NBC continues to hold a first charge over all of the undistributed assets of the debtors and the proceeds therefrom. As a result of the *Redwater* decision, the AER is a significant stakeholder in the receivership even though it is not a "creditor" *per se* (*Redwater* at para 122).

III. Analysis

A. Prentice Creek Contracting Ltd.

17 Prentice Creek submits that it was not the intention of the decision in *Redwater* to extend the enforcement of end-of-life obligations against specific assets improved by a lienholder that are unrelated to the environmental condition or damaged properties of Manitok. Prentice Creek notes that its liens were registered against property that was sold to Persist, which has assumed all of the end-of-life obligations of that property.

18 The work performed by Prentice Creek related to the reclamation and clean-up of specific oil and gas sites.

19 The Receiver submits that, in accordance with Redwater, end-of-life obligations must be satisfied in preference to any builders' liens that may otherwise be first ranking.

B. Riverside Fuels Ltd.

20 Riverside submits that the holdback funds should be used to satisfy the debt owing to Riverside on the basis of equity and unjust enrichment. It notes that the materials furnished and services provided enhanced the particular assets, and that the liened assets are unrelated to the environmental claims and end-of-life obligations for the remaining assets.

21 Riverside's liens relate to the provision of fuels and lubricants on a periodic basis for use at specific production and operation sites. While Riverside continued to provide services after the commencement of the receivership, its lien claims relate to services provided before that time.

22 The Receiver responds with the same submission as it made with respect to Prentice Creek: end-of-life obligations must be satisfied in preference to builders' liens that may otherwise be first ranking.

C. The Effect of the Redwater Decision on the Claims

23 In order to determine whether the *Redwater* decision is dispositive of this application, it is necessary to analyze the decision.

24 Counsel for the Receiver has provided a useful summary of the *Redwater* decision as follows:

- Trustees in bankruptcy are bound by and must act in compliance with valid provincial laws, provided the obligations thereunder do not constitute provable claims and no conflict engages the paramountcy doctrine.

- Regulatory laws governing abandonment and reclamation are valid provincial laws of general application. They do not conflict with the BIA or frustrate the purpose of the BIA, even though estate assets may have to be expended to comply with provincial regulatory laws.

• Abandonment and reclamation obligations are not provable claims because a regulator is not a creditor when enforcing a public duty. Further, any right of reimbursement in the circumstances of the case was too speculative to be accepted as a provable claim by the AER.

• In the result, the Redwater estate must comply with ongoing environmental obligations that are not claims provable in bankruptcy (para 162).

25 However, as submitted by the lien claimants, the facts and certain comments of the Court in *Redwater* are relevant to add context to the findings of the Court.

26 Redwater was the AER licensee of about 84 oil and gas wells, seven facilities, and 36 pipelines. Of these, only 19 wells were producing: the remainder were inactive. Most of these were spent and burdened with abandonment and reclamation liabilities that exceeded their value (*Redwater*, para 48).

27 Redwater was placed into receivership on May 12, 2015. Within two days, the AER advised the Receiver that it must fund its abandonment obligations before it distributed any funds or finalized a proposal to creditors. The AER warned that it would not approve a transfer unless both transferee and transferor would be in a position to fulfil all regulatory obligations (para 47).

28 In response, the Receiver advised that it was only taking possession and control of the productive wells and, in its view, it had no obligation with respect to renounced assets (para 50). Almost immediately, the AER issued orders requiring Redwater to suspend and abandon the renounced assets, such work to be carried out within a short period of time (para 51).

29 Soon after that, the AER and the OWA applied for an order declaring that the Receiver's renunciation of assets was void, requiring the Receiver to comply with the abandonment orders and requiring it to fulfill its statutory obligations as licensee in relation to the abandonment, reclamation and remediation of all of Redwater's licensed properties. The AER did not seek to hold the Receiver liable for these obligations beyond the assets in the Redwater estate.

30 The Receiver cross-applied, seeking approval to pursue a sales process excluding the renounced assets and an order directing that the AER could not prevent the transfer of the licenses of the retained assets on the basis of, among other things, a failure to comply with the abandonment orders, refusal to take possession of the renounced assets or Redwater's outstanding debts to the regulator (para 52).

31 The chambers judge approved the sale procedure. It appears that at the time of the hearing before the Supreme Court, Redwater's assets had been sold and the sale proceeds were being held in trust (para. 108).

32 Chief Justice Wagner made certain comments in the majority decision that are relevant to this application.

33 At para 75, on the issue of paramountcy, he noted that 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."

34 In interpreting section 14.06(4) of the BIA, the Chief Justice stated that "[u]nder 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", thus making it clear that s.14.06(4)'s scope in limiting the personal liability of a trustee is not narrowed to disclaimer in the formal sense (para 87).

35 He notes further that "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" (para 86).

36 In para 96, the Court noted that, prior to 1997, "it was unclear what effect 'disclaimers' 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*" (emphasis added) (see also para 97).

37 Thus, the Court concluded, disclaimer by a trustee "has no effect on the bankrupt estate's continuing liability for orders to remedy any environmental condition or damage" (para 98). "[The trustee] continues to have the responsibilities and duties of a 'licensee' *to the extent that assets remain in the Redwater estate*" (para 114).

38 In the majority's conclusion on whether end-of-life obligations are claims provable in bankruptcy, Wagner, CJ found that such obligations are not claims, and therefore do not conflict with the general priority scheme in the *BIA*. In support of this conclusion, he notes at para 159:

> 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 Order 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. (emphasis added)

39 It is here that the distinction between the facts of Redwater and the facts in this case becomes apparent. In this case, the AER is seeking to require Manitok to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage represented by the abandonment orders it has issued, assets over which Manitok no longer has ownership or control. This change in ownership occurred prior to any action by the AER, so that the orders a) do not apply to property over which the respondents claim a lien, and b) do not apply to contiguously owned property at the time.

40 The Supreme Court in paragraph 159 finds support for the conclusion that requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the *BIA* by referring to section 14.06(7), which allows a regulator to place a charge on the real property of the debtor that is contaminated or affected by an environmental condition, but only on that property or contiguous property.

41 The Court notes that abandonment orders "replicate s.14.06(7)'s effect". Clearly, the decision of the Court in *Redwater* expands the limited scope of section 14.06(7), but it does not appear to expand it to cover trust funds relating to the proceeds of sale of property to which the debtors no longer have the status of "owner, party in control, or licensee" at the time the orders were issued.

42 Thus, the findings in *Redwater* do not extend to a situation, such as in this case, where property unrelated to property that is affected by an environmental condition is sold to a new licensee before any abandonment or reclamation orders are made, and where the new licensee assumes the inherent end-of-life obligations for that property. In this case, the AER is not at risk for any current costs of reclamation of the transferred property.

43 The lien claimants were protected by the purchase agreement terms that were approved by court order. As the funds have been held in trust in accordance with the order and the purchase and sale agreement pending resolution of the claims, they are not property of the estate, and would not become part of the estate unless the claims are denied. As the Court in *Redwater* comments at para 114, a trustee, or Receiver/trustee in this case, has the responsibilities and duties of a licensee "to the extent that assets remain in the . . . estate".

44 Therefore, the decision in Redwater does not provide priority to the trust funds to the AER in these circumstances. Assuming that the liens are valid, and that they only refer to the Persist lands, there is no reason to deny the lien holders' claims to the proceeds in trust.

45 It is not necessary to consider the claims of other creditors, as this application involves only the amounts held in trust.

D. Other Submissions

1. Unjust Enrichment

46 Both Prentice Creek and Riverside submit that the release of the trust funds to satisfy end-of-life obligations of Manitok would be an unjust enrichment of the AER. However, whether or not the enrichment and corresponding deprivation requirements for a finding of unjust enrichment could be satisfied in this case, there would have been a juristic reason for the enrichment if I am incorrect in finding that the decision in *Redwater* does not extend to the facts in this case, arising from the statutory obligation. Therefore, if I am incorrect in my interpretation of *Redwater*, I would not find a constructive trust arising from unjust enrichment to be an appropriate remedy.

2. Equity and Fairness

47 Riverside submits that this Court could find for the lien claimants on the basis of equity and fairness. Neither the Judicature Act nor the *BIA* give the Court carte blanche to do what is fair despite binding authority. In any event, the same argument could be made on behalf of any creditor of the debtors that supplied goods or services, particularly secured creditors, who prior to the decision in *Redwater* had reason to think that they had done all that was necessary or possible to ensure the priority of their claims.

3. Status of Lien Claimants

48 Riverside also submits that lien claimants are not creditors; that they have a proprietary claim that is not subject to the *BIA* priority scheme. This is incorrect. The essence of the lien provisions is that they create a lien over the property that was improved or remediated, and if the property is sold, the lien goes with the property, or, in this case the proceeds of sale held in trust. It is a security interest subject to the priority scheme of the *BIA* in the same way as other provable claims: BIA section 2, definition of "secured creditor".

IV. Conclusion

49 In the specific circumstances of this case, I find that the *Redwater* decision does not affect the rights of Prentice Creek and Riverside to the trust funds arising from the Persist purchase of Manitok's property.

50 If the parties are unable to agree on costs, they may make written submissions on that issue.

TAB 2

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 7 — Resolving Claims Without Full Trial
Division 1 — Trial of Particular Questions or Issues

Alta. Reg. 124/2010, s. 7.1

s 7.1 Application to resolve particular questions or issues

Currency

7.1Application to resolve particular questions or issues

7.1(1) On application, the Court may

(a) order a question or an issue to be heard or tried before, at or after a trial for the purpose of

(i) disposing of all or part of a claim,

(ii) substantially shortening a trial, or

(iii) saving expense,

(b) in the order or in a subsequent order

(i) define the question or issue, or

(ii) in the case of a question of law, approve or modify the issue agreed by the parties,

(c) stay any other application or proceeding until the question or issue has been decided, or

(d) direct that different questions of fact in an action be tried by different modes.

7.1(2) If the question is a question of law, the parties may agree

(a) on the question of law for the Court to decide,

(b) on the remedy resulting from the Court's opinion on the question of law, or

(c) on the facts or that the facts are not in issue.

7.1(3) If the Court is satisfied that its determination of a question or issue substantially disposes of a claim or makes the trial of the issue unnecessary, it may

(a) strike out a claim or order a commencement document or pleading to be amended,

(b) give judgment on all or part of a claim and make any order it considers necessary,

(c) make a determination on a question of law, or

(d) make a finding of fact.

7.1(4) Part 5, Division 2 applies to an application under this rule unless the parties otherwise agree or the Court otherwise orders.

Currency
Alberta Current to Gazette Vol. 117:2 (January 30, 2021)

Concordance References
Rules Concordance 56, Points of law & definition of issues
Rules Concordance 57, Special case-stated case
Rules Concordance 73, Preparation of judgments

End of Document

TAB 3

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.)

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Lewis Manning, Toby Kruger, for Intervener, Canadian Association of Petroleum Producers
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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
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 --- 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-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 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

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 — 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 — 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.

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

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

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

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.

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

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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Husky Oil Operations Ltd. v. Minister of National Revenue (1995), [1995] 10 W.W.R. 161, 188 N.R. 1, 24 C.L.R. (2d) 131, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, 1995 CarswellSask 739, 1995 CarswellSask 740 (S.C.C.) — considered in a minority or dissenting opinion

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Mitchell v. Peguis Indian Band (1990), [1990] 2 S.C.R. 85, 71 D.L.R. (4th) 193, 3 T.C.T. 5219, 67 Man. R. (2d) 81, 110 N.R. 241, [1990] 3 C.N.L.R. 46, 1990 CarswellMan 209, 1990 CarswellMan 380, [1990] 5 W.W.R. 97 (S.C.C.) — considered in a minority or dissenting opinion

Multiple Access Ltd. v. McCutcheon (1982), [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1, 44 N.R. 181, 18 B.L.R. 138, 1982 CarswellOnt 128, 1982 CarswellOnt 738 (S.C.C.) — considered in a minority or dissenting opinion

New Skeena Forest Products Inc. v. Kitwanga Lumber Co. (2005), 2005 BCCA 154, 2005 CarswellBC 578, 9 C.B.R. (5th) 267, 39 B.C.L.R. (4th) 327, (sub nom. *New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd.)* 251 D.L.R. (4th) 328, (sub nom. *New Skeena Forest Products Inc. v. Hull (Don) & Sons Contracting Ltd.)* 210 B.C.A.C. 185, (sub nom. *New Skeena Forest Products Inc. v. Hull (Don) & Sons Contracting Ltd.)* 348 W.A.C. 185 (B.C. C.A.) — refered to in a minority or dissenting opinion

Nortel Networks Corp., Re (2013), 2013 ONCA 599, 2013 CarswellOnt 13651, 78 C.E.L.R. (3d) 43, 6 C.B.R. (6th) 159, 311 O.A.C. 101, 368 D.L.R. (4th) 122 (Ont. C.A.) — considered in a minority or dissenting opinion

Northstar Aerospace Inc., Re (2013), 2013 ONCA 600, 2013 CarswellOnt 13653, 8 C.B.R. (6th) 154 (Ont. C.A.) — considered in a minority or dissenting opinion

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.) — refered to in a minority or dissenting opinion

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R. v. H. (L.) (2008), 2008 SCC 49, 2008 CarswellNS 454, 2008 CarswellNS 455, (sub nom. *R. v. H. (L.T.))* 234 C.C.C. (3d) 301, 59 C.R. (6th) 1, (sub nom. *R. v. H. (L.T.))* 297 D.L.R. (4th) 1, (sub nom. *R. v. L.T.H.)* 379 N.R. 247, (sub nom. *R. v. L.T.H.)* 268 N.S.R. (2d) 200, (sub nom. *R. v. L.T.H.)* 857 A.P.R. 200, (sub nom. *R. v. L.T.H.)* [2008] 2 S.C.R. 739, (sub nom. *R. v. H. (L.T.))* 179 C.R.R. (2d) 279 (S.C.C.) — refered to in a minority or dissenting opinion

R. v. Morgentaler (1975), [1976] 1 S.C.R. 616, 30 C.R.N.S. 209, 4 N.R. 277, 20 C.C.C. (2d) 449, 53 D.L.R. (3d) 161, 1975 CarswellQue 3, 1975 CarswellQue 31F (S.C.C.) — considered in a minority or dissenting opinion

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Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd. (2015), 2015 SCC 53, 2015 CSC 53, 2015 CarswellSask 680, 2015 CarswellSask 681, 31 C.B.R. (6th) 1, [2016] 1 W.W.R. 423, 391 D.L.R. (4th) 383, (sub nom. *Lemare Lake Logging Ltd. v. 3L Cattle Co.)* 477 N.R. 26, [2015] 3 S.C.R. 419, (sub nom. *Lemare Lake Logging Ltd. v. 3L Cattle Co.)* 467 Sask. R. 1, (sub nom. *Lemare Lake Logging Ltd. v. 3L Cattle Co.)* 651 W.A.C. 1 (S.C.C.) — refered to in a minority or dissenting opinion

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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.*:

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Generally — referred to

s. 2 "claim provable in bankruptcy, provable claim or claim provable" — considered

s. 2 "creditor" — considered

s. 14.06 [en. 1992, c. 27, s. 9(1)] — considered

s. 14.06(1.2) [en. 2005, c. 47, s. 17] — considered

s. 14.06(2) [en. 1992, c. 27, s. 9(1)] — considered

s. 14.06(4) [en. 1997, c. 12, s. 15] — considered

s. 14.06(4)(a)(ii) [en. 1997, c. 12, s. 15] — considered

s. 14.06(4)(c) [en. 1997, c. 12, s. 15] — referred to

s. 14.06(4)-14.06(8) [en. 1997, c. 12, s. 15] — referred to

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

s. 14.06(8) [en. 1997, c. 12, s. 15] — considered

s. 20 — referred to

s. 69.3(1) [en. 1992, c. 27, s. 36(1)] — considered

s. 69.3(2) [en. 1992, c. 27, s. 36(1)] — considered

s. 72(1) — considered

s. 80 — referred to

s. 121(1) — considered

s. 121(2) — considered

s. 135(1.1) [en. 1997, c. 12, s. 89(1)] — considered

s. 136(1) — considered

s. 141 — considered

s. 197(3) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 91 ¶ 21 — considered

s. 92 ¶ 13 — considered

s. 92A(1)(c) — considered

Environmental Protection Act, S.N. 2002, c. E-14.2

Generally — referred to

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

Generally — referred to

s. 1(ddd) "reclamation" — considered

ss. 112-122 — referred to

s. 134(b) "operator" — considered

s. 134(b) "operator" (vi) — considered

s. 137 — considered

s. 140 — considered

s. 142(1)(a)(ii) — considered

ss. 227-230 — referred to

s. 240 — referred to

s. 240(3) — referred to

s. 245 — referred to

Oil and Gas Conservation Act, R.S.A. 2000, c. O-6

Generally — referred to

s. 1(1)(a) "abandonment" — considered

s. 1(1)(w) "facility" — considered

s. 1(1)(cc) "licensee" — considered

s. 1(1)(eee) "well" — considered

s. 11(1) — considered

s. 12(1) — considered

s. 18(1) — referred to

s. 24(2) — referred to

s. 25 — referred to

s. 27(3) — considered

ss. 27-30 — referred to

s. 30(5) — referred to

s. 30(6) — referred to

s. 68(d) "facility" — considered

s. 70(1) — considered

s. 70(2)(a) — considered

s. 73(1) — referred to

s. 73(2) — referred to

s. 106 — referred to

s. 106(3)(a) — referred to

s. 106(3)(b) — referred to

s. 106(3)(c) — referred to

s. 106(3)(d) — referred to

s. 106(3)(e) — referred to

s. 108 — referred to

s. 110 — referred to

Pipeline Act, R.S.A. 2000, c. P-15

Generally — referred to

s. 1(1)(a) "abandonment" — considered

s. 1(1)(n) "licensee" — considered

s. 1(1)(t) "pipeline" — considered

s. 6(1) — referred to

s. 9(1) — referred to

s. 23 — considered

ss. 23-26 — referred to

ss. 51-54 — referred to

Responsible Energy Development Act, S.A. 2012, c. R-17.3

s. 2(1)(a) — considered

s. 2(2)(h) — referred to

s. 3(1) — referred to

s. 28 — referred to

s. 29 — referred to

Surface Rights Act, R.S.A. 2000, c. S-24

s. 1(h) "operator" — considered

s. 15 — considered

Statutes considered by *Côté J.* (dissenting):

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

Generally — referred to

s. 14.06 [en. 1992, c. 27, s. 9(1)] — considered

s. 14.06(2) [en. 1992, c. 27, s. 9(1)] — considered

s. 14.06(4) [en. 1997, c. 12, s. 15] — considered

s. 14.06(5) [en. 1997, c. 12, s. 15] — considered

s. 14.06(6) [en. 1997, c. 12, s. 15] — considered

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

ss. 16-38 — referred to

s. 20(1) — considered

s. 40 — referred to

s. 72(1) — considered

ss. 121-154 — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

s. 11.8(8) [en. 1997, c. 12, s. 124] — referred to

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

Generally — referred to

s. 91 ¶ 21 — considered

Environmental Protection Act, S.N. 2002, c. E-14.2

Generally — referred to

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

Generally — referred to

s. 240(3) — considered

Oil and Gas Conservation Act, R.S.A. 2000, c. O-6

Generally — referred to

s. 1(1)(cc) "licensee" — considered

s. 27 — referred to

s. 29 — referred to

s. 30 — referred to

s. 30(5) — referred to

s. 70(1)(a)(ii) — referred to

s. 70(2) — considered

s. 74 — referred to

s. 108 — referred to

s. 110(1) — referred to

Pipeline Act, R.S.A. 2000, c. P-15
Generally — referred to

s. 1(1)(n) "licensee" — considered

s. 23 — referred to

s. 25 — referred to

s. 52(2) — referred to

s. 54(1) — referred to

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

Alberta Energy Regulator Administration Fees Rules, Alta. Reg. 98/2013
Generally — referred to

Oil and Gas Conservation Rules, Alta. Reg. 151/71
R. 3.012 — referred to

R. 3.012(d) — considered

Rules considered by *Côté J.* (dissenting):

Oil and Gas Conservation Rules, Alta. Reg. 151/71
R. 1.100(2) — referred to

R. 3.012 — referred to

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

North American Free Trade Agreement, 1992, C.T.S. 1994/2; 32 I.L.M. 296,612
Generally — referred to

Treaties considered by *Côté J.* (dissenting):

North American Free Trade Agreement, 1992, C.T.S. 1994/2; 32 I.L.M. 296,612
Generally — referred to

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

Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12
Conservation and Reclamation Regulation, Alta. Reg. 115/93

Generally — referred to

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Orphan Fund Delegated Administration Regulation, Alta. Reg. 45/2001

Generally — referred to

Regulations considered by *Côté J.* (dissenting):

Oil and Gas Conservation Act, R.S.A. 2000, c. O-6
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Generally — referred to

s. 3(2)(b) — considered

s. 6 — considered

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Para. 197 — considered

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Words and phrases considered:

facility

A "facility" is broadly defined and includes any building, structure, installation or equipment that is connected to or associated with the recovery, development, production, handling, processing, treatment or disposal of oil and gas resources (*OGCA*[Oil and Gas Conservation Act, R.S.A. 2000, c. O-6], s. 1(1)(w)).

operator

. . . an "operator", that is, the person having the right to a mineral or the right to work it (*Surface Rights Act*, R.S.A. 2000, c. S-24, ss. 1(h) and 15).

orphans

. . . "orphans", which are oil and gas assets and their sites left behind in an improperly abandoned or unreclaimed state by defunct companies at the close of their insolvency proceedings.

profit à prendre

Canadian courts characterize a mineral lease that allows a company to exploit oil and gas resources as a *profit à prendre*. It is not disputed that a *profit à prendre* is a form of real property interest held by the company (*Berkheiser v. Berkheiser*, [1957] S.C.R. 387 (S.C.C.)).

Termes et locutions cités:

exploitant

[Un] « exploitant » [est] la personne qui a droit à une substance minérale ou le droit de la travailler (*Surface Rights Act*, R.S.A. 2000, c. S-24, al. 1(h) et art. 15).

installation

L'« installation » est définie au sens large et englobe tous les bâtiments, structures, installations et matériaux qui sont liés ou associés à la récupération, à la mise en valeur, à la production, à la manutention, au traitement ou à l'élimination de ressources pétrolières et gazières ([*Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6], art. 1(1)(w)).

orphelins

[L]es « orphelins » [sont] les biens pétroliers et gaziers ainsi que leurs sites délaissés sans que les processus en question n'aient été correctement effectués par les sociétés liquidées à la fin de leur procédure d'insolvabilité.

profit à prendre

Les tribunaux canadiens qualifient le bail d'exploitation minière permettant à une société d'exploiter des ressources pétrolières et gazières de profit à prendre. Il n'est pas contesté qu'un profit à prendre constitue une forme d'intérêt détenue par la société sur un bien réel (*Berkheiser c. Berkheiser*, [1957] R.C.S. 387).

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

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

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

I. Introduction

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

2 The question in this appeal is what happens to these obligations when a company is bankrupt and a trustee in bankruptcy is charged with distributing its assets among various creditors according to the rules in the *Bankruptcy and Insolvency Act*,

R.S.C. 1985, c. B-3 ("*BIA*"). Redwater Energy Corporation ("Redwater") is the bankrupt company at the centre of this appeal. Its principal assets are 127 oil and gas assets — wells, pipelines and facilities — and their corresponding licences. A few of Redwater's licensed wells are still producing and profitable. The majority of the wells are spent and burdened with abandonment and reclamation liabilities that exceed their value.

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

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

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

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

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

II. Background

A. Alberta's Regulatory Regime

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

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

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

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

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

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

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

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

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

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

18 The Licensee Liability Rating Program, which was, at the time of Redwater's insolvency, set out in *Directive 006: Licensee Liability Rating (LLR) Program and License Transfer Process* (March 12, 2013) ("Directive 006") is one means by which the Regulator seeks to ensure that end-of-life obligations will be satisfied by licensees rather than being offloaded onto the Alberta public. As part of this program, the Regulator assigns each company a Liability Management Rating ("LMR"), which is the ratio between the aggregate value attributed by the Regulator to a company's licensed assets and the aggregate liability attributed by the Regulator to the eventual cost of abandoning and reclaiming those assets. For the purpose of calculating the LMR, all the licences held by a given company are treated as a package, without any segregation or parcelling of assets. A licensee's LMR is calculated on a monthly basis and, where it dips below the prescribed ratio (1.0 at the time of Redwater's insolvency), the licensee is required to pay a security deposit. The security deposit is added to the licensee's "deemed assets" and must bring its LMR back up to the ratio prescribed by the Regulator. If the required security deposit is not paid, the Regulator may cancel or suspend the company's licences (*OGCA*, s. 25). As an alternative to posting security, the licensee can perform end-of-life obligations or transfer licences (with approval) in order to bring its LMR back up to the prescribed level.

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

20 As discussed in greater detail below, if either the transferor or the transferee would have a post-transfer LMR below 1.0, the Regulator would refuse to approve the licence transfer. In such a situation, the Regulator would insist on certain remedial steps being taken to ensure that neither LMR would drop below 1.0. Although Directive 006, as it was in the 2013 version,

required both the transferee and transferor to have a post transfer LMR of at least 1.0, during this litigation, the Regulator stated that, when licensees are in receivership or bankruptcy, its working rule is to approve transfers as long as they do not cause a deterioration in the transferor's LMR, even where its LMR will remain below 1.0 following the transfer. The explanation for this working rule is that it helps to facilitate purchases. The Regulator's position is that the Licensee Liability Rating Program continues to apply to the transfer of licences as part of insolvency proceedings.

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

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

23 The Regulator has delegated its statutory authority to abandon and reclaim orphans to the OWA (*Orphan Fund Delegated Administration Regulation*, Alta. Reg. 45/2001), a non-profit organization overseen by an independent board of directors. It is funded almost entirely through the industry-wide levy described above, 100 percent of which is remitted to it by the Regulator. The OWA has no power to seek reimbursement of its costs. However, once it has completed its environmental work, it may be reimbursed up to the value of any security deposit held by the Regulator to the credit of the licensee of the orphans. In recent years, the number of orphans in Alberta has increased rapidly. For example, the number of new orphan wells increased from 80 in the 2013-14 years to 591 in the 2014-15 years.

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

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

26 A licensee that contravenes or fails to comply with an order of the Regulator, or that has an outstanding debt to the Regulator in respect of abandonment or reclamation costs, is subject to a number of potential enforcement measures. The Regulator may suspend operations, refuse to consider licence applications or licence transfer applications (*OGCA*, s. 106(3)(a), (b) and (c)), or require the payment of security deposits, generally or as a condition of granting any further licences, approvals or transfers (*OGCA*, s. 106(3)(d) and (e)). Where a licensee contravenes the Act, regulations or rules, any order or direction of the Regulator,

or any condition of a licence, the Regulator may prosecute the licensee for a regulatory offence and a fine may be imposed as a penalty, although the licensee can raise a due diligence defence (*OGCA*, ss. 108 and 110). A similar scheme applies with respect to pipelines (*Pipeline Act*, ss. 51 to 54) and the *EPEA* contains similar debt-creating provisions with respect to environmental protection orders. The *EPEA* also provides for the prosecution of regulatory offences in cases of non-compliance, with an available due diligence defence. However, as noted, a trustee's liability in relation to environmental protection orders is capped at estate assets, unless the trustee is guilty of gross negligence or wilful misconduct (*EPEA*, ss. 227 to 230, 240 and 245).

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

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

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

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

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

B. The Relevant Provisions of the BIA

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

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

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

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

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

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

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

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

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

> First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. [Emphasis in original.]

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

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

40 The *BIA* establishes a comprehensive priority scheme for the satisfaction of the provable claims asserted against the bankrupt in the collective proceeding. Section 141 sets out the general rule, which is that all creditors rank equally and share rateably in the bankrupt's assets. However, the rule set out in s. 141 applies "[s]ubject to [the *BIA*]". Section 136(1) lists the claims of preferred creditors and the order of priority for their payment. It also states that this order of priority is "[s]ubject to the rights of secured creditors". Under s. 69.3(2), the stay of proceedings does not prevent secured creditors from realizing their

security interest. The *BIA* therefore sets out a priority scheme for paying claims provable in bankruptcy, with secured creditors being paid first, preferred creditors second and unsecured creditors last (see *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 (S.C.C.) , at paras. 32-35).

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

42 Section 14.06(2) reads as follows:

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

43 Section 14.06(4) reads as follows:

> **(4)** Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of requiring a trustee to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,
>
> (a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, or during the period of the stay referred to in paragraph (b), the trustee
>
> (i) complies with the order, or
>
> (ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property, or any right in any immovable, affected by the condition or damage;
>
> (b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a), within ten days after the order is made or within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, by
>
> (i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the trustee to contest the order, or
>
> (ii) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or
>
> (c) if the trustee had, before the order was made, abandoned or renounced or been divested of any interest in any real property, or any right in any immovable, affected by the condition or damage.

44 As I will discuss, a main point of contention between the parties is the very different interpretations they ascribe to s. 14.06(4) of the *BIA*. I note that s. 14.06(4)(a)(ii), which is relied upon by GTL, refers to a trustee who "abandons, disposes of or otherwise releases any interest in any real property". The word "disclaim" is used in these reasons, as it has been throughout this litigation, as a shorthand for these terms.

45 I turn now to a brief discussion of the events of the Redwater bankruptcy.

C. The Events of the Redwater Bankruptcy

46 Redwater was a publicly traded oil and gas company. It was first granted licences by the Regulator in 2009. On January 31 and August 19, 2013, ATB advanced funds to Redwater and, in return, was granted a security interest in Redwater's present and after-acquired property. ATB lent funds to Redwater with full knowledge of the end-of-life obligations associated with its assets. In mid-2014, Redwater began to experience financial difficulties. Upon application by ATB, GTL was appointed receiver for Redwater on May 12, 2015. At that time, Redwater owed ATB approximately $5.1 million.

47 Upon being advised of the receivership, the Regulator sent GTL a letter dated May 14, 2015, setting out its position. The Regulator noted that the *OGCA* and the *Pipeline Act* included both receivers and trustees in the definition of "licensee". The Regulator stated that it was not a creditor of Redwater and that it was not asserting a "provable claim in the receivership". Accordingly, notwithstanding the receivership, Redwater remained obligated to comply with all regulatory requirements, including abandonment obligations for all licensed assets. The Regulator stated that GTL was legally obligated to fulfill these obligations prior to distributing any funds or finalizing any proposal to creditors. It warned that it would not approve the transfer of any of Redwater's licences unless it was satisfied that both the transferee and the transferor would be in a position to fulfill all regulatory obligations. It requested confirmation that GTL had taken possession of Redwater's licensed properties and that it was taking steps to comply with all of Redwater's regulatory obligations.

48 At the time it ran into financial difficulties, Redwater was licensed by the Regulator for 84 wells, 7 facilities and 36 pipelines, all in central Alberta. The vast majority of its assets were these oil and gas assets. At the time GTL was appointed receiver, 19 of the wells and facilities were producing and the remaining 72 were inactive or spent. There were working interest participants in several of the wells and facilities. Redwater's LMR did not drop below 1.0 until after it went into receivership, so it never paid any security deposits to the Regulator.

49 By September 2015, Redwater's LMR had dropped to 0.93. The net value of its deemed assets and its deemed liabilities was negative $553,000. The 19 producing wells and facilities for which Redwater was the licensee would have had an LMR of 2.85 and a deemed net value of $4.152 million. The remaining 72 wells and facilities for which Redwater was the licensee would have had an LMR of 0.30 and a deemed net value of negative $4.705 million. Given that Redwater was in receivership, the Regulator's position was that it would approve the transfer of Redwater's licences only if the transfer did not cause a deterioration in its LMR.

50 In its Second Report to the Alberta Court of Queen's Bench dated October 3, 2015, GTL explained why it had concluded that it could not meet the Regulator's requirements. GTL had concluded that the cost of the end-of-life obligations for the spent wells would likely exceed the sale proceeds for the productive wells. It viewed a sale of the non-producing wells — even if bundled with producing wells — as unlikely. If such a sale were possible, the purchase price would be reduced by the end-of-life obligations, negating the benefit to the estate. Based on this assessment, by letter dated July 3, 2015, GTL informed the Regulator that it was taking possession and control only of Redwater's 17 most productive wells (including a leaking well that was subsequently abandoned), 3 associated facilities and 12 associated pipelines ("Retained Assets"), and that, pursuant to para. 3(a) of the Receivership Order, it was not taking possession or control of any of Redwater's other licensed assets ("Renounced Assets"). GTL's position was that it had no obligation to fulfill any regulatory requirements associated with the Renounced Assets.

51 In response, on July 15, 2015, the Regulator issued orders under the *OGCA* and the *Pipeline Act* requiring Redwater to suspend and abandon the Renounced Assets ("Abandonment Orders"). The orders required abandonment to be carried out immediately where there were no other working interest participants and, by September 18, 2015, where there were other working interest participants. The Regulator stated that it considered the Renounced Assets an environmental and safety hazard and that s. 3.012(d) of the *Oil and Gas Conservation Rules* required a licensee to abandon wells or facilities so considered. In issuing the Abandonment Orders, the Regulator also relied on ss. 27 to 30 of the *OGCA* and ss. 23 to 26 of the *Pipeline Act*. If the Abandonment Orders were not complied with, the Regulator threatened to abandon the assets itself and to sanction

Redwater through the use of s. 106 of the *OGCA*. The Regulator further stated that, once abandonment had taken place, the surface would need to be reclaimed and reclamation certificates obtained in accordance with s. 137 of the *EPEA*.

52 On September 22, 2015, the Regulator and the OWA filed an application for a declaration that GTL's renunciation of the Renounced Assets was void, an order requiring GTL to comply with the Abandonment Orders, and an order requiring GTL to "fulfill the statutory obligations as licensee in relation to the abandonment, reclamation and remediation" of all of Redwater's licensed properties (A.R., vol. II, at p. 41). The Regulator did not seek to hold GTL liable for these obligations beyond the assets remaining in the Redwater estate. GTL brought a cross-application on October 5, 2015, seeking approval to pursue a sales process excluding the Renounced Assets. GTL sought a court order directing that the Regulator could not prevent the transfer of the licences associated with the Retained Assets on the basis of, *inter alia*, the LMR requirements, failure to comply with the Abandonment Orders, refusal to take possession of the Renounced Assets or any outstanding debts owed by Redwater to the Regulator. GTL did not seek to foreclose the possibility that the Regulator might have some other valid reason to reject a proposed transfer.

53 A bankruptcy order was issued for Redwater on October 28, 2015, and GTL was appointed as trustee. GTL sent another letter to the Regulator on November 2, 2015, this time invoking s. 14.06(4)(a)(ii) of the *BIA* in relation to the Renounced Assets. The Abandonment Orders remain outstanding.

D. Judicial History

(1) Court of Queen's Bench of Alberta

54 The chambers judge concluded that s. 14.06 of the *BIA* was designed to permit trustees to disclaim property where this was a rational economic decision in light of the environmental condition affecting the property. Personal liability of the trustee was not a condition precedent to the power to disclaim. The chambers judge accordingly found an operational conflict between s. 14.06 of the *BIA* and the definition of "licensee" in the *OGCA* and the *Pipeline Act*. Under s. 14.06 of the *BIA*, GTL could renounce assets and not be responsible for the associated environmental obligations. However, under the *OGCA* and the *Pipeline Act*, GTL could not renounce licensed assets because the definition of "licensee" included receivers and trustees, so GTL remained liable for environmental obligations.

55 Applying the test from *Abitibi*, the chambers judge concluded that, although in a "technical sense" it was not sufficiently certain that the Regulator or the OWA would carry out the Abandonment Orders and assert a monetary claim to have its costs reimbursed, the situation met what was intended by the Court in *Abitibi* because the Abandonment Orders were "intrinsically financial" (para. 173). Forcing GTL, as a "licensee", to comply with the Abandonment Orders would therefore frustrate the *BIA*'s overall purpose of equitable distribution of the bankrupt's assets, as the Regulator's claim would be given a super priority to which it was not entitled, ahead of the claims of secured creditors. It would also frustrate the purpose of s. 14.06, by which Parliament had legislated as to environmental claims in bankruptcy and had specifically chosen not to give them a super priority. The conditions imposed by the Regulator on transfers of the licences for the Retained Assets further frustrated s. 14.06 by including the Renounced Assets in the calculation for determining the approval of a sale.

56 The chambers judge approved the sale procedure proposed by GTL. He declared that the *OGCA* and the *Pipeline Act* were inoperative to the extent that they conflicted with the *BIA* by deeming GTL to be the "licensee" of the Renounced Assets; that GTL was entitled to disclaim the Renounced Assets pursuant to s. 14.06(4)(a)(ii) and (c), and was not subject to any obligations in relation to those assets; that the Abandonment Orders were inoperative to the extent that they required GTL to comply or to provide security deposits; and that Directive 006 was inoperative to the extent it conflicted with s. 14.06 of the *BIA*. Lastly, he declared that the Regulator, in exercising its discretion to approve a transfer of the licences for the Retained Assets, could not consider the Renounced Assets for the purpose of calculating Redwater's LMR before or after the transfer, nor could it consider any other issue involving the Renounced Assets.

(2) Court of Appeal of Alberta

(a) Majority Reasons

57 Slatter J.A., for the majority, dismissed the appeals. He stated that the constitutional issues in the appeals were complementary to the primary issue, which was the interpretation of the *BIA*. Section 14.06 did not exempt environmental claims from the general bankruptcy regime, other than the super priority in s. 14.06(7), which would rarely, if ever, have any application to oil and gas wells. Section 14.06(4) did not "limit the power of the trustee to renounce ... properties to those circumstances where it might be exposed to personal liability" (para. 68). Additionally, the word "order" in s. 14.06(4) had to be given a wide meaning.

58 Slatter J.A. identified the essential issue as "whether the environmental obligations of Redwater meet the test for a provable claim" (para. 73). He agreed with the chambers judge that the third branch of the *Abitibi* test was met, but concluded that that test had been met "in both a technical and substantive way" (para. 76). The Regulator's policies essentially stripped away from the bankrupt estate enough value to meet environmental obligations. Requiring the depositing of security, or diverting value from the bankrupt estate, clearly met the standard of "certainty". The Regulator's policies required that the full value of the bankrupt's assets be applied first to environmental liabilities, creating a super priority for environmental claims. Slatter J.A. concluded that, "[n]otwithstanding their intended effect as conditions of licensing, the Regulator's policies [had] a direct effect on property, priorities, and the Trustee's right to renounce assets, all of which [were] governed by the *BIA*" (para. 86).

59 In terms of constitutional analysis, Slatter J.A. concluded that the role of GTL as a "licensee" under the *OGCA* and the *Pipeline Act* was "in operational conflict with the provisions of the *BIA*" that exempted trustees from personal liability, allowed them to disclaim assets and established the priority of environmental claims (para. 89). It also frustrated the *BIA*'s purpose of "managing the winding up of insolvent corporations and settling the priority of claims against them" (para. 89). As such, the Regulator could not "insist that the Trustee devote substantial parts of the bankrupt estate in satisfaction of the environmental claims in priority to the claims of the secured creditor" (para. 91).

(b) Dissenting Reasons

60 Martin J.A. dissented. In contrast to the majority, she stressed the constitutional dimensions of the case, in particular the need for co-operative federalism in the area of the environment, and noted that the doctrine of paramountcy should be applied with restraint. She concluded that the Regulator was not asserting a provable claim within the meaning of the *Abitibi* test. It was not enough for a regulatory order to be "intrinsically financial" for it to be a claim provable in bankruptcy (para. 185, quoting the chambers judge's reasons, at para. 173). There was not sufficient certainty that the ordered abandonment work would be done, either by the Regulator or by the OWA, and there was "no certainty at all that a claim for reimbursement would be made" (para. 184). Martin J.A. was also of the view that the Regulator was not a creditor of Redwater — or, if it was a creditor in issuing the Abandonment Orders, it was at least not one in enforcing the conditions for the transfer of licences. The Regulator had to be able to maintain control over the transfer of licences during a bankruptcy, and there was no reason why such regulatory requirements could not coexist with the distribution of the bankrupt's estate.

61 With regard to s. 14.06, Martin J.A. accepted the Regulator's argument that s. 14.06(4) allowed a trustee to renounce real property in order to avoid personal liability but did not prevent the assets of the bankrupt estate from being used to comply with environmental obligations. However, she went beyond this. In her view, s. 14.06(4) to (8) were enacted together as a statutory compromise. Martin J.A. concluded that a trustee's power to disclaim assets under s. 14.06 simply had no applicability to Alberta's regulatory regime. The ability to renounce under s. 14.06(4) had to be read in conjunction with the other half of the compromise — the Crown's super priority over the debtor's real property established by s. 14.06(7). Licence conditions were not the sort of "order" contemplated by s. 14.06(4), nor were licences the kind of "real property" contemplated by that provision. The balance struck by s. 14.06 was not effective when there was no "real property of the debtor" in which the Crown could take a super priority (para. 210).

62 As there was no entitlement under the *BIA* to renounce the end-of-life obligations imposed by Alberta's regulatory regime, there was no operational conflict in enforcing those obligations under provincial law. Nor was there any frustration of purpose. The Regulator was not asserting any claims provable in bankruptcy: "The continued application of [Alberta's] regulatory regime

following bankruptcy did not determine or reorder priorities among creditors, but rather value[d] accurately the assets available for distribution" (para. 240).

III. Analysis

A. The Doctrine of Paramountcy

63 As I have explained, Alberta legislation grants the Regulator wide-ranging powers to ensure that companies that have been granted licences to operate in the Alberta oil and gas industry will safely and properly abandon oil wells, facilities and pipelines at the end of their productive lives and will reclaim their sites. GTL seeks to avoid being subject to two of those powers: the power to order Redwater to abandon the Renounced Assets and the power to refuse to allow a transfer of the licences for the Retained Assets due to unmet LMR requirements. There is no doubt that these are valid regulatory powers granted to the Regulator by valid Alberta legislation. GTL seeks to avoid their application during bankruptcy by virtue of the doctrine of federal paramountcy, which dictates that the Alberta legislation empowering the Regulator to use the powers in dispute in this appeal will be inoperative to the extent that its use of these powers during bankruptcy conflicts with the *BIA*.

64 The issues in this appeal arise from what has been termed the "untidy intersection" of provincial environmental legislation and federal insolvency legislation (*Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111 (Ont. S.C.J. [Commercial List]), at para. 8). Paramountcy issues frequently arise in the insolvency context. Given the procedural nature of the *BIA*, the bankruptcy regime relies heavily on the continued operation of provincial laws. However, s. 72(1) of the *BIA* confirms that, where there is a genuine conflict between provincial laws concerning property and civil rights and federal bankruptcy legislation, the *BIA* prevails (see *Moloney*, at para. 40). In other words, bankruptcy is carved out from property and civil rights but remains conceptually part of it. Valid provincial legislation of general application continues to apply in bankruptcy until Parliament legislates pursuant to its exclusive jurisdiction in relation to bankruptcy and insolvency. At that point, the provincial law becomes inoperative to the extent of the conflict (see *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.) , at para. 3).

65 Over time, two distinct forms of conflict have been recognized. The first is *operational conflict*, which arises where compliance with both a valid federal law and a valid provincial law is impossible. Operational conflict arises "where one enactment says 'yes' and the other says 'no', such that 'compliance with one is defiance of the other'" (*Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 (S.C.C.), at para. 18, quoting *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.) , at p. 191). The second is *frustration of purpose*, which occurs where the operation of a valid provincial law is incompatible with a federal legislative purpose. The effect of a provincial law may frustrate the purpose of the federal law, even though it does "not entail a direct violation of the federal law's provisions" (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.) , at para. 73). The party relying on frustration of purpose "must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose" (*Lemare*, at para. 26, quoting *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536 (S.C.C.) , at para. 66).

66 Under both branches of paramountcy, the burden of proof rests on the party alleging the conflict. This burden is not an easy one to satisfy, as the doctrine of paramountcy is to be applied with restraint. Conflict must be defined narrowly so that each level of government may act as freely as possible within its respective sphere of constitutional authority. "[H]armonious interpretations of federal and provincial legislation should be favoured over an interpretation that results in incompatibility ... [i]n the absence of 'very clear' statutory language to the contrary" (*Lemare*, at paras. 21 and 27). "It is presumed that Parliament intends its laws to co-exist with provincial laws" (*Moloney*, at para. 27). As this Court found in *Lemare*, at paras. 22-23, the application of the doctrine of paramountcy should also give due weight to the principle of co-operative federalism. This principle allows for interplay and overlap between federal and provincial legislation. While co-operative federalism does not impose limits on the otherwise valid exercise of legislative power, it does mean that courts should avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with provincial legislation.

67 The case law has established that the *BIA* as a whole is intended to further "two purposes: the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation" (*Moloney*, at para. 32, citing *Husky Oil*, at para. 7). Here, the bankrupt is a corporation that will never emerge from bankruptcy. Accordingly, only the former purpose is relevant. As I will discuss below, the chambers judge also spoke of the purposes of s. 14.06 as distinct from the broader purposes of the *BIA*. This Court has discussed the purpose of specific provisions of the *BIA* in previous cases — see, for example, *Lemare*, at para. 45.

68 GTL has proposed two conflicts between the Alberta legislation establishing the disputed powers of the Regulator during bankruptcy and the *BIA*, either of which, it says, would have provided a sufficient basis for the order granted by the chambers judge.

69 The first conflict proposed by GTL results from the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act*. GTL says that s. 14.06(4) releases it from all environmental liability associated with the Renounced Assets after a valid "disclaimer" is made. But as a "licensee", it can be required by the Regulator to satisfy all of Redwater's statutory obligations and liabilities, which disregards the "disclaimer" of the Renounced Assets. GTL further notes the possibility that it may be held personally liable as a "licensee". In response, the Regulator says that s. 14.06(4) is concerned primarily with protecting trustees from personal liability in relation to environmental orders, and does not affect the ongoing responsibilities of the bankrupt estate. Thus, as long as a trustee is protected from personal liability, no conflict arises from its status as a "licensee" or from the fact that the bankrupt estate remains responsible under provincial law for the ongoing environmental obligations associated with "disclaimed" assets.

70 The second conflict proposed by GTL is that, even if s. 14.06(4) is only concerned with a trustee's personal liability, the Regulator's use of its statutory powers effectively reorders the priorities in bankruptcy established by the *BIA*. Such reordering is said to be caused by the fact that the Regulator requires the expenditure of estate assets to comply with the Abandonment Orders and to discharge or secure the environmental liabilities associated with the Renounced Assets before it will approve a transfer of the licences for the Retained Assets (in keeping with the LMR requirements). These end-of-life obligations are said by GTL to be unsecured claims held by the Regulator, which cannot, under the *BIA*, be satisfied in preference over the claims of Redwater's secured creditors. In response, the Regulator says that, on the proper application of the *Abitibi* test, these environmental regulatory obligations are not provable claims in bankruptcy. Accordingly, says the Regulator, the provincial laws requiring the Redwater estate to satisfy these obligations prior to the distribution of its assets to secured creditors do not conflict with the priority scheme in the *BIA*.

71 I will consider each alleged conflict in turn.

B. Is There a Conflict Between the Alberta Regulatory Scheme and Section 14.06 of the BIA?

72 As a statutory scheme, s. 14.06 of the *BIA* raises numerous interpretive issues. As noted by Martin J.A., the only matter concerning s. 14.06 on which all the parties to this litigation can agree is that it "is not a model of clarity" (C.A. reasons, at para. 201). Given the confusion caused by attempts to interpret s. 14.06 as a coherent scheme during this litigation, Parliament may very well wish to re-examine s. 14.06 during its next review of the *BIA*.

73 At its core, this appeal raises the issue of whether there is a conflict between specific Alberta legislation and the *BIA*. GTL submits that there is such a conflict. It argues that, because it "disclaimed" the Renounced Assets under s. 14.06(4) of the *BIA*, it should cease to have any responsibilities, obligations or liability with respect to them. And yet, it notes, as a "licensee" under the *OGCA* and the *Pipeline Act*, it remains responsible for abandoning the Renounced Assets. Furthermore, those assets continue to be included in the calculation of Redwater's LMR. GTL suggests an additional conflict with s. 14.06(2) of the *BIA* based on its possible exposure, as a "licensee", to personal liability for the costs of abandoning the Renounced Assets.

74 I have concluded that there is no conflict. Various arguments were advanced during this appeal concerning the disparate elements of the s. 14.06 scheme. However, the provision upon which GTL in fact relies in arguing that it is entitled to avoid its responsibilities as a "licensee" under the Alberta legislation is s. 14.06(4). As I have noted, GTL and the Regulator propose

very different interpretations of s. 14.06(4). However, s. 14.06(4) is clear and unambiguous when read on its own: where it is invoked by a trustee, the result is that "the trustee is not personally liable" for failure to comply with certain environmental orders or for the costs incurred by any person in carrying out the terms of such orders. The provision says nothing about the liability of the "bankrupt" or the "estate" — distinct concepts referenced many times throughout the *BIA*. Section 14.06(4), on its own wording, does not support the interpretation urged upon this Court by GTL.

75 In my view, s. 14.06(4) sets out the result of a trustee's "disclaimer" of real property when there is an order to remedy any environmental condition or damage affecting that property. Regardless of whether "disclaimer" is understood as a common law power or as a power deriving from some other statutory source, the result of a trustee's "disclaimer" of real property where an environmental order has been made in relation to that property is that the trustee is protected from personal liability, while the ongoing liability of the bankrupt estate is unaffected. The interpretation of s. 14.06(4) as being concerned with the personal liability of the trustee and not with the liability of the bankrupt estate is supported not only by the plain language of the section, but also by the Hansard evidence, a previous decision of this Court and the French version of the section. Furthermore, not only is the plain meaning of the words "personally liable" clear, but the same concept is also found in both s. 14.06(1.2) and s. 14.06(2), which specifically state that the trustee is not personally liable. In particular, in my view, it is impossible to coherently read s. 14.06(2) as referring to personal liability and yet read s. 14.06(4) as somehow referring to the liability of the bankrupt estate.

76 Given that s. 14.06(4) dictates that "disclaimer" only protects trustees from personal liability, then, even assuming that GTL successfully "disclaimed" in this case, no operational conflict or frustration of purpose results from the fact that the Regulator requires GTL, as a "licensee", to expend estate assets on abandoning the Renounced Assets. Furthermore, no conflict is caused by continuing to include the Renounced Assets in the calculation of Redwater's LMR. Finally, given the restraint with which the doctrine of paramountcy must be applied, and given that the Regulator has not attempted to hold GTL personally liable as a "licensee" for the costs of abandonment, no conflict with s. 14.06(2) or s. 14.06(4) is caused by the mere theoretical possibility of personal liability under the *OGCA* or the *Pipeline Act*.

77 In what follows, I will begin by interpreting s. 14.06(4) and explaining why, based on its plain wording and other relevant considerations, the provision is concerned solely with the personal liability of the trustee, and not with the liability of the bankrupt estate. I will then explain how, despite their superficial similarity, s. 14.06(4) and s. 14.06(2) have different rationales, and I will demonstrate that, on a proper understanding of the scheme crafted by Parliament, s. 14.06(4) does not affect the liability of the bankrupt estate. To conclude, I will demonstrate that there is no operational conflict or frustration of purpose between the Alberta legislation and s. 14.06 of the BIA in this case, with particular reference to the question of GTL's protection from personal liability.

(1) The Correct Interpretation of Section 14.06(4)

(a) Section 14.06(4) Is Concerned With the Personal Liability of Trustees

78 I have concluded that s. 14.06(4) is concerned with the personal liability of trustees, and not with the liability of the bankrupt estate. I emphasize here the well-established principle that, "[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes" (*Canadian Western Bank*, at para. 75, quoting *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.), at p. 356).

79 Section 14.06(4) says nothing about the "bankrupt estate" avoiding the applicability of valid provincial law. In drafting s. 14.06(4), Parliament could easily have referred to the liability of the bankrupt estate. Parliament chose instead to refer simply to the personal liability of a trustee. Notably, s. 14.06(7) and s. 14.06(8) both refer to a "debtor in a bankruptcy". Parliament's choice in this regard cannot be ignored. I agree with Martin J.A. that there is no basis on which to read the words "the trustee is not personally liable" in s. 14.06(4) as encompassing the liability of the bankrupt estate. As noted by Martin J.A., it is apparent from the express language chosen by Parliament that s. 14.06(4) was motivated by and aimed at concerns about the protection of trustees, not the protection of the full value of the estate for creditors. Nothing in the wording of s. 14.06(4) suggests that it was intended to extend to estate liability.

80 The Hansard evidence leads to the same conclusion. Jacques Hains, Director, Corporate Law Policy Directorate, Department of Industry Canada, noted the following during the 1996 debates preceding the enactment of s. 14.06(4) in 1997:

> The aim is to provide a better definition of the liability of insolvency professionals and practitioners in order to encourage them to accept mandates where there may be problems related to the environment. It is hoped that this will reduce the number of abandoned sites both for the benefit of the environment and the safeguard of businesses and jobs.
>
> (Standing Committee on Industry, *Evidence*, No. 16, 2nd Sess., 35th Parl., June 11, 1996, at 15:49-15:55, as cited in C.A. reasons, at para. 197.)

Several months later, Mr. Hains stated:

> What Parliament tried to do in 1992 was to provide a relief to insolvency practitioners ... because they were at risk when they accepted a mandate to liquidate an insolvent business. Under environmental laws, therefore, they could have been subject to personal liability to clean up the environment. I am speaking of personal liability here, meaning "out of their own pockets."
>
> (*Proceedings of the Standing Committee on Banking, Trade and Commerce*, No. 13, 2nd Sess., 35th Parl., November 4, 1996, at p. 15)

Mr. Hains proceeded to explain how the 1997 amendments were intended to improve on the 1992 reforms to the *BIA* that had included the original version of s. 14.06(2) (as discussed further below), but he gave no indication that the focus had somehow shifted away from a trustee's "personal liability".

81 Prior to the enactment of the 1997 amendments, G. Marantz, Legal Advisor to the Department of Industry Canada, noted that they were intended to "provide the trustee with protection from being chased with deep-pocket liability" (Standing Committee on Industry, *Evidence*, No. 21, 2nd Sess., 35th Parl., September 25, 1996, at 17:15, as cited in C.A. reasons, at para. 198). I agree with the Regulator that the legislative debates give no hint of any intention by Parliament to immunize bankrupt estates from environmental liabilities. The notion that s. 14.06(4) was aimed at encouraging trustees in bankruptcy to accept mandates, and not at limiting estate liability, is further supported by the fact that the provision was inserted under the general heading "Appointment and Substitution of Trustees".

82 Furthermore, in drafting s. 14.06(4), Parliament chose to use exactly the same concept it had used earlier in s. 14.06(2): by their express wording, where either provision applies, a trustee is not "personally liable". This cannot have been an oversight given that s. 14.06(4) was added to the *BIA* some five years after the enactment of s. 14.06(2). Since both provisions deal expressly with the protection of trustees from being "personally liable", it is very difficult to accept that they could be concerned with different kinds of liability. By their wording, s. 14.06(2) and s. 14.06(4) are clearly both concerned with the same concept. Indeed, if one interprets s. 14.06(4) as extending to estate liability, then there is no principled reason not to interpret s. 14.06(2) in the same way. However, it is undisputed that this was not Parliament's intention in enacting s. 14.06(2).

83 Similarly, Parliament has also chosen to use the same concept found in both s. 14.06(4) and s. 14.06(2) in a third part of the 14.06 scheme, namely s. 14.06(1.2). This provision states that a trustee carrying on the business of a debtor or continuing the employment of a debtor's employees is not "personally liable" in respect of certain enumerated liabilities, including as a successor employer. Although this provision is not directly raised in this litigation, by its own terms, it clearly does not and cannot refer to the liability of the bankrupt estate. Again, it is difficult to conceive of how Parliament could have specified that a trustee is not "personally liable", using the ordinary, grammatical sense of that phrase, in both s. 14.06(1.2) and s. 14.06(2), but then intended the phrase to be read in a completely different and illogical manner in s. 14.06(4). All three provisions refer to the personal liability of a trustee, and all three must be interpreted consistently. Indeed, I note that the concept of a trustee being "not personally liable" is also used consistently in other parts of the *BIA* unrelated to the s. 14.06 scheme — see, for example, s. 80 and s. 197(3).

84 This interpretation of s. 14.06(4) is also bolstered by the French wording of s. 14.06. The French versions of both s. 14.06(2) and s. 14.06(4) refer to a trustee's protection from personal liability "*ès qualités*". This French expression is defined by *Le Grand Robert de la langue française* (2nd ed. 2001) dictionary as referring to someone acting "à cause d'un titre, d'une fonction particulière", which, in English, would mean acting by virtue of a title or specific role. The *Robert & Collins* dictionary (online) translates "*ès qualités*" as in "one's official capacity". In using this expression in s. 14.06(4), Parliament is therefore stating that, where "disclaimer" properly occurs, a trustee, is not personally liable, in its capacity as trustee, for orders to remedy any environmental condition or damage affecting the "disclaimed" property. These provisions are clearly not concerned with the concept of estate liability. The French versions of s. 14.06(2) and s. 14.06(4) thus utilize identical language to describe the limitation of liability they offer trustees. It is almost impossible to conceive of Parliament using identical language in two such closely related provisions and yet intending different meanings. Accordingly, a trustee is not personally liable in its official capacity as representative of the bankrupt estate where it invokes s. 14.06(4).

85 Prior to this litigation, the case law on s. 14.06 was somewhat scarce. However, this Court has considered the s. 14.06 scheme once before, in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123 (S.C.C.) . In that case, comments made by both the majority and the dissenting judge support my conclusion that s. 14.06(4) is concerned only with the personal liability of trustees. Abella J., writing for the majority, explained that "where Parliament has intended to confer immunity on trustees or receivers from certain claims, it has done so explicitly" (para. 67). As examples of this principle, she referred to 14.06(1.2) and, most notably for our purposes, to s. 14.06(4), which she described as follows: "trustee immune in certain circumstances from environmental liabilities" (para. 67). In her dissent, Deschamps J. explained that a "trustee is not personally bound by the bankrupt's obligations" (para. 91). She noted that trustees are protected by the provisions that confer immunity upon them, including s. 14.06 (1.2), (2) and (4).

86 Although the dissenting reasons focus on the source of the "disclaimer" power in s. 14.06(4), nothing in this case turns on either the source of the "disclaimer" power or on whether GTL successfully "disclaimed" the Renounced Assets. I would note that, while the dissenting reasons rely on a purported common law power of "disclaimer", the Court has been referred to no cases — and the dissenting reasons have cited none — demonstrating the existence of a common law power allowing trustees to "disclaim" *real property*. In any case, regardless of the source of the "disclaimer" power, nothing in s. 14.06(4) suggests that, where a trustee does "disclaim" real property, the result is that it is simply free to walk away from the environmental orders applicable to it. Quite the contrary — the provision is clear that, where an environmental order has been made, the result of an act of "disclaimer" is the cessation of personal liability. No effect of "disclaimer" on the liability of the bankrupt estate is specified. Had Parliament intended to empower trustees to walk away entirely from assets subject to environmental liabilities, it could easily have said so.

87 Additionally, as I have mentioned, s. 14.06(4)'s scope is not narrowed to a "disclaimer" in its formal sense. Under s. 14.06(4)(a)(ii), a trustee is not personally liable for an environmental order where the trustee "abandons, disposes of or otherwise releases any interest in any real property". This appeal does not, however, require us to decide what constitutes abandoning, disposing of or otherwise releasing real property for the purpose of s. 14.06(4), and I therefore leave the resolution of this question for another day. Nor does this appeal require us to decide the effects of a successful divestiture under s. 20 of the *BIA*. Section 20 of the *BIA* was not raised or relied upon by GTL as providing it with the authority to walk away from all responsibility, obligation or liability regarding the Renounced Assets.

88 The dissenting reasons argue that certain other parts of the s. 14.06 scheme make the most sense if s. 14.06(4) limits estate liability. Other than s. 14.06(2), none of these provisions is in issue in this litigation, and none of them was relied on by GTL. Regardless, in view of the clear and unambiguous wording of s. 14.06(4), less weight should be given to its statutory context. This is particularly so given that the proposed alternative interpretation would require the Court to read words such as "personally" out of the subsection. As has been noted, when the words of a provision are precise and unequivocal, their ordinary meaning plays a dominant role in the interpretive process (*Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.) , at para. 10). Ultimately, the consequences of a trustee's "disclaimer" are clear — protection from personal liability, not from estate liability. There is no ambiguity on the face of s. 14.06(4). This Court has no option other than to accede to the clear intention of Parliament.

89 I turn now to the relationship between s. 14.06(2) and (4).

(b) How Section 14.06(4) Is Distinguishable From Section 14.06(2)

90 In this case, GTL relied solely on s. 14.06(4) in purporting to "disclaim" the Renounced Assets. However, as I will explain, GTL is fully protected from personal liability for the environmental liabilities associated with those assets whether it is understood as having "disclaimed" the Renounced Assets or not. However, it cannot simply "walk away" from the Renounced Assets in either case.

91 Regardless of whether GTL can access s. 14.06(4) (in other words, regardless of whether it has "disclaimed"), it is already fully protected from personal liability in respect of environmental matters by s. 14.06(2). Section 14.06(2) protects trustees from personal liability for "any environmental condition that arose or environmental damage that occurred", unless it is established that the condition arose or the damage occurred after the trustee's appointment and as a result of their gross negligence or wilful misconduct. In this case, it is not disputed that the environmental condition or damage leading to the Abandonment Orders arose or occurred prior to GTL's appointment. Section 14.06(2) provides trustees with protection from personal liability as broad as that provided by s. 14.06(4). Although, on the face of the provisions, there are two ways in which s. 14.06(4) may appear to offer broader protection, neither of them withstands closer examination.

92 First, the Regulator submits that the protection offered by s. 14.06(4) should be distinguished from that offered by s. 14.06(2) on the basis that the former is concerned with orders while the latter is concerned with environmental obligations generally. I agree with the dissenting reasons that a persuasive distinction cannot be drawn between liability for an environmental condition or environmental damage (purportedly covered by s. 14.06(2)) and liability for failure to comply with an order to remedy such a condition or such damage (purportedly covered by s. 14.06(4)). As the dissenting reasons note, "[t]his distinction is entirely artificial" (para. 212). The underlying liability addressed through environmental orders is the liability provided for in s. 14.06(2): an "environmental condition that arose or environmental damage that occurred". Second, on the face of s. 14.06(4), no exceptions are carved out for gross negligence or wilful misconduct post-appointment, unlike in s. 14.06(2). However, s. 14.06(4) is expressly made "subject to subsection (2)". I agree with the dissenting reasons that the only possible interpretation of this proviso is that, where the trustee has caused an environmental condition or environmental damage through its wilful misconduct or gross negligence, the trustee will still be personally liable, regardless of its reliance on s. 14.06(4).

93 It follows that s. 14.06(4) does not provide trustees with protection from personal liability any broader than the protection provided by s. 14.06(2). Despite this, in my view, Parliament had good reasons for enacting s. 14.06(4) in 1997. The first was to make it clear to trustees that they had complete protection from personal liability in respect of environmental conditions and damage (absent wilful misconduct or gross negligence), especially in situations where they have "disclaimed". The Hansard evidence shows that one of the impetuses for the 1997 reforms was the desire of trustees for further certainty. The second was to clarify the effect of a trustee's "disclaimer", on the liability of the *bankrupt estate* for orders to remedy an environmental condition or damage. In other words, s. 14.06(4) makes it clear not just that a trustee who "disclaims" real property is exempt from personal liability under environmental orders applicable to that property, but also that the liability of the bankrupt estate is unaffected by such "disclaimer".

94 In 1992, Parliament turned its attention to the potential liability of trustees in the environmental context and enacted s. 14.06(2). The provision originally stated that trustees were protected from personal liability for any environmental condition that arose or any environmental damage that occurred "(a) before [their] appointment ... or (b) after their appointment except where the condition arose or the damage occurred as a result of their failure to exercise due diligence". The Hansard evidence demonstrates that trustees were unhappy with the original language of s. 14.06(2). As Mr. Hains explained, they complained that the due diligence standard was "too vague. No one knows what it does and it may vary from one case to another. With the vagueness of the standard and what may be required to satisfy it, and with the risk of personal liability, the trustees were not even interested in investigating how they might exercise due diligence" (*Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, No. 13, 2nd Sess., 35th Parl., November 4, 1996, at pp. 15-16).

95 As a result, Parliament made reforms to the *BIA* in 1997. These reforms not only changed the standard of protection offered to trustees by s. 14.06(2) by adopting the current language, but also introduced s. 14.06(4). As is evident from their shared language, the provisions were intended to work together to clarify a trustee's protection from personal liability for any environmental condition or damage. Section 14.06(4) provided the certainty that trustees had been seeking in the years prior to 1997. For the first time, it explicitly linked the concept of "disclaimer" to the scheme protecting trustees from environmental liability. Whether it is understood as a common law power or as a reference to other statutory provisions, the concept of "disclaimer" predates s. 14.06(4) itself, as well as the 1992 version of s. 14.06(2). "Disclaimer" is also applicable in other contexts, such as in relation to executory contracts, as discussed in *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154, 251 D.L.R. (4th) 328 (B.C. C.A.).

96 Prior to 1997, the effects of a "disclaimer" of real property on environmental liability was unclear. In particular, it was unclear what effect "disclaimer" might have on the liability of the bankrupt estate, given that environmental legislation imposed liability based on the achievement of the status of owner, party in control or licensee (see J. Klimek, *Insolvency and Environment Liability* (1994), at p. 4-19). By enacting s. 14.06(4), Parliament clarified that the effect of the "disclaimer" of real property was to limit the personal liability of the trustee for orders to remedy any environmental condition or damage, but not to limit the liability of the bankrupt estate. Parliament could have merely updated the language of s. 14.06(2) in 1997, but this would have left the question of "disclaimer" and estate liability unaddressed. Knowledge of the impact of "disclaimer" could be important to a trustee who is deciding whether to accept a mandate. Section 14.06(4) thus went a considerable way towards resolving the vagueness of which trustees had complained prior to 1997.

97 A notable aspect of the scheme crafted by Parliament is that s. 14.06(4) applies "[n]otwithstanding anything in any federal or provincial law". In enacting s. 14.06(4), Parliament specified the effect of the "disclaimer" of real property solely in the context of *environmental orders*. The effect of "disclaimer" on liability in other contexts was not addressed. Parliament was concerned with orders to remedy any environmental condition or damage, where, liability frequently attaches based on the status of owner, party in control, or licensee. Parliament did not want trustees to think that they could avoid the estate's environmental liability through the act of "disclaiming". Accordingly, it used specific language indicating that the effect of the "disclaimer" of real property on orders to remedy an environmental condition or damage is merely that the trustee is not personally liable. It is possible that the effect of "disclaimer" on the liability of the bankrupt estate might be different in other contexts.

98 Section 14.06(4) thus makes it clear that "disclaimer" by the trustee has no effect on the bankrupt estate's continuing liability for orders to remedy any environmental condition or damage. The liability of the bankrupt estate is, of course, an issue with which s. 14.06(2) is absolutely unconcerned. Thus, it can be seen that s. 14.06(4) and s. 14.06(2) are not in fact the same — they may provide trustees with the same protection from personal liability, but only the former has any relevance to the question of estate liability. Section 14.06(2) protects trustees without having to be invoked by them — it does not speak to the results of a trustee's "disclaimer".

99 Where a trustee has "disclaimed" real property, it is not personally liable under an environmental order applicable to that property, but the bankrupt estate itself remains liable. Of course, the fact that the bankrupt estate remains liable even where a trustee invokes s. 14.06(4) does not necessarily mean that the trustee must comply with environmental obligations in priority to all other claims. The priority of an environmental claim depends on the proper application of the *Abitibi* test, as I will discuss below.

100 Accordingly, regardless of whether GTL is properly understood as having "disclaimed", the result is the same. Given that the environmental condition or damage arose or occurred prior to GTL's appointment, it is fully protected from personal liability by s. 14.06(2). However, "disclaimer" does not empower a trustee to simply walk away from the "disclaimed" assets when the bankrupt estate has been ordered to remedy any environmental condition or damage. The environmental liability of the bankrupt estate remains unaffected.

101 I offer the following brief comment on the balance of the s. 14.06 scheme, although, as mentioned, none of those provision is actually in issue before this Court. The dissenting reasons argue that interpreting s. 14.06(4) as being concerned

solely with the personal liability of trustees creates interpretive issues with the balance of the s. 14.06 scheme. In my view, this is not a reason to ignore the plain meaning of s. 14.06(4). No principle of statutory interpretation requires that the plain meaning of a provision be contorted to make its scheme more coherent. This Court has been tasked with interpreting s. 14.06(4), and, in my view, the wording of s. 14.06(4) admits of only one interpretation.

(2) There Is No Operational Conflict or Frustration of Purpose Between Section 14.06(2) and Section 14.06(4) of the BIA and the Alberta Regulatory Scheme

102 The operational conflicts between the *BIA* and the Alberta legislation alleged by GTL arise from its status as a "licensee" under the *OGCA* and the *Pipeline Act*. As I have just demonstrated, s. 14.06(4) does not empower a trustee to walk away from all responsibilities, obligations and liabilities with respect to "disclaimed" assets. Rather, it clarifies a trustee's protection from environmental personal liability and makes it clear that a trustee's "disclaimer" does not affect the environmental liability of the bankrupt estate. Regardless of whether GTL effectively "disclaimed" the Renounced Assets, it cannot walk away from them. In light of the proper interpretation of s. 14.06(4), no operational conflict is caused by the fact that, under Alberta law, GTL, as a "licensee", remains responsible for abandoning the Renounced Assets utilizing the remaining assets of the Redwater estate. Likewise, no operational conflict is caused by the fact that the end-of-life liabilities associated with the Renounced Assets continue to be included in the calculation of Redwater's LMR.

103 Thus, regardless of whether it has effectively "disclaimed", s. 14.06(2) fully protects GTL from personal liability in respect of environmental matters affecting the Redwater estate. GTL notes that, on the face of the *OGCA* and the *Pipeline Act*, there is nothing specifically preventing the Regulator from holding it personally liable as a "licensee" for the costs of carrying out the Abandonment Orders. GTL submits that the mere possibility that it may be held personally liable for abandonment under the Alberta legislation creates an operational conflict with the protection from personal liability provided by s. 14.06(2) of the *BIA*.

104 There is no possibility of trustees facing personal liability for reclamation or remediation — they are specifically protected from such liability by the *EPEA*, absent wilful misconduct or gross negligence. GTL is correct that its potential personal liability for abandonment as a "licensee" is not similarly capped at estate assets under the *OGCA* and the *Pipeline Act*. The Regulator submits that "[w]hile the definition of a licensee does not explicitly provide that the receiver's liability is limited to assets in the insolvency estate, such federal requirements are obviously read in to the provision and [are] explicitly included in other legislation administered by the [Regulator], namely the [*EPEA*]" (A.F., at para. 104 (footnote omitted)). For its part, GTL says that it is no answer that the Regulator's practice is to impose liability only up to the value of the estate because, as ATB argues, without a specific statutory provision, "[p]ractices can change without notice" (ATB's factum, at para. 106).

105 I reject the proposition that the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act* should be rendered inoperative by the mere theoretical possibility of a conflict with s. 14.06(2). Such an outcome would be inconsistent with the principle of restraint which underlies paramountcy, as well as with the principles of cooperative federalism. The inclusion of trustees in the definition of "licensee" is an important part of the Alberta regulatory regime. It confers on them the privilege of operating the licensed assets of bankrupts while also ensuring that insolvency professionals are regulated during the lengthy periods of time when they manage oil and gas assets.

106 Importantly, the situation in this case is completely different from the one before the Court in *Moloney* . In that case, Gascon J. rejected the argument that there was no operational conflict because the bankrupt could voluntarily pay a provincial debt post discharge or could choose not to drive. He noted that "the test for operational conflict cannot be limited to asking whether the respondent can comply with both laws by renouncing the protection afforded to him or her under the federal law or the privilege he or she is otherwise entitled to under the provincial law" (para. 60). In the instant case, GTL retains both the protection afforded to it under the federal law (no personal liability) and the privilege to which it is entitled under the provincial law (ability to operate the bankrupt's assets in a regulated industry). GTL is not being asked to forego doing anything or to voluntarily pay anything. Nor is it urged that the Regulator could avoid conflict by declining to apply the impugned law during bankruptcy, as in *Moloney* , at para. 69. This is not a situation in which the Regulator might decline to apply the provincial law, but a situation in which the provincial law can be — and has been — applied during bankruptcy without conflict.

107 According to the evidence in this case, the *OGCA* and the *Pipeline Act* have included trustees in the definition of "licensee" for 20 years now, and, in that time, the Regulator has never attempted to hold a trustee personally liable. The Regulator does not look beyond the assets remaining in the bankrupt estate in seeking compliance with the bankrupt's environmental obligations. If the Regulator were to attempt to hold GTL personally liable under the Abandonment Orders, this would create an operational conflict between the *OGCA* and the *Pipeline Act*, and s. 14.06(2) of the *BIA*, rendering the former two Acts inoperative to the extent of the conflict. As it stands, however, GTL can both be protected from personal liability by s. 14.06(2) and comply with the Alberta regime in administering the Redwater estate as a "licensee".

108 The suggestion, in the dissenting reasons, that the Regulator is seeking to hold GTL personally liable is untrue. No one disputes that significant value remains in the Redwater estate. Although the Regulator's entitlement is, of course, dependent on the priorities established by the *BIA*, the history of this regulatory system demonstrates that there are ways for the Regulator to access that value without holding GTL personally liable. It is not this Court's role to mandate a particular mechanism for the Regulator to achieve that end. Even if this was not the case, the fact that Redwater's assets have already been sold and are currently being held in trust means that personal liability is no longer a concern. There is no operational conflict.

109 I turn now to frustration of purpose. The chambers judge identified a number of purposes of s. 14.06 in his reasons. GTL relies on three of them, namely: "limit[ing] the liability of insolvency professionals, so that they will accept mandates despite environmental issues"; "reduc[ing] the number of abandoned sites in the country"; and "permit[ing] receivers and trustees to make rational economic assessments of the costs of remedying environmental conditions, and giv[ing] receivers and trustees the discretion to determine whether to comply with orders to remediate property affected by these conditions" (chambers judge's reasons, at paras. 128-29).

110 The burden is on GTL to establish the specific purposes of s. 14.06(2) and s. 14.06(4) if it wishes to demonstrate a conflict. This has been described as a "high" burden, requiring "[c]lear proof of purpose" (*Lemare*, at para. 26). In my view, based on the plain wording of s. 14.06(2) and s. 14.06(4) (a "trustee is not personally liable") and the Hansard evidence, it is evident that the purpose of these provisions is to protect trustees from personal liability in respect of environmental matters affecting the estates they are administering.

111 This purpose is not frustrated by the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act*. The Regulator's position is that it would never attempt to hold a trustee personally liable. Trustees have been considered licensees under these Acts for over 20 years, and they have yet to face the scourge of personal liability. To find an essential part of Alberta's regulatory regime inoperative based on the theoretical possibility of frustration of purpose would be inconsistent with the principles of paramountcy and cooperative federalism. To date, Alberta's regulatory regime has functioned as intended without frustrating the purpose of s. 14.06(2) or s. 14.06(4) of the *BIA*.

112 In arguing that s. 14.06 has the broader goals of reducing the number of abandoned sites (in the non-technical sense of "abandoned") and encouraging trustees to accept mandates, GTL relies on what it calls "the available extrinsic evidence and the actual words and structure of that section" (GTL's factum, at para. 91). In my view, the arguments it advances are insufficient for GTL to meet its high burden and demonstrate that the purpose of s. 14.06(2) and s. 14.06(4) should be defined as including these broader objectives. Reducing the number of unaddressed sites and encouraging trustees to accept mandates may be positive side effects of s. 14.06(2) and s. 14.06(4), but it is a stretch to see them as the purpose of the provisions. Like the provision at issue in *Lemare*, it is more plausible that they serve a "simple and narrow purpose" (para. 45).

113 Regardless, even if it is assumed that such broader goals are part of the purpose of s. 14.06(2) and s. 14.06(4), the evidence does not show that they are frustrated by the inclusion of trustees in the statutory definition of "licensee". Relying on statements made by GTL in the Second Report, ATB asserts that, if trustees continue to be considered licensees and if environmental claims continue to be binding on estates, then, in situations akin to that of the Redwater insolvency, trustees will refuse to accept appointments. The fact that, prior to this litigation, it had been settled in Alberta since at least *Northern Badger* that certain ongoing environmental obligations in the oil and gas industry continue to be binding on bankrupt estates must be weighed against this bald allegation. It was also well established that the Regulator would never attempt to hold insolvency

professionals personally liable for such obligations. As noted by the Canadian Association of Petroleum Producers, there is nothing to suggest that this well-established state of affairs has led insolvency professionals to refuse to accept appointments or has increased the number of orphaned sites. There is no reason why the Regulator and trustees cannot continue to work together collaboratively, as they have for many years, to ensure that end-of-life obligations are satisfied, while at same time maximizing recovery for creditors.

(3) Conclusion on Section 14.06 of the BIA

114 There is no conflict between the Alberta legislation and s. 14.06 of the *BIA* that makes the definition of "licensee" in the former inapplicable insofar as it includes GTL. GTL continues to have the responsibilities and duties of a "licensee" to the extent that assets remain in the Redwater estate. Nonetheless, GTL submits that, even if it cannot walk away from the Renounced Assets by invoking s. 14.06(4), the environmental obligations associated with those assets are unsecured claims of the Regulator for the purposes of the *BIA*. GTL says that the order of priorities in the *BIA* requires it to satisfy the claims of Redwater's secured creditors before the Regulator's claims, which rank equally with the claims of other unsecured creditors. According to GTL, the Regulator's attempts to use its statutory powers to prioritize its environmental claims conflict with the *BIA*. I will now consider this alleged conflict, which turns on the *Abitibi* test.

C. The Abitibi Test: Is the Regulator Asserting Claims Provable in Bankruptcy?

115 The equitable distribution of the bankrupt's assets is one of the purposes of the *BIA*. It is achieved through the collective proceeding model. Creditors of the bankrupt wishing to enforce a claim provable in bankruptcy must participate in the collective proceeding. Their claims will ultimately have the priority assigned to them by the *BIA*. This ensures that the bankrupt's assets are distributed fairly. This model avoids inefficiency and chaos, thus maximizing global recovery for all creditors. For the collective proceeding model to be viable, creditors with provable claims must not be allowed to enforce them outside the collective proceeding.

116 It is well established that a provincial law will be rendered inoperative in the context of bankruptcy where the effect of the law is to conflict with, reorder or alter the priorities established by the *BIA*. Both Martin J.A. and the chambers judge dealt with the altering of bankruptcy priorities under the frustration of purpose branch of paramountcy. In my view, it could also be plausibly advanced that a provincial law that has the effect of reordering bankruptcy priorities is in operational conflict with the *BIA* — such was the conclusion in *Husky Oil* , at para. 87. For the purposes of this appeal, there is no need to decide which would be the appropriate branch of the paramountcy analysis. Under either branch, the Alberta legislation authorizing the Regulator's use of its disputed powers will be inoperative to the extent that the use of these powers during bankruptcy alters or reorders the priorities established by the *BIA*.

117 GTL says that this is precisely the effect of the obligations imposed on the Redwater estate by the Regulator through the use of its statutory powers, even if it cannot walk away from the Renounced Assets by invoking s. 14.06(4). Parliament has assigned a particular rank to environmental claims that are provable in bankruptcy. It is accepted that the limited super priority for environmental claims created by s. 14.06(7) of the *BIA* does not apply here, and accordingly, says GTL, the Regulator is an ordinary creditor as regards its environmental claims — in other words, neither a secured nor a preferred creditor. The Regulator's environmental claims are thus to be paid rateably with those of Redwater's other ordinary creditors under s. 141 of the *BIA*. GTL argues that, to comply with the Abandonment Orders or LMR requirements, the Redwater estate will have to expend funds prior to distributing its assets to the secured creditors, and that this amounts to the Regulator using its statutory powers to create for itself a priority in bankruptcy to which it is not entitled.

118 However, only claims provable in bankruptcy must be asserted within the single proceeding. Other claims are not stayed upon bankruptcy and continue to be binding on the estate. In *Abitibi*, this Court clearly stated that not all environmental obligations enforced by a regulator will be claims provable in bankruptcy. As a matter of principle, bankruptcy does not amount to a licence to disregard rules. The Regulator says that it is not asserting any claims provable in the bankruptcy, so the Redwater estate must comply with its environmental obligations, to the extent that assets are available to do so.

119 The resolution of this issue turns on the proper application of the *Abitibi* test for determining whether a particular regulatory obligation amounts to a claim provable in bankruptcy. To reiterate:

> First, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation. [Emphasis in original; para. 26.]

120 There is no dispute that in this appeal, the second part of the test is met. Accordingly, I will discuss only the first and the third parts of the test.

121 In this Court, the Regulator, supported by various interveners, raised two concerns about how the *Abitibi* test has been applied, both by the courts below and in general. The first concern is that the "creditor" step of the *Abitibi* test has been interpreted too broadly in cases such as the instant appeal and *Nortel Networks Corp., Re*, 2013 ONCA 599, 368 D.L.R. (4th) 122 (Ont. C.A.) ("*Nortel* CA"), and that, in effect, this step of the test has become so pro forma as to be practically meaningless. The second concern has to do with the application of the "monetary value" step of the *Abitibi* test by the chambers judge and Slatter J.A. This step is generally called the "sufficient certainty" step, based on the guidance provided in *Abitibi*. The argument here is that the courts below went beyond the test established in *Abitibi* by focusing on whether Redwater's regulatory obligations were "intrinsically financial". Under *Abitibi*, the sufficient certainty analysis should have focused on whether the Regulator would ultimately perform the environmental work and assert a monetary claim for reimbursement.

122 In my view, both concerns raised by the Regulator have merit. As I will demonstrate, *Abitibi* should not be taken as standing for the proposition that a regulator is always a creditor when it exercises its statutory enforcement powers against a debtor. On a proper understanding of the "creditor" step, it is clear that the Regulator acted in the public interest and for the public good in issuing the Abandonment Orders and enforcing the LMR requirements and that it is, therefore, not a creditor of Redwater. It is the public, not the Regulator or the General Revenue Fund, that is the beneficiary of those environmental obligations; the province does not stand to gain financially from them. Although this conclusion is sufficient to resolve this aspect of the appeal, for the sake of completeness, I will also demonstrate that the chambers judge erred in finding that, on these facts, there is sufficient certainty that the Regulator will ultimately perform the environmental work and assert a claim for reimbursement. To conclude, I will briefly comment on why the *effects* of the end-of-life obligations do not conflict with the priority scheme in the *BIA*.

(1) The Regulator Is Not a Creditor of Redwater

123 The Regulator and the supporting interveners are not the first to raise issues with the "creditor" step of the *Abitibi* test. In the six years since *Abitibi* was decided, concerns about the "creditor" step and the fact that, as it is commonly understood, it will seemingly be satisfied in all — or nearly all — cases have also been expressed by academic commentators, such as A. J. Lund, "Lousy Dentists, Bad Drivers, and Abandoned Oil Wells: A New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law" (2017) 80 *Sask. L. Rev.* 157, at p. 178, and Stewart. This Court has not had an opportunity to comment on *Abitibi* since it was decided. However, the interpretation of the "creditor" step adopted by lower courts, including the majority of the Court of Appeal in this case, has focused on certain comments found at para. 27 of *Abitibi*, and the "creditor" step has accordingly been found to be satisfied whenever a regulator exercises its enforcement powers against a debtor (see, for example, C.A. reasons, at para. 60; *Nortel* CA, at para. 16).

124 GTL submits that these lower courts have correctly interpreted and applied the "creditor" step. It further submits that, because of *Abitibi*, the 1991 Alberta Court of Appeal decision in *Northern Badger* is of no assistance in analyzing the creditor issue. Conversely, the Regulator forcefully argues that *Abitibi* must be understood in the context of its own unique facts and that it did not overrule *Northern Badger*. Relying on *Northern Badger*, the Regulator argues that a regulator exercising a power to enforce a public duty is not a creditor of the individual or corporation subject to that duty. Like Martin J.A., I agree with the Regulator on this point. If, as GTL urges and the majority of the Court of Appeal concluded, the "creditor" step is satisfied whenever a regulator exercises its enforcement powers against a debtor, then it is hard to imagine a situation in which the

"creditor" step would not be satisfied by the actions of an environmental regulator. Stewart was correct to suppose that "[s]urely, the Court did not intend this result" (p. 189). For the "creditor" step to have meaning, "there must be situations where the other two steps could be met... but the order [or obligation] is still not a provable claim because the regulator is not a creditor of the bankrupt" (Attorney General of Ontario's factum, at para. 39).

125 Before further explaining my conclusion on this point, I must address a preliminary issue: the fact that the Regulator conceded in the courts below that it was a creditor. It is well established that concessions of law are not binding on this Court: see *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781 (S.C.C.) , at para. 44; *M. v. H.*, [1999] 2 S.C.R. 3 (S.C.C.) , at para. 45; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686 (S.C.C.) , at para. 62. As noted by L'Heureux-Dubé J., in dissent, but not on this point, in *R. v. Elshaw*, [1991] 3 S.C.R. 24 (S.C.C.) , at p. 48, "the fact that an issue is conceded below means nothing in and of itself". Although concessions by the parties are often relied upon, it is ultimately for this Court to determine points of law. For several reasons, no fairness concerns are raised by disregarding the Regulator's concession in this case.

126 First, in a letter to GTL dated May 14, 2015, the Regulator advanced the position that it was "not a creditor of [Redwater]", but, rather, had a "statutory mandate to regulate the oil and gas industry in Alberta" (GTL's Record, vol. 1, at p. 78). I note that this was the initial communication between the Regulator and GTL, only two days after the latter's appointment as receiver of Redwater's property. Second, the issue of whether the Regulator is a creditor was discussed in the parties' factums. Third, during oral arguments before this Court, the Regulator was questioned about its concession. Counsel made the undisputed point that higher courts are not bound by such concessions and took the position that, on the correct interpretation of *Abitibi*, the Regulator was not a creditor. Fourth, when the Regulator's status as a creditor was raised as an issue before this Court, opposing counsel did not argue that they would have adduced further evidence on the issue had it been raised in the courts below. Finally, a proper understanding of the "creditor" step of the *Abitibi* test is of fundamental importance to the proper functioning of the national bankruptcy scheme and of provincial environmental schemes throughout Canada. I conclude that this case is one in which it is appropriate to disregard the Regulator's concession in the courts below.

127 Returning to the analysis, I note that the unique factual matrix of*Abitibi* must be kept in mind. In that case, Newfoundland and Labrador expropriated most of AbitibiBowater's property in the province without compensation. Subsequently, AbitibiBowater was granted a stay under the *CCAA*. It then filed a notice of intent to submit a claim to arbitration under the *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, Can. T.S. 1994 No. 2 ("NAFTA"), for losses resulting from the expropriation. In response, Newfoundland's Minister of Environment and Conservation ordered AbitibiBowater to remediate five sites pursuant to the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("EPA"). Three of the five sites had been expropriated by Newfoundland and Labrador. The evidence led to the conclusion that "the Province never truly intended that Abitibi was to perform the remediation work", but instead sought a claim that could be used as an offset in connection with AbitibiBowater's NAFTA claim (*Abitibi*, at para. 54). In other words, the Province sought a financial benefit from the remediation orders.

128 In this appeal, it is not disputed that, in seeking to enforce Redwater's end-of-life obligations, the Regulator is acting in a *bona fide* regulatory capacity and does not stand to benefit financially. The Regulator's ultimate goal is to have the environmental work actually performed, for the benefit of third-party landowners and the public at large. There is no colourable attempt by the Regulator to recover a debt, nor is there an ulterior motive on its part, as there was in*Abitibi*. The distinction between the facts of this appeal and those of*Abitibi* becomes even clearer when one examines the comprehensive reasons of the chambers judge in *Abitibi*. The crux of the findings of Gascon J. (as he then was) is found at paras. 173-76:

> ... the Province stands as the direct beneficiary, from a monetary standpoint, of Abitibi's compliance with the EPA Orders. In other words, the execution in nature of the EPA Orders would result in a definite credit to the Province's own "balance sheet". Abitibi's liability in that regard is an asset for the Province itself.
>
> With all due respect, this is not regulatory in nature; it is rather purely financial in reality. This is, in fact, closer to a debtor-creditor relationship than anything else.

> This is quite far from the situation of the detached regulator or public enforcer issuing order for the public good. Here, the Province itself derives the direct pecuniary benefit from the required compliance of Abitibi to the EPA Orders. The Province stands to directly gain in the outcome. None of the cases submitted by the Province bear any similarity to the fact pattern in the present proceedings.
>
> From this perspective, it is the hat of a creditor that best fits the Province, not that of a disinterested regulator.
>
> (*AbitibiBowater inc., Re*, 2010 QCCS 1261, 68 C.B.R. (5th) 1 (C.S. Que.))

129 This Court recognized in *Abitibi* that the Province "easily satisfied" the creditor requirement (para 49). It was therefore not necessary to consider at any length how the "creditor" step should be understood or how it would apply in other factual situations. However, even at para. 27 of *Abitibi*, the paragraph relied on by the majority of the Court of Appeal, Deschamps J. made a point of noting that "[m]ost environmental regulatory bodies *can be* creditors in respect of monetary or non-monetary obligations imposed by the relevant statutes" (emphasis added). The interpretation of the "creditor" step adopted by the majority of the Court of Appeal and urged upon this Court by GTL leaves no room for a regulator that enforces obligations not to be a creditor, though this possibility was clearly contemplated by para. 27 of*Abitibi*. As noted above, GTL's interpretation leaves the "creditor" step with no independent work to perform.

130 *Northern Badger* established that a regulator enforcing a public duty by way of non-monetary order is not a creditor. I reject the claim in the dissenting reasons that*Northern Badger* should be interpreted differently. First, I note that whether the Regulator has a contingent claim is relevant to the sufficient certainty test, which presupposes that the Regulator is a creditor. I cannot accept the proposition in the dissenting reasons that *Northern Badger* was concerned with what would become the third prong of the *Abitibi* test. In *Northern Badger*, Laycraft C.J.A. accepted that abandonment was a liability and identified the issue as "whether that liability is to the board so that it is the board which is the creditor" (para. 32). Second, the underlying scenario here with regards to Redwater's end-of-life obligations is exactly the same as in *Northern Badger* — a regulator is ordering an entity to comply with its legal obligations in furtherance of the public good. This reasoning from *Northern Badger* was subsequently adopted in cases such as *Strathcona (County) v. Fantasy Construction Ltd. Estate (Trustee of)*, 2005 ABQB 794, 261 D.L.R. (4th) 221 (Alta. Q.B.), at paras. 23-25, and *Lamford Forest Products Ltd., Re* (1991), 86 D.L.R. (4th) 534 (B.C. S.C.).

131 I cannot agree with the suggestion by the majority of the Court of Appeal in this case that *Northern Badger* "is of limited assistance" in the application of the *Abitibi* test (para. 63). Rather, I agree with Martin J.A. that *Abitibi* did not overturn the reasoning in *Northern Badger*, but instead "emphasized the need to consider the substance of provincial regulation in assessing whether it creates a claim provable in bankruptcy" (para. 164). As Martin J.A. noted, even following *Abitibi*, the law continues to be that "public obligations are not provable claims that can be counted or compromised in the bankruptcy" (para. 174).*Abitibi* clarified the scope of *Northern Badger* by confirming that a regulator's environmental claims will be provable claims under certain circumstances. It does not stand for the proposition that a regulator exercising its enforcement powers is always a creditor. The reasoning in *Northern Badger* was simply not applicable on the facts of *Abitibi*, given the actions of the Province as outlined above.

132 In *Abitibi*, Deschamps J. noted that insolvency legislation had evolved in the years since *Northern Badger*. That legislative evolution did not, however, change the meaning to be ascribed to the term "creditor". In this regard, I agree with the conclusion in *Strathcona (County) v. Fantasy Construction Ltd. Estate (Trustee of)*, 2005 ABQB 559, 256 D.L.R. (4th) 536 (Alta. Q.B.), that the amendments to the *BIA* dealing with environmental matters in the years following *Northern Badger* cannot be interpreted as having overturned the reasoning in that case. As should be clear from the earlier discussion of s. 14.06, the amendments to the *BIA* do not speak to when a regulator enforcing an environmental claim is a creditor.

133 The conclusion that the reasoning in *Northern Badger* continues to be relevant since *Abitibi* and the amendments to insolvency legislation also finds support in the writings of academic commentators. Stewart's position is that, while*Abitibi* discussed*Northern Badger*, it did not overturn it. He urges this Court to clarify that there remains "a distinction between a regulatory body that is a creditor because it is enforcing a debt, and a regulatory body that is not a creditor because it is enforcing

the law" (p. 221). Similarly, Lund argues that a court should "consider the importance of the public interests protected by the regulatory obligation when deciding whether the debtor owes a debt, liability or obligation to a creditor" (p. 178).

134 For the foregoing reasons, *Abitibi* cannot be understood as having changed the law as summarized by Laycraft C.J.A. I adopt his comments at para. 33 of *Northern Badger*:

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

135 Based on the analysis in *Northern Badger*, it is clear that the Regulator is not a creditor of the Redwater estate. The end-of-life obligations the Regulator seeks to enforce against Redwater are public duties. Neither the Regulator nor the Government of Alberta stands to benefit financially from the enforcement of these obligations. These public duties are owed, not to a creditor, but, rather, to fellow citizens, and are therefore outside the scope of "provable claims". I do not intend to suggest, however, that a regulator will be a creditor only where it acts exactly as the province did in*Abitibi*. There may very well be situations in which a regulator's actions fall somewhere between those in *Abitibi* and those in the instant case. Notably, unlike some previous cases, the Regulator has performed no environmental work itself. I leave such situations to be addressed in future cases in which there are full factual records. Here, it is clear that the Regulator is seeking to enforce Redwater's public duties, whether by issuing the Abandonment Orders or by maintaining the LMR requirements. The Regulator is not a creditor within the meaning of the *Abitibi* test.

136 I reject the suggestion that the foregoing analysis somehow overrules the first prong of the *Abitibi* test. The facts in *Abitibi* were not comparable to the facts of this appeal. Although this Court discussed*Northern Badger* in *Abitibi*, it merely referenced the subsequent amendments to the *BIA*, and did not overturn the earlier decision. The Court was clear that the ultimate outcome "must be grounded in the facts of each case" (para. 48). The dissenting reasons claim that, given the foregoing analysis, it will be nearly impossible to find that regulators are ever creditors. *Abitibi* itself shows this not to be the case. Furthermore, as I have said, there may well be cases that fall between *Abitibi* and the present case. However, if *Abitibi* is read as requiring only a determination of whether the regulator has exercised an enforcement power, it will in fact be impossible for a regulator *not* to be a creditor. The dissenting reasons do not seriously deny this, merely suggesting that regulators can publish guidelines or issue licences. The Regulator does both, yet, under the approach taken in the dissenting reasons, it is powerless to take any practical steps in the public interest regarding its guidelines or licences without qualifying as a creditor. As I have explained,*Abitibi* clearly contemplates a place for regulators who are not creditors.

137 Strictly speaking, this is sufficient to dispose of this aspect of the appeal. However, additional guidance on the sufficient certainty analysis may prove helpful in future cases. Accordingly, I turn now to a discussion of the "sufficient certainty" step and of the reasons why the Abandonment Orders and the LMR conditions both fail on this step of the *Abitibi* test.

(2) There Is No Sufficient Certainty That the Regulator Will Perform the Environmental Work and Advance a Claim for Reimbursement

138 The "sufficient certainty" test articulated in paras. 30 and 36 in*Abitibi* essentially does no more than reorganize and restate the requirements of the relevant provisions of the *BIA*. Section 121(2) provides that contingent claims may be provable claims. In other words, contingent debts or liabilities owed by a bankrupt to a creditor may be, but are not necessarily, provable claims. Section 135(1.1) provides for the valuation of such a claim. A contingent claim must be capable of valuation under s. 135(1.1) — it cannot be too remote or speculative — in order to be a provable claim under s. 121(2).

139 Before the third step of the *Abitibi* test can even be reached, a regulator must already have been shown to be a creditor. I have concluded that, on the facts of this case, the Regulator is not a creditor of Redwater. However, for the purpose of explaining how I differ from the chambers judge on the "sufficient certainty" analysis, I will proceed as if the Regulator were, in fact, a creditor of Redwater in respect of the Abandonment Orders and LMR requirements. These end-of-life obligations do not directly require Redwater to make a payment to the Regulator. Rather, they are obligations requiring Redwater to *do something*. As discussed in *Abitibi*, if the Regulator were in fact a creditor, end-of-life obligations would be its contingent claims.

140 What a court must determine is whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to a regulator. In determining whether a non-monetary regulatory obligation of a bankrupt is too remote or too speculative to be included in the bankruptcy proceeding, the court must apply the general rules that apply to future or contingent claims. It must be sufficiently certain that the contingency will come to pass — in other words, that the regulator will enforce the obligation by performing the environmental work and seeking reimbursement.

141 I will now discuss the Abandonment Orders and the LMR requirements in turn and demonstrate how they fail to satisfy the "sufficient certainty" step of the *Abitibi* test.

(a) The Abandonment Orders

142 The Regulator has issued orders under the *OGCA* and the *Pipeline Act* requiring Redwater to abandon the Renounced Assets. Even if the Regulator were a creditor of Redwater, the Abandonment Orders would still have to be capable of valuation in order to be included in the bankruptcy process. In my view, it is not established either by the chambers judge's factual findings or by the evidence that it is sufficiently certain that the Regulator will perform the abandonments and advance a claim for reimbursement. The claim is too remote and speculative to be included in the bankruptcy process.

143 The chambers judge acknowledged that it was "unclear" whether the Regulator would perform the abandonments itself or would deem the wells subject to the Abandonment Orders to be orphans (para. 173). He stated that, in the latter case, the OWA would probably carry out the abandonments, although it was not clear when they would be completed. Indeed, the chambers judge acknowledged that, given the OWA's resources, it could take as long as 10 years for it to get around to performing the required environmental work on the Redwater property. He nonetheless concluded that — even though the "sufficient certainty" step was not satisfied in a "technical sense" — the situation met what had been intended in*Abitibi*. That conclusion was at least partly based on his finding that the Abandonment Orders were "intrinsically financial" (para. 173).

144 In my view, the chambers judge did not make a finding of fact that the Regulator would carry out the abandonments *itself*. As noted, he acknowledged that it was "unclear" whether the Regulator would perform the abandonments. This can hardly be deemed a finding of fact deserving of deference. In my view, considered as a whole, the evidence in this case leads to the conclusion that the Regulator will not abandon the Renounced Assets itself.

145 The Regulator is not in the business of performing abandonments. It has no statutory duty to do so. Abandonment is instead an obligation of the licensee. The evidence of the Regulator's affiant was that the Regulator very rarely abandons properties on behalf of licensees and virtually never does so where the licensee is in receivership or bankruptcy. The affiant stated that the Regulator had no intention of abandoning Redwater's licensed assets. As noted by the chambers judge, it is true that, in its letter to GTL dated July 15, 2015, the Regulator threatened to perform the abandonments itself, but the Regulator subsequently took no steps to follow up on that threat. Even if this letter should be accorded any weight, the contradiction between it and the Regulator's subsequent affidavits at the very least makes it difficult to say with anything approaching sufficient certainty that the Regulator intends to carry out the abandonments. These facts distinguish this case from *Abitibi*, in which the restructuring judge's findings were based on the premise that the province would most likely perform the remediation work itself.

146 Below, I will explain why the OWA's involvement is insufficient to satisfy the "sufficient certainty" test. First, I note that any reliance the chambers judge placed on the intrinsically financial nature of the Abandonment Orders was an error. In this regard, I am in complete agreement with Martin J.A. Considering whether an order is intrinsically financial is an erroneous interpretation of the third step of the *Abitibi* test. It is too broad and would result in a provable claim being found even where

the existence of a monetary claim in bankruptcy is merely speculative. Thus, in *Nortel* CA, Juriansz J.A. rightly rejected the argument that the *Abitibi* test did not require a determination that the regulator would perform the environmental work and claim reimbursement, and that it was sufficient for there to be an environmental order requiring an expenditure of funds by the bankrupt estate. He held the following, at paras. 31-32:

> As I read it, the Supreme Court's decision is clear: ongoing environmental remediation obligations may be reduced to monetary claims that can be compromised in CCAA proceedings only where the province has performed the remediation work and advances a claim for reimbursement, or where the obligation may be considered a contingent or future claim because it is "sufficiently certain" that the province will do the work and then seek reimbursement.
>
> The respondents' approach is not only inconsistent with *AbitibiBowater Inc., Re*, it is too broad. It would result in virtually all regulatory environmental orders being found to be provable claims. As Deschamps J. observed, a company may engage in activities that carry risks. When those risks materialize, the costs are borne by those who hold a stake in the company. A risk that results in an environmental obligation becomes subject to the insolvency process only when it is in substance monetary and is in substance a provable claim.

147 As the chambers judge correctly acknowledged, the fact that the Regulator would not conduct the abandonments itself does not mean that it would wash its hands of the Renounced Assets. Rather, if necessary, it would designate them as orphans pursuant to the *OGCA* and leave them for the OWA. I am not suggesting that a regulator can strategically avoid the "sufficient certainty" test simply by delegating environmental work to an arm's length organization. I would not decide, as the Regulator urges, that the *Abitibi* test *always* requires that the environmental work be performed by the regulator itself. However, the OWA's true nature must be emphasized. There are strong grounds to conclude that, given the particular features of this regulatory context, the OWA is not the regulator.

148 The creation of the OWA was not an attempt by the Regulator to avoid the *BIA* order of priorities in bankruptcy. It is a non-profit organization with its own mandate and independent board of directors, and it operates as a financially independent entity pursuant to legally delegated authority. Although the OWA's board includes a representative of the Regulator and a representative of Alberta Environment and Parks, its independence is not in question. The OWA's 2014-2015 annual report indicates that five out of six voting directors represent industry. The OWA uses a risk assessment tool to prioritize when and how it will perform environmental work on the many hundreds of orphans in Alberta. There is no suggestion that the Regulator has any say in the order in which the OWA chooses to perform environmental work. The 2014-2015 annual report also states that, since 1992, 87 percent of the money collected and invested to fund OWA activities has been provided by industry via the orphan levy. The Regulator, at para. 99 of its factum, hints obliquely that additional provincial or federal funding may be forthcoming in the future, but even if it materializes, it will be almost entirely in the form of loans. I cannot accept the suggestion in the dissenting reasons that the Regulator and the OWA are "inextricably intertwined" (para. 273).

149 Even assuming that the OWA's abandonment of Redwater's licensed assets could satisfy the "sufficient certainty" test, I agree with Martin J.A. that it is difficult to conclude that there is sufficient certainty that the OWA will in fact perform the abandonments. I also agree with her view that there is no certainty that a claim for reimbursement will be advanced should the OWA ultimately abandon the assets.

150 The dissenting reasons suggest that the facts of this appeal are more akin to those of *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154 (Ont. C.A.), than to those of *Nortel* CA, arguing that the "sufficient certainty" test is satisfied because, as in *Northstar*, there is no purchaser to take on Redwater's assets and the debtor itself is insolvent, so only the OWA can perform the work. In my view, *Northstar* is easily distinguishable. In that case, the bankrupt had been voluntarily carrying out remediation prior to its bankruptcy. After it made its assignment into bankruptcy, the Ministry of the Environment ("MOE") took over the remediation activities itself, purporting to do so on a without prejudice basis. Jurianz J.A. found that the fact that the MOE had already undertaken remediation activities made it sufficiently certain that it would do so. As I will now demonstrate, the facts here are very different.

151 At the beginning of this litigation, the OWA estimated that it would take 10 to 12 years to get through the backlog of orphans. By 2015, that backlog was increasing rapidly, and it may well have continued to increase at the same or an even greater speed in the intervening years, as submitted by the Regulator. If anything, this suggests the possibility of an even larger backlog. There is no indication that the Renounced Assets would have a particularly high priority in the backlog. Even if the potential additional funding materializes, the Regulator submits that it will be a generation or more before the OWA can address its existing inventory of orphans.

152 The dissenting reasons rely on the chambers judge's conclusion that the OWA would "probably" perform the abandonments eventually, while downplaying the fact that he also concluded that this would not "necessarily [occur] within a definite timeframe" (paras. 261 and 278, citing the chambers judge's reasons, at para. 173). Given the most conservative timeline — the 10 years discussed by the chambers judge — it is difficult to predict anything occurring with sufficient certainty. Much could change within the next decade, both in terms of government policy and in terms of the willingness of those in the Alberta oil and gas industry to discharge environmental liabilities. This is not at all the same situation as in *Northstar*, in which the MOE had already commenced environmental work.

153 Perhaps more to the point, this lengthy timeline means that, should it ultimately perform the work, the OWA will not advance a claim for reimbursement. Advancement of a claim is an element of the test that is just as essential as performance of the work. The OWA itself has no ability to seek reimbursement of its costs from licensees and, although the costs of abandonment carried out by a person authorized by the Regulator constitute a debt payable to the Regulator under s. 30(5) of the *OGCA*, no evidence has been adduced that the Regulator has exercised its power to recover such costs in comparable cases. There is a good reason for this: the reality is that, by the time the OWA got around to abandoning any of Redwater's wells, the estate would be finalized and GTL long since discharged. In sum, the chambers judge erred in failing to consider whether the OWA can be treated as the regulator and in failing to appreciate that, even if it can, it is not sufficiently certain that the OWA will in fact perform the abandonments and advance a claim for reimbursement.

154 Accordingly, even if the Regulator had acted as a creditor in issuing the Abandonment Orders, it cannot be said with sufficient certainty that it would perform the abandonments and advance a claim for reimbursement.

(b) The Conditions for the Transfer of Licenses

155 I will deal briefly with the LMR conditions for the transfer of licences. Much of the foregoing analysis with regard to the Abandonment Orders also applies to these conditions. As noted by Martin J.A., the requirement of regulatory approval for licence transfers is difficult to compare directly with the remediation orders at issue in *Abitibi*. However, this Court confirmed that the *Abitibi* test applies to a class of regulatory obligations that is broader than "orders" in *Moloney* , at paras. 54-55. The LMR conditions are a "non-monetary obligation" for the Redwater estate, since they must be satisfied before the Regulator will approve the transfer of any of Redwater's licences. However, it is notable that, even apart from the LMR conditions, licences are far from freely transferrable. The Regulator will not approve the transfer of licences where the transferee is not a licensee under the *OGCA*, the *Pipeline Act*, or both. The Regulator also reserves the right to reject a proposed transfer where it determines that the transfer is not in the public interest, such as where the transferee has outstanding compliance issues.

156 In a sense, the factors suggesting an absence of sufficient certainty are even stronger for the LMR requirements than for the Abandonment Orders. There is a debt enforcement scheme under the *OGCA* and the *Pipeline Act* in respect of abandonment, but there is no such scheme for the LMR requirements. The Regulator's refusal to approve licence transfers unless and until the LMR requirements have been satisfied does not give it a monetary claim against Redwater. It is true that compliance with the LMR requirements results in a reduction in the value of the bankrupt estate. However, as discussed earlier, not every obligation that diminishes the value of the bankrupt estate, and therefore the amount available to secured creditors, satisfies the "sufficient certainty" step. The question is not whether an obligation is intrinsically financial.

157 Compliance with the LMR conditions prior to the transfer of licences reflects the inherent value of the assets held by the bankrupt estate. Without licences, Redwater's *profits à prendre* are of limited value at best. All licences held by Redwater were

received by it subject to the end-of-life obligations that would one day arise. These end-of-life obligations form a fundamental part of the value of the licensed assets, the same as if the associated costs had been paid up front. Having received the benefit of the Renounced Assets during the productive period of their life cycles, Redwater cannot now avoid the associated liabilities. This understanding is consistent with *Daishowa-Marubeni International Ltd. v. R.*, 2013 SCC 29, [2013] 2 S.C.R. 336 (S.C.C.) , which dealt with the statutory reforestation obligations of holders of forest tenures in Alberta. This Court unanimously held that the reforestation obligations were "a future cost embedded in the forest tenure that serves to depress the tenure's value at the time of sale" (para. 29).

158 The fact that regulatory requirements may cost money does not transform them into debt collection schemes. As noted by Martin J.A., licensing requirements predate bankruptcy and apply to all licensees regardless of solvency. GTL does not dispute the fact that Redwater's licences can be transferred only to other licensees nor that the Regulator retains the authority in appropriate situations to reject proposed transfers due to safety or compliance concerns. There is no difference between such conditions and the condition that the Regulator will not approve transfers where they would leave the requirement to satisfy end-of-life obligations unaddressed. All these regulatory conditions depress the value of the licensed assets. None of them creates a monetary claim in the Regulator's favour. Licensing requirements continue to exist during bankruptcy, and there is no reason why GTL cannot comply with them.

(3) Conclusion on the Abitibi test

159 Accordingly, the end-of-life obligations binding on GTL are not claims provable in the Redwater bankruptcy, so they do not conflict with the general priority scheme in the *BIA*. This is not a mere matter of form, but of substance. Requiring Redwater to pay for abandonment before distributing value to creditors does not disrupt the priority scheme of the *BIA*. In crafting the priority scheme set out in the *BIA*, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation (see s. 14.06(7)). Thus, the *BIA* explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage. Although the nature of property ownership in the Alberta oil and gas industry meant that s. 14.06(7) was unavailable to the Regulator, the Abandonment Orders and the LMR replicate s. 14.06(7)'s effect in this case. Furthermore, it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* — rather, it facilitates them.

160 Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non-monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the *BIA*, notwithstanding the consequences this may have for the bankrupt's secured creditors. The Abandonment Orders and the LMR requirements are based on valid provincial laws of general application — exactly the kind of valid provincial laws upon which the *BIA* is built. As noted in *Moloney* , the *BIA* is clear that "[t]he ownership of certain assets and the existence of particular liabilities depend upon provincial law" (para. 40). End-of-life obligations are imposed by valid provincial laws which define the contours of the bankrupt estate available for distribution.

161 Finally, as noted earlier, the *BIA*'s general purpose of facilitating financial rehabilitation is not relevant for a corporation such as Redwater. Corporations with insufficient assets to satisfy their creditors will never be discharged from bankruptcy because they cannot satisfy all their creditors' claims in full (*BIA*, s. 169(4)). Thus, no conflict with this purpose is caused by the conclusion that the end-of-life obligations binding Redwater are not provable claims.

IV. Conclusion

162 There is no conflict between Alberta's regulatory regime and the *BIA* requiring portions of the former to be rendered inoperative in the context of bankruptcy. Although GTL remains fully protected from personal liability by federal law, it cannot

walk away from the environmental liabilities of the bankrupt estate by invoking s. 14.06(4). On a proper application of the *Abitibi* test, the Redwater estate must comply with ongoing environmental obligations that are not claims provable in bankruptcy.

163 Accordingly, the appeal is allowed. In *Alberta Energy Regulator v. Grant Thornton Limited*, 2017 ABCA 278, 57 Alta. L.R. (6th) 37 (Alta. C.A.), Wakeling J.A. declined to stay the precedential effect of the Court of Appeal's decision. As he noted, the interests of the Regulator itself were already protected. Pursuant to earlier orders of the Alberta courts, GTL had already sold or renounced all of Redwater's assets, and the sale proceeds were being held in trust. Accordingly, the Regulator's request for an order that the proceeds from the sale of Redwater's assets be used to address Redwater's end-of-life obligations is granted. Additionally, the chambers judge's declarations in paras. 3 and 5-16 of his order are set aside.

164 As the successful party in the appeal, the Regulator would normally be entitled to its costs. However, the Regulator specifically did not seek costs. Accordingly, there will be no order made as to costs.

***Côté J.* (dissenting) (Moldaver J. concurring):**

I. Introduction

165 Redwater Energy Corporation ("Redwater") is a bankrupt oil and gas company. Its estate principally consists of two types of properties or assets: valuable, producing oil wells and facilities that are still capable of generating revenue; and value-negative, non-producing assets, including depleted wells that are subject to onerous environmental liabilities. Redwater's receiver and trustee in bankruptcy, Grant Thornton Limited ("GTL"), purports to have disclaimed ownership of the non-producing assets. It did so in order to sell the valuable, producing wells separately — unencumbered by the liabilities attached to the disclaimed properties — and to distribute the proceeds of that sale to the estate's creditors.

166 However, Alberta law does not recognize GTL's disclaimers as enforceable. Shortly after GTL's appointment as receiver, the Alberta Energy Regulator ("AER") issued "Abandonment Orders" for the disclaimed assets, directing Redwater and its working interest participants to carry out environmental work on those properties. Specifically, the AER sought to have GTL "abandon" the non-producing properties, which meant to render the wells environmentally safe according to the AER's directives. It later notified GTL that it would refuse to approve any sale of Redwater's valuable assets unless GTL did one of three things: sell the disclaimed properties in a single package with the producing wells and facilities; complete the abandonment and reclamation work itself; or post security to cover the environmental liabilities associated with the disclaimed properties.

167 The evidence reveals that none of these options is economically viable. The net value of Redwater's 127 licensed properties is negative, so no rational purchaser would ever agree to buy them as a package. This is precisely why GTL opted to disclaim the burdensome properties in the first place. As to the remaining options, GTL cannot undertake or guarantee the abandonment and reclamation work because the environmental liabilities attached to the disclaimed assets exceed the estate's realizable value — and in any event, GTL could not access the funds necessary to satisfy these commitments until after a sale of the estate's valuable assets was completed. The effect of the AER's position, then, is to hamper GTL in its administration of the estate, preventing it from realizing *any* value for *any* of Redwater's creditors, including the AER. And the AER's position effectively leaves the valuable and producing wells in limbo, creating a real risk that they, too, will become "orphans" — assets that are unable to be sold to another company and are left entirely unrealized.

168 According to Wagner C.J., GTL is without recourse because federal law enables it only to protect itself from personal liability and because the AER was entitled to assert its environmental liability claims outside of the bankruptcy process. I disagree on both points. In my view, two aspects of Alberta's regulatory regime conflict with the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). This result flows from a proper and accurate understanding of fundamental principles of constitutional and insolvency law.

169 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 is that insolvency professionals are subject to the same obligations and liabilities as Redwater itself — including the obligation to comply with the AER's Abandonment Orders and the risk of personal liability for failing to do so. The *BIA*, however, permits a trustee in bankruptcy to disclaim assets encumbered by environmental liabilities.

This power was available to GTL in the circumstances of this case, and GTL validly disclaimed the non-productive assets. The result is that it is no longer subject to the environmental liabilities associated with those assets. Because Alberta's statutory regime does not recognize these disclaimers as lawful (by virtue of the fact that receivers and trustees are regulated as licensees, who cannot disclaim assets), there is an unavoidable operational conflict between federal and provincial law. Alberta's legislation governing the oil and gas sector should therefore be held inoperative to the extent that it does not recognize the legal effect of GTL's disclaimers.

170 Second, the AER has required that GTL satisfy Redwater's environmental liabilities ahead of the estate's other debts, which contravenes the *BIA*'s priority scheme. Because the Abandonment Orders are "claims provable in bankruptcy" under the three-part test outlined by this Court in *AbitibiBowater Inc., Re*, 2012 SCC 67, [2012] 3 S.C.R. 443 (S.C.C.) — from which this Court should not depart either explicitly or implicitly — the AER cannot assert those claims outside the bankruptcy process. To do so would frustrate an essential purpose of the *BIA*: distributing the estate's value in accordance with the statutory priority scheme. Nor can the AER achieve the same result indirectly by imposing conditions on the sale of Redwater's valuable assets. The province's licensing scheme effectively operates as a debt collection mechanism in relation to a bankrupt company: it prevents GTL from discharging its duties as trustee unless the AER's environmental claims are satisfied. As such, it should be held inoperative as applied to Redwater under the second prong of the paramountcy test, frustration of purpose.

II. Background

171 Redwater was a publicly traded oil and gas company that operated wells, pipelines and other facilities in central Alberta. In mid-2014, it suffered a number of financial setbacks following a series of acquisitions and unsuccessful drilling initiatives. As a result, it became unable to meet its obligations to its largest secured creditor, ATB Financial, which commenced enforcement proceedings.

172 GTL was appointed as Redwater's receiver on May 12, 2015. Upon its appointment, but before taking possession of any AER-licensed properties, GTL carried out an analysis of the economic viability and marketability of Redwater's assets. It determined that only a portion of the company's properties was actually saleable and that it would not be in Redwater's best interests — or in the interests of its creditors — for GTL, as receiver, to take possession of the non-producing properties. It therefore informed the AER on July 3, 2015, that it would take possession of only 20 of Redwater's 127 licensed wells and facilities. On November 2, 2015, shortly after its appointment as trustee, GTL again disclaimed the same non-producing properties it had previously renounced in its capacity as receiver.

173 According to GTL's assessment, Redwater's valuable assets were worth $4.152 million and would generate significant value for the estate's creditors if they were sold at auction. On the other hand, the net value of the non-producing properties was -$4.705 million, reflecting the extensive abandonment and reclamation liabilities owed to the AER. The net value of the estate as a whole was -$0.553 million. This was why, in GTL's business judgment, a sale of all the estate's assets together was simply not realistic.

174 The AER responded to GTL's first disclaimer notice by issuing the Abandonment Orders which required Redwater to carry out environmental work on the non-producing properties that GTL had disclaimed. But the AER's enforcement efforts were not limited to the debtor's estate itself. In its initial application that spurred this litigation, the AER filed suit against GTL seeking three principal remedies: (1) a declaration that GTL's disclaimers were void and unenforceable; (2) an order compelling GTL, in its capacity as receiver, to comply with the Abandonment Orders issued in relation to a portion of Redwater's assets; and (3) an order compelling GTL to fulfill its obligations as licensee under Alberta's legislation, specifically in relation to the abandonment, reclamation and remediation of Redwater's licensed properties.

175 The genesis of this litigation, then, was a clear and forceful effort by the AER to require GTL to satisfy Redwater's environmental obligations. To understand why the AER took that approach, it is important to note that it had provincial law on its side. Under the *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6 ("*OGCA*") and the *Pipeline Act*, R.S.A. 2000, c. P-15 ("*PLA*"), the term "licensee" is defined to include receivers and trustees in bankruptcy (*OGCA*, s. 1(1)(cc); *PLA*, s. 1(1)(n)). As a result, insolvency professionals become subject to the same regulatory obligations as the insolvent debtor itself by

effectively stepping into its shoes. They can therefore be compelled to carry out abandonment and reclamation work on the direction of the AER (*OGCA*, s. 27; *PLA*, s. 23; *Oil and Gas Conservation Rules*, Alta. Reg. 151/71 ("*OGCA Rules*"), s. 3.012); to reimburse anyone else who does abandonment work (*OGCA*, ss. 29 and 30; *PLA*, s. 25); to pay the orphan fund levy for any of the debtor's assets (*OGCA*, s. 74); to provide a security deposit, under certain circumstances, at the AER's request (*OGCA Rules*, s. 1.100(2)); and to pay a fine for failing to comply with an order made by the AER (*OGCA*, ss. 108 and 110(1); *PLA*, ss. 52(2) and 54(1)). These liabilities are all personal in nature. Other comparable legislation expressly limits the liability of insolvency professionals. For example, the *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, states that the liability of a receiver or trustee under an environmental protection order "is limited to the value of the assets that the person is administering", absent "gross negligence or wilful misconduct" (s. 240(3)). Alberta's oil and gas statutory regime, however, does not include such a clause protecting receivers and trustees. And as the AER's initial application makes clear, the AER itself viewed these obligations as personal. This was why it sued GTL to compel it, among other things, to comply with its obligations as a licensee under provincial law.

176 The AER also exercised its enforcement power in another capacity. In addition to issuing the Abandonment Orders, the AER imposed restrictions and conditions on the sale of Redwater's assets — conditions that effectively required GTL to satisfy those same obligations before a sale could be approved. Thus, even if GTL defied the AER's request to abandon the non-producing properties, it would still be unable to discharge its duties as receiver and trustee.

177 Both the chambers judge and the majority of the Court of Appeal found in favour of GTL on each prong of the paramountcy test, concluding that there is an operational conflict and a frustration of purpose (2016 ABQB 278, 33 Alta. L.R. (6th) 221 (Alta. Q.B.); 2017 ABCA 124, 50 Alta. L.R. (6th) 1 (Alta. C.A.)). They agreed with GTL and ATB Financial that the provisions of Alberta's statutory regime permitting the AER to enforce compliance with Redwater's environmental abandonment and reclamation obligations were constitutionally inoperative during bankruptcy. The AER and the Orphan Well Association ("OWA") then appealed to this Court.

III. Analysis

178 The *Constitution Act, 1867*, grants the federal government exclusive jurisdiction to regulate matters relating to bankruptcy and insolvency (s. 91(21)). In the exercise of that jurisdiction, Parliament enacted the *BIA*, "a complete code governing bankruptcy" (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 (S.C.C.) , at para. 40; see also *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.) , at para. 85). The *BIA* outlines, among other things, the powers, duties and functions of receivers and trustees responsible for administering bankrupt or insolvent estates and the scope of claims that fall within the bankruptcy process (see *BIA*, ss. 16 to 38 and 121 to 154).

179 Although the operation of the *BIA* "depends upon the survival of various provincial rights" (*Moloney* , at para. 40), this is true only to the extent that "substantive provisions of any [provincial] law or statute relating to property ... are not in conflict with [the *BIA*]" (*BIA*, s. 72(1)). When a conflict arises, the *BIA* necessarily prevails (*Moloney* , at paras. 16 and 29; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 (S.C.C.) , at para. 16). This reflects the constitutional principle that federal laws are paramount (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.) , at para. 32).

180 The respondents in this appeal — GTL and ATB Financial — posit two distinct conflicts between the federal and provincial legislation. First, they argue that the *BIA* grants receivers and trustees the power to disclaim any interest in any real property, even where they are not at risk of personal liability by virtue of their possession of the property. This disclaimer power enables trustees to renounce valueless and liability-laden property of a bankrupt in pursuit of their primary goal, which is to maximize global recovery for all creditors. The respondents argue that GTL validly disclaimed the non-producing assets and therefore cannot be held responsible for carrying out the Abandonment Orders; nor can the AER make any sale of Redwater's assets conditional on the fulfillment of obligations with respect to the disclaimed properties.

181 Second, they argue that the AER's Abandonment Orders constitute "claims provable in bankruptcy". In their view, it would undermine the *BIA*'s priority scheme if the AER could assert those claims outside the bankruptcy process — and ahead

of the estate's secured creditors — whether by compelling GTL to carry out those orders or by making the sale of Redwater's valuable assets conditional on the fulfillment of those obligations.

182 In my view, GTL and ATB Financial have satisfied their burden of demonstrating a genuine inconsistency between federal and provincial law under both branches of the paramountcy test. In what follows, I first discuss the operational conflict that arises between Alberta's regulatory regime and s. 14.06(4) of the *BIA*. I then turn to the second branch of the paramountcy analysis, frustration of purpose.

A. Operational Conflict

183 The first branch of the paramountcy test is operational conflict. An operational conflict arises where "it is impossible to comply with both laws" (*Moloney* , at para. 18) — "where one enactment says 'yes' and the other says 'no'", or where "the same citizens are being told to do inconsistent things" (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.) , at p. 191; see also *Lemare Lake*, at para. 18).

184 In essence, an operational conflict analysis is an exercise in statutory interpretation: the Court must ascertain the meaning of each competing enactment in order to determine whether dual compliance is possible. Although this interpretation exercise takes place within the guiding confines of cooperative federalism, a concept that allows for some interplay and overlap between federal and provincial legislation, this Court recently set out the limits to this concept:

> [C]ooperative federalism may be used neither to "override nor [to] modify the division of powers itself" (*Rogers Communications Inc. v. Châteauguay (City)*, [2016 SCC 23, [2016] 1 S.C.R. 467] at para. 39), nor to impose "limits on the otherwise valid exercise of legislative competence" (*Quebec (Attorney General) v. Canada (Attorney General)*, [2015 SCC 14, [2015] 1 S.C.R. 693] at para. 19; *Reference re Securities Act*, [2011 SCC 66, [2011] 3 S.C.R. 837] at paras. 61-62). It cannot, therefore, be used to make *ultra vires* legislation *intra vires*. By fostering cooperation between Parliament and the legislatures within the existing constitutional boundaries, however, cooperative federalism works to support, rather than supplant, the division of legislative powers (see: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 22).
>
> (*Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189 (S.C.C.), at para. 18)

185 Properly understood, cooperative federalism operates as a straightforward interpretive presumption — one that supports, rather than supplants, the modern approach to statutory interpretation. This Court recognized as much in *Moloney* , where Gascon J. wrote that courts should "favour an interpretation of the federal legislation that allows the concurrent operation of both laws" on the basis of a presumption "that Parliament intends its laws to co-exist with provincial laws" (*Moloney* (para. 27). But where "the proper meaning of the provision" — one that is not limited to "a mere literal reading of the provisions at issue" — cannot support a harmonious interpretation, it is beyond this Court's power to create harmony where Parliament did not intend it (*Moloney* (para. 23; see also *Pan-Canadian Securities Regulation*, at para. 18; *Lemare Lake*, at paras. 78-79, per Côté J., dissenting, but not on this point).

186 In my view, my colleague places undue reliance on the principle of cooperative federalism to narrow the scope of federal law and find a harmonious interpretation where no plausible one exists. Courts must be especially careful about using cooperative federalism to interpret legislative provisions narrowly in a case like this where Parliament expressly envisioned that the disclaimer right could come into conflict with provincial law. This is evident from the very first line of s. 14.06(4), which states that the disclaimer power applies "[n]otwithstanding *anything* in *any* federal or *provincial law*". The notion that judicial restraint should compel a different interpretation is therefore belied by the fact that Parliament considered, acknowledged and *accepted* the potential for conflict. To rely on judicial restraint, then, to avoid a conflict between federal and provincial law is to disregard Parliament's express instruction. Simply put, this is not a case where a drastic power is to be assumed from the statute; it is one where such a power is clearly provided for. In my view, reliance on cooperative federalism must never result in an interpretation of s. 14.06(4) that is inconsonant with its language, context and purpose.

187 It is undisputed in this appeal that Alberta law does not recognize GTL's disclaimers of assets licensed by the AER as enforceable to the extent that they relieve GTL of the obligation to satisfy the environmental liabilities associated with the assets. As receiver and trustee, GTL steps into Redwater's shoes as a "licensee" under provincial law; and, GTL submits, it can therefore, without the disclaimers, be held liable for the debtor's abandonment and reclamation obligations in the same manner as Redwater itself. The question, then, is whether the *BIA* permits GTL to disclaim these properties and what legal effect results from such disclaimer.

188 Section 14.06 of the *BIA*, reproduced in full in the appendix, outlines a trustee's powers and duties with respect to environmental liabilities and the disclaimer of property. Specifically, s. 14.06(4) states that the trustee is "not personally liable for failure to comply" with an order requiring it to "remedy any environmental condition or environmental damage affecting property involved in a bankruptcy", provided that the trustee "abandons, disposes of or otherwise releases any interest in any real property... affected by the condition or damage" within the statutory timeframes. The timing of GTL's disclaimers is not at issue here.

189 My colleague concludes that, regardless of whether GTL could have properly invoked the disclaimer power in this case, the effect of any such disclaimer would simply be to protect it from personal liability. He states that, in any event, the exercise of the disclaimer power was unnecessary in this case because GTL was already fully protected from personal liability through the operation of s. 14.06(2). Further, he argues, because the AER has not sought to hold GTL personally liable, there is no conflict between federal and provincial law on the facts of this case. With respect, I disagree with this approach to the language of the *BIA*, which does not properly account for fundamental principles of constitutional and insolvency law. I will begin by addressing the proper scope of the disclaimer power provided to trustees, explaining that the actual existence of a risk of personal liability is not a necessary condition for the exercise of this power and that, while protection from personal liability is one effect of a valid disclaimer, it is not the only one. In my view, this interpretation makes s. 14.06(4) consistent with the remainder of the section and is therefore to be preferred. With respect, I do not accept that Parliament intended s. 14.06(4) simply to protect trustees from the exact same liability that it had already addressed through s. 14.06(2). Subsection (4) must have a meaningful role to play within Parliament's bankruptcy and insolvency regime; I reject the suggestion that Parliament crafted a superfluous provision. I will also deal briefly with the AER's argument that the disclaimer power is not available at all in the context of Alberta's oil and gas statutory regime. In my view, it is available in this context.

(1) The Power to Disclaim Under Section 14.06(4)

190 The "natural meaning which appears when the provision is simply read through" (*Canadian Pacific Air Lines Ltd. v. C.A.L.P.A.*, [1993] 3 S.C.R. 724 (S.C.C.) , at p. 735) is that s. 14.06(4) assumes and incorporates a pre-existing common law right to disclaim property in the context of bankruptcy and insolvency (see L. Silverstein, "Rejection of Executory Contracts in Bankruptcy and Reorganization" (1964), 31 *U. Chi. L. Rev.* 467, at pp. 468-72; *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154, 251 D.L.R. (4th) 328 (B.C. C.A.), at paras. 24-31; *Thomson Knitting Co., Re*, [1925] 2 D.L.R. 1007 (Ont. C.A.), at p. 1008). This right is in keeping with the fundamental objective of court officers in insolvencies: the maximization of recovery for creditors as a whole by realizing the estate's valuable assets. By allowing trustees to disclaim assets with substantial liabilities, this power enables them to administer the estate in the most efficient manner and to avoid significant costs of administration that would reduce creditor recovery. Section 14.06(4) recognizes and supports this foundational principle of insolvency law.

191 This reading offers the clearest and most obvious explanation for the manner in which the provision is drafted, in that it plainly describes a result or legal effect of disclaimer: a trustee "is not personally liable for failure to comply" with an environmental order "*if* ... the trustee ... abandons, disposes of or otherwise releases any interest in any real property" (s. 14.06(4)). We should interpret s. 14.06(4) as authorizing the act of disclaimer in light of the principle that "[t]he legislator does not speak in vain" (*Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.) , at para. 37, citing *Québec (Procureur général) c. Carrières Ste-Thérèse ltée*, [1985] 1 S.C.R. 831 (S.C.C.) , at p. 838). If a trustee did not have the power to disclaim property, and if that power were not recognized and provided for in the statute, a provision describing the effect of such a disclaimer would serve no purpose.

192 The AER submits that property may be disclaimed only where it is necessary for a trustee to avoid personal liability with respect to an environmental order. This interpretation entirely inverts the language of the provision, turning a stated *effect* of disclaimer into a necessary condition that circumscribes the exercise of the power. The operative clauses are neither written nor ordered in this manner. Rather, s. 14.06(4) expresses the disclaimer right in unqualified terms and emphasizes that a trustee may not be held liable whenever that right is exercised. If Parliament truly intended to condition the right to disclaim property on the actual existence of a risk of personal liability, "it is hard to conceive of a more convoluted and sibylline way of stating something that could be so easily expressed in clear and direct terms" (*Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 (S.C.C.) , at p. 124).

193 My colleague adopts a slightly different approach. Rather than accepting the argument that the risk of personal liability is a necessary condition to the exercise of the disclaimer power in s. 14.06(4), he concludes that protection from personal liability for non-compliance with environmental orders is the only consequence of a valid disclaimer. Therefore, he says, the bankrupt's estate is not relieved of its obligations under the environmental orders and the trustee can be compelled to expend the entirety of the estate's assets on compliance. With respect, this also cannot be the correct reading of the subsection. Nor do I believe that the brief references to s. 14.06(4) in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123 (S.C.C.) — a case in which this subsection was not directly in issue and this Court was not tasked with interpreting it in any meaningful way — provide much assistance in this case.

194 I accept that the opening words of s. 14.06(4) refer to the personal liability of the trustee. However, when the words of the subsection are read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament", as the courts are required to do (see *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) ; *Bell ExpressVu* , at para. 26, quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87), their meaning becomes apparent.

195 Section 14.06(4) both assumes and relies on the common law power of trustees to disclaim assets, a power that the majority of the Court of Appeal described as "commonplace" (para. 47). Even my colleague appears to accept that this disclaimer power "predates" s. 14.06(4) itself (at para. 95). Indeed, the majority of the Court of Appeal recognized that "[s]ection 14.06 does not appear to create a right in a trustee to abandon properties without value, but rather assumes that one exists upon bankruptcy" (para. 63). This is the only rational explanation for why Parliament made the effects of s. 14.06(4) available when the trustee "abandons, disposes of or otherwise releases any interest in any real property". While avoiding personal liability is one effect of the appropriate exercise of this power, it is not the only effect. Disclaimer operates to "determine, as from the date of the disclaimer, the rights, interests and liabilities" in the disclaimed property (R. Goode, *Principles of Corporate Insolvency Law* (4th ed. 2011), at p. 202). By properly disclaiming certain assets, the trustee is relieved of any liabilities associated with the disclaimed property and loses the ability to sell the property for the benefit of the estate. The author Frank Bennett, writing about the administration of the bankrupt's real property, explains that "[w]here the trustee disclaims its interest, the disclaimer releases and disclaims any and all right, title and interest to the property" (*Bennett on Creditors' and Debtors' Rights and Remedies* (5th ed. 2006), at p. 482 (footnote omitted)).

196 The majority asserts that s. 14.06(4) does not allow a trustee to "walk away" from assets and the environmental liabilities associated with them (paras. 86, 100 and 102). However, *disclaiming* property does have precisely this effect. It permits the trustee not to realize assets that would provide no value to the estate's creditors and whose realization would therefore undermine the trustee's fundamental objective. A recognized purpose of the disclaimer power is to "avoid the continuance of liabilities in respect of onerous property which would be payable as expenses of the liquidation, to the detriment of unsecured creditors" (Goode, at p. 200 (footnote omitted)). These principles are no less valid in relation to valueless real property than they are in relation to unprofitable and burdensome executory contracts. Indeed, there has been no suggestion in this appeal, including from the AER and the OWA, that trustees can never disclaim onerous real property.

197 This explanation of the disclaimer power is borne out by GTL's actions in the instant case. After assessing the economic viability and marketability of Redwater's assets, GTL determined that it would be most beneficial to Redwater's creditors as a whole if it disclaimed the non-producing, liability-laden assets.

198 Parliament's recognition of this common law disclaimer power in s. 14.06(4) is not new. The power is also referred to in another section, albeit in a broader context. Section 20(1) of the *BIA*, provides trustees with the ability to "divest" themselves of "any real property or immovable of the bankrupt" generally. However, the disclaimer power itself does not derive from this section. Nor is a trustee required to invoke s. 20(1) in order to exercise the disclaimer power described in s. 14.06(4), which incorporates that power and spells out the particular effects of its exercise in the specific context of environmental remediation orders. In any event, this Court is not required in this appeal to comment on the full effects of s. 20(1).

199 Under my colleague's interpretation, it is unclear why Parliament chose to enact the disclaimer mechanism. It is surely true that Parliament could have achieved the same outcome through the use of simpler language. Had it merely intended to protect trustees from personal liability for failure to comply with environmental orders, it could have easily done so directly — in fact, it had already done so in s. 14.06(2). There is no reason why Parliament would have attempted to achieve this relatively straightforward result through the convoluted mechanism of requiring trustees to disclaim property while at the same time not intending such disclaimer to have its "commonplace" common law effects. There is a reason why Parliament has referred to the power to disclaim in s. 14.06(4); we must give effect to this choice and to the words that Parliament has used.

200 It follows, then, that I respectfully disagree that s. 14.06(4) only protects trustees from specific types of personal liability. But it does not follow that the *estate* is relieved of its liabilities once a trustee exercises the disclaimer power — a misconception that is pervasive in the AER's submissions and the majority's analysis. The disclaimed property ultimately reverts to the estate at the conclusion of the bankruptcy proceedings, as is the case with unrealized assets (see *BIA*, s. 40; see also Bennett, at p. 528). The estate remains liable for the remediation obligations attached to the land. Whether the estate has sufficient assets capable of satisfying those liabilities at that point in time is a separate question that is unrelated to the underlying fact of ongoing liability. In any case, the regulatory scheme continues to apply with respect to the retained assets. In referring repeatedly to the idea that disclaimer does not "immunize bankrupt estates from environmental liabilities" (para. 81), the majority misunderstands the impact and purpose of the disclaimer power. The estate itself is not relieved of environmental obligations. As I have noted, the trustee does not take possession of the bankrupt's assets in order to continue the life of the bankrupt indefinitely. The trustee's function is to realize on the estate's valuable assets and maximize global recovery for all creditors. Allowing the trustee to deal only with the value-positive assets to achieve this goal does not relieve the *estate* of its environmental obligations. As a result, the disclaimer power, and its incorporation into s. 14.06(4), is entirely consistent with the foundational principles of insolvency law.

201 In s. 14.06(4), Parliament has expressly referred to this disclaimer power and spelled out the particular effects flowing from its proper exercise. By doing so, it has purposefully incorporated the disclaimer power into its statutory scheme to achieve its desired purposes.

202 My interpretation of s. 14.06(4) finds ample support in the Hansard evidence. In the debates preceding the enactment of s. 14.06(4) in 1997, Jacques Hains, a director in the Department of Industry Canada who had been involved in drafting the amendments to the *BIA*, discussed the new options being provided to trustees when faced with an environmental remediation order:

> First, he could decide to carry out the order and remedy the environmental damage, the costs to be charged as costs of administration from the bankrupt's assets.
>
> The second option would be to challenge this order to remedy before the appropriate courts; these two options are already to be found in environmental legislation.
>
> The third option would be for the monitor to apply to the appropriate court for a period of stay to assess the economic viability of complying with the order, whether it is worth the trouble and whether the assets are sufficient to cover the clean up costs.
>
> As a fourth option, if he considers that this course has absolutely no economic viability, he may give notification that he has renounced the real property to which the order applies. [Emphasis added.]

(Standing Committee on Industry, *Evidence*, No. 16, 2nd Sess., 35th Parl., June 11, 1996, at 15:45 to 15:50)

The above passage makes no reference to the personal liability of a trustee who is considering whether to invoke the "fourth option" and disclaim the property. Mr. Hains was clear that the decision to disclaim is based on the "economic viability" of complying with the remediation orders, specifically "whether the assets are sufficient to cover the clean up costs". This makes sense only in the context of the trustee's obligation to maximize economic recovery for creditors.

203 Several months later, Mr. Hains reiterated this fourth option, explaining that, after assessing the economic viability of complying with the order and "knowing that the bill will be too expensive and will not be economically viable, *the trustees are then out of it and can abandon that piece of property* subject to the order" (*Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, No. 13, 2nd Sess., 35th Parl., November 4, 1996, at p. 13:68 (emphasis added)). This description plainly reflects the function of the disclaimer power, which does indeed allow trustees to "walk away" from liability-laden assets that will not contribute to maximizing creditor recovery.

204 Mr. Hains' answers to questions from the House of Commons Standing Committee further confirms this interpretation of the disclaimer power. The following exchange is very telling:

> **Mr. Lebel [Member of Parliament for Chambly]**: When a trustee decides to give up the land and realize[s] assets elsewhere, for example by making a profit from the sale of assets, having released himself from the obligation to clean up the land, he would be sharing a dividend realized from other profitable assets and telling the creditors to manage as best they can with the real property. If the creditors are not willing to touch it, he will then tell the government to clean it up. In such a case, each of the bankruptcy creditors would also ... stand to earn a small dividend, as it is referred to in Bankruptcy Law.
>
> Do you not think that your bill should require the trustee to carry out a clean-up from the assets of the bankruptcy before the dividends are distributed?
>
> **Mr. Hains**: It's an excellent question that was put to me only three weeks ago by colleagues from the Department of the Environment of Quebec, whom I was meeting to discuss this subject. There were a number of matters of interest to them, particularly the one raised by Mr. Lebel. [Emphasis added.]
>
> (Standing Committee on Industry, June 11, 1996, at 16:55)

Mr. Hains went on to reference various other features of the scheme to assuage Mr. Lebel's concerns and noted that provincial environmental agencies would be responsible for performing the remediation work. Significantly, at no point did Mr. Hains contradict Mr. Lebel's understanding of the bill's provisions. Nor did he take issue with the premise underlying the question: that the new legislation does not "require the trustee to carry out a clean-up from the assets of the bankruptcy" before they are distributed to creditors. Mr. Hains did not claim that provincial regulators might still enforce such a requirement.

205 This exchange between Mr. Lebel and Mr. Hains clearly demonstrates the collective understanding of all parties that the proposed amendments, containing what would become s. 14.06(4), specifically *did not* require the trustee to expend the estate's assets to comply with environmental remediation orders. The drafters of s. 14.06(4) thus turned their minds directly to this issue, and their understanding of the provision's effects was contrary to that proposed by the majority.

206 Based on these references to Hansard, I cannot agree with the majority's statement that the legislative debates provide "no hint" of a parliamentary intention to relieve trustees of the obligation to expend estate assets on environmental remediation (para. 81). This intention was clearly expressed on multiple occasions.

207 As courts must read statutory provisions in their entire context, and as Parliament is presumed to craft sections and subsections of legislation as parts of a coherent whole, it is important to carefully examine the other subsections of s. 14.06. This is true regardless of whether a party to litigation seeks to apply them or to put them directly in issue (majority reasons, at paras. 88 and 101). Significantly, the immediate statutory context surrounding s. 14.06(4) confirms that a trustee's right to

disclaim property is not limited in the manner suggested by the AER or my colleague. Four provisions adjacent to s. 14.06(4) support this conclusion.

208 First, s. 14.06(5) provides that a court may stay an environmental order "for the purpose of enabling the trustee to assess the economic viability of complying with the order". Assessing "economic viability" is, on its face, broader than assessing the risk of personal liability. This provision indicates that a trustee is entitled to disclaim assets based on a rational economic analysis geared toward maximizing the value of the estate, and not merely in order to protect itself from personal liability. Otherwise, there would be no reason for Parliament to permit a court to grant a stay for the purpose of assessing economic viability. This understanding is consistent with the fundamental principles of insolvency law and with the Hansard evidence, as noted above, as well as with one of the recognized justifications for the disclaimer power more generally: to allow a trustee "to complete the administration of the liquidation without being held up by continuing obligations on the company under ... continued ownership and possession of assets which are of no value to the estate" (Goode, at p. 200).

209 Second, s. 14.06(7) grants the government a super priority for environmental claims in cases where it has already taken action to remedy the condition or damage. This provision would serve little purpose if a government regulator could assert a super priority for *all* environmental claims, as the AER effectively purports to do here by refusing to recognize GTL's disclaimers as lawful. It also suggests that Parliament specifically envisioned that the government could obtain a super priority and leapfrog other creditors, but *only* where the government itself has already remediated the environmental damage. An analogous argument was central to the reasoning in *Abitibi*, where this Court observed that the existence of a Crown priority limited to the contaminated property and certain related property under s. 11.8(8) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, undercut the argument that Parliament "intended that the debtor always satisfy all remediation costs" in circumstances where that express priority was inapplicable and where the Crown had no further priority with respect to the totality of the estate's assets (para. 33).

210 Third, s. 14.06(6) provides that claims for costs of remedying an environmental condition or environmental damage cannot rank as costs of administration if the trustee has disclaimed the property in question. Again, if the AER could effectively assert a super priority by compelling GTL to use all of Redwater's assets to satisfy its outstanding environmental liabilities, this provision would be unnecessary, because the costs of environmental remediation would rank *ahead* of administrative costs in the priority structure. Moreover, s. 14.06(6) highlights the potential for a direct conflict between federal and provincial law. A trustee cannot comply with the AER's instruction to pay environmental costs as part of its administration of the estate while simultaneously complying with the *BIA*'s requirement that such costs *not* be included in the trustee's administrative costs. This further raises the spectre of bankruptcy professionals being forced to expend their own funds under Alberta's regulatory regime — a notion that Parliament clearly rejected by amending the *BIA* in response to *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 D.L.R. (4th) 280 (Alta. C.A.) (see C.A. reasons, at para. 63). This is a risk that is not adequately addressed under my colleague's interpretation.

211 Fourth, s. 14.06(2) already deals with the circumstances in which a trustee can be held personally liable for a bankrupt's environmental liabilities. Under this provision, personal liability can arise only where environmental damage occurs as a result of the trustee's gross negligence or wilful misconduct. If a risk of personal liability is, in fact, a necessary condition to disclaim under s. 14.06(4), or if protection from personal liability is the only effect of disclaimer, this would mean that the disclaimer power is available or useful only in cases where the underlying environmental condition arises after the trustee's appointment and the trustee is responsible for gross negligence or wilful misconduct.

212 This obvious absurdity cannot be sidestepped by trying to distinguish between liability for environmental *damage* (purportedly covered by s. 14.06(2)) and liability for *a failure to comply with an order* to remedy such damage (purportedly covered by s. 14.06(4)). This distinction is entirely artificial. If the AER issues an abandonment order in relation to a licensed property, it effectively creates liability for the underlying condition itself — liability that would still be encompassed by s. 14.06(2). This is evident from the marginal note for s. 14.06(2), "[l]iability in respect of environmental *matters*", which is capacious enough to include liability that flows from a failure to comply with an environmental order. In any event, it is difficult to imagine why Parliament would intend to immunize a trustee from personal liability for an environmental *condition*, but still hold the trustee liable for a failure to comply with an *order* to remedy that exact same condition — and then further, permit

the trustee to avoid that very liability by disclaiming the property, but either not permit the trustee to disclaim that property in any other circumstance or make it pointless to do so. This convoluted reasoning not only misreads s. 14.06(4), but also rewrites s. 14.06(2) in the process. It effectively creates a sector specific exemption from bankruptcy law that would prohibit many receivers and trustees that operate in the oil and gas industry from disclaiming assets (see N. Bankes, *Majority of the Court of Appeal Confirms Chief Justice Wittmann's Redwater Decision*, May 3, 2017 (online)).

213 I also cannot accept that Parliament enacted s. 14.06(4) simply to protect trustees from personal liability in the narrow subset of circumstances not already covered by s. 14.06(2) — namely where an environmental condition or environmental damage arises after a trustee's appointment and as a result of the trustee's gross negligence or wilful misconduct — for two main reasons. Firstly, the terms of the provision itself belie this theory. The opening lines of s. 14.06(4) expressly make the limitation of liability "subject to subsection (2)". This indicates that Parliament deliberately intended subs. (2) to supersede subs. (4) in the determination of liability. Thus, where a trustee has caused an environmental condition or environmental damage through its wilful misconduct or gross negligence, the trustee *will still be personally liable*, despite any valid disclaimer under subs. (4). Secondly, there is no evidence, or indeed any rationale, to explain why Parliament would have drafted s. 14.06(4) to protect trustees in such narrow circumstances, through the method of disclaiming property, and to shield them from liability where they cause environmental issues through their own wrongdoing.

214 The majority of this Court accepts that, on its interpretation, no meaningful distinction can be drawn between the protection from personal liability provided by subs. (2) and that provided by subs. (4). Indeed, the majority appears to believe that such a distinction is not even necessary, accepting 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)" (para. 93). However, the effect of this interpretation is to render subs. (4) entirely meaningless and redundant. Trustees would have no reason to exercise their power to disclaim assets, as the only effect of doing so would be to protect them from personal liability from which they are already fully shielded by subs. (2). Section 14.06(4) would therefore serve no purpose whatsoever within Parliament's bankruptcy regime. I cannot understand the logic of Parliament explicitly referring to, and incorporating, the ability of trustees to disclaim assets — and specifically outlining one consequence of that power — simply to mandate that such an action has no meaningful effect. We must presume that Parliament does not speak in vain and did not craft a pointless provision (*J.T.I. MacDonald Corp. c. Canada (Procureure générale)*, 2007 SCC 30, [2007] 2 S.C.R. 610 (S.C.C.) , at para. 87). It is a trite principle of statutory interpretation that every provision of a statute should be given meaning:

> It is presumed that every feature of a legislative text has been deliberately chosen and has a particular role to play in the legislative design. The legislature does not include unnecessary or meaningless language in its statutes; ... it does not make the same point twice.
>
> (R. Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 43)

215 This evident absurdity cannot be avoided by suggesting that s. 14.06(4) was created to clarify to trustees that they may be required to expend the entire value of a bankrupt estate to comply with environmental orders, despite valid disclaimers. If Parliament's intent was truly to undermine the disclaimer power in this way, it is difficult to conceive of a more convoluted, tortuous and unclear method to achieve this result than s. 14.06(4). Had Parliament simply sought to make clear to trustees that disclaimer would not allow them to relieve themselves from satisfying environmental liabilities, it could easily have done so directly rather than enacting a provision that describes protection from personal liability they do not actually face.

216 Section 14.06, when read as a whole, indicates that subs. (4) does more than merely protect trustees from personal liability. My colleague has declined to even consider the remaining subsections of s. 14.06 that I have discussed, other than subs. (2). Nonetheless, he says that the plain meaning of a provision cannot be "contorted to make its scheme more coherent" (para. 101). The conclusion that would result from such an approach would be that Parliament simply intended to craft a largely incoherent framework. I disagree that we should reach this conclusion here. As Dickson J. (as he then was) stated in *R. v. Morgentaler* (1975), [1976] 1 S.C.R. 616 (S.C.C.) , at p. 676: "We should pay Parliament the respect of not assuming readily that it has enacted legislative inconsistencies or absurdities." A determination that Parliament designed s. 14.06 as an incoherent whole is

inconsistent with the role of the courts in statutory interpretation, which is to read the words of a statute in their entire context, harmoniously with the scheme of the statute. As Ruth Sullivan has noted:

> It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal.
>
> The presumption of coherence is also expressed as a presumption against internal conflict. It is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other. [Footnote omitted.]
>
> (*Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 337; see also *R. v. H. (L.)*, 2008 SCC 49, [2008] 2 S.C.R. 739 (S.C.C.), at para. 47.)

217 Where it is possible to read the provisions of a statute — especially the various subsections of a single section — in a consistent manner, that interpretation is to be preferred over one that results in internal inconsistency. In my view, as I have set out above, it is possible to read s. 14.06(4) coherently with the remainder of the section. This is the interpretation that Parliament is presumed to have intended. In this case, I see no compelling reason to depart from this presumption.

218 My colleague's analysis is reminiscent of the strictly textual or literal approach to statutory interpretation — the "plain meaning rule" — that this Court squarely rejected in *Rizzo*. This is apparent from the fact that he relies strictly on what he alleges to be the "clear and unambiguous" wording of s. 14.06(4), while discounting the context of the provision. With respect, I am of the view that the Court should rely on the predominant and well-established modern approach to statutory interpretation: the words of an Act must be "'read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament'" (*Rizzo*, at para. 21; *Bell ExpressVu* , at para. 26, both quoting Driedger, at p. 87).

219 In *Rizzo*, Iaccobucci J. explained that "statutory interpretation cannot be founded on the wording of the legislation alone" (para. 21). The Court of Appeal in *Rizzo*, which had adopted the plain meaning interpretation, "did not pay sufficient attention to the scheme of the [Act], its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized" (para. 23).

220 In interpreting s. 14.06(4) of the *BIA*, the majority similarly relies on the supposed plain meaning of the words of the provision but does not pay sufficient attention to the scheme of s. 14.06 as a whole; nor does it appropriately recognize the context of the words.

221 Even if we were to leave aside the wording of the provision itself and its immediate statutory context, a purposive interpretation would lead to the same result. Consider the consequences of the analysis of the AER or the analysis of my colleague in other cases like this, where an oil company's environmental liabilities exceed the value of its realizable assets. Insolvency professionals, knowing in advance that they can be compelled to funnel all of the estate's remaining assets toward those environmental liabilities (either because they cannot disclaim value-negative assets absent a risk of personal liability or because their disclaimer will be ineffective to prevent this), will never accept mandates in the first place. This is sensible business practice: if the estate's entire realizable value must go toward its environmental liabilities, leaving nothing behind to cover administrative costs, insolvency professionals will have nothing to gain — and much to lose — by stepping in to serve as receivers and trustees, irrespective of whether they are protected from personal liability. Debtors and creditors alike, knowing that this is the case, will have no reason to even petition for bankruptcy. The result is that *none* of a bankrupt estate's assets will be sold — not even an oil company's valuable wells — and the number of orphaned properties will increase. This is a far cry from the objectives of the 1997 amendments to the *BIA* as discussed in Parliament, which were to "encourage [insolvency professionals] to accept mandates" and to "reduce the number of abandoned sites" (Standing Committee on Industry, June

11, 1996, at 15:49). It is difficult to imagine that Parliament would have intended a construction of s. 14.06(4) that explicitly undermines its stated purposes.

222 The majority appears to accept that the purposes of s. 14.06(4) of the *BIA* included encouraging insolvency professionals to accept mandates in cases where there may be environmental liabilities (paras. 80-81). However, merely protecting trustees from personal liability in such cases will fail to achieve Parliament's desired result. As I have explained, even where prospective trustees face no risk of personal liability, they will be reluctant to accept mandates if provincial entities can require the entire value of a bankrupt's realizable estate to be applied to satisfy environmental obligations.

223 Since I have explained that s. 14.06(4) provides trustees with the power to disclaim assets even where there is no risk of personal liability, it is now necessary to briefly consider whether this power was available to GTL on the facts of this case. Here, the statutory conditions to the exercise of this power were met. The Abandonment Orders clearly relate to the remediation of an "environmental condition" (or "tout fait ... lié à l'environnement" in the French version of the *BIA*, which can be translated literally as "any fact ... related to the environment"). Indeed, even the AER and the OWA have never contested this point. In response to such orders, GTL was therefore entitled to exercise the disclaimer power provided for in s. 14.06(4).

(2) Section 14.06(4) Applies to Alberta's Oil and Gas Industry

224 The AER raised an additional argument that the right of disclaimer is entirely inapplicable in the context of the statutory regime governing the oil and gas industry due to the role played by third-party surface landowners and the nature of the property interests involved which rendered the Crown's super priority under s. 14.06(7) impractical. Martin J.A. (as she then was), writing in dissent at the Alberta Court of Appeal, reached the same conclusion. With respect, I cannot agree. Parliament did not make the disclaimer power in s. 14.06(4) conditional on the availability of the Crown's super priority.

225 In delineating what interests may be disclaimed by a trustee under s. 14.06(4), Parliament used exceptionally broad language. The trustee is permitted to disclaim "any interest" in "any real property". While Redwater's AER-issued licences may not be real property, all of the parties accept that *profits à prendre* and surface leases can be characterized as real property interests. In the context of this case, it is these interests that GTL truly sought to disclaim. The AER argued that s. 14.06(4) permits the disclaimer only of "true real property", meaning land currently or previously owned by the bankrupt, without any third-party landowners. This interpretation is not consistent with the actual language used by Parliament. Had Parliament intended to restrict the disclaimer power solely to fee simple interests, it could have stated this, rather than referring to "any interest in any real property".

226 Further, the Alberta oil and gas industry is far from the only natural resource sector in which companies traditionally operate on the land of third parties, whether the Crown or private landowners. The potential liability of trustees would explode if the mere presence of these third-party landowners rendered the disclaimer power in s. 14.06(4) entirely inapplicable. The language of the section is clearly broad enough to capture the statutory regime governing Alberta's oil and gas sector.

(3) Conclusion on Operational Conflict

227 In light of this interpretation of s. 14.06(4), I agree with both courts below that there is an operational conflict to the extent that Alberta's statutory regime holds receivers and trustees liable as "licensees" in relation to the disclaimed assets (see chambers judge reasons, at para. 181; C.A. reasons, at para. 57). This conflict is far from hypothetical. Under federal law, GTL is entitled to disclaim the bankrupt's assets affected by the Abandonment Orders. Under the *BIA*, GTL cannot be compelled to take action with respect to properties it has validly disclaimed, since the act of disclaimer relieves it of any rights, interests and liabilities in respect of the disclaimed properties. But under provincial law, the AER can order GTL to abandon the disclaimed assets, among other things (see para. 11). This is exactly what happened here. Not only did the AER order GTL to complete the work, but it also made the sale of Redwater's valuable assets conditional on GTL either abandoning the non-producing properties itself or packaging those properties with the estate's valuable assets for the purposes of any sale. In doing so, the AER impermissibly disregarded the effect of GTL's disclaimers. This remains the case, irrespective of whether GTL could (or would) ever be held personally liable for the costs of abandoning the properties above and beyond the entire value of the estate.

228 My colleague claims that the AER "has never attempted to hold a trustee personally liable" (para. 107). What is clear is that, on the facts of this case, the AER directly sought to require GTL to perform or pay for the abandonment work itself, whether this is referred to as personal liability or not. It is critical to observe that this litigation began when the AER filed an application seeking to compel GTL to comply with its obligations as a licensee, including the obligation to abandon the non-producing properties. Practically speaking, this amounted to an effort to hold GTL personally liable. Where else would the money required to abandon the disclaimed properties have come from? The value of the estate as a whole was negative, and the AER refused to permit GTL to sell the valuable properties on their own. No purchaser would have agreed to buy all of the assets together. Therefore, GTL had no way to recoup any value from the estate, as Redwater was bankrupt and no longer generating income. The *only* source of funds, in this scenario, was GTL itself. This is why the AER filed suit to compel GTL to carry out Redwater's abandonment obligations. As this makes clear, I cannot agree with the suggestion that the provincial regime has never been utilized to hold trustees personally liable in contravention of federal law. That is precisely what happened in this very case.

229 This conclusion cannot be avoided by referring to the fact that, pursuant to orders of the Alberta courts, GTL has already sold the valuable Redwater assets and the proceeds are being held in trust pending the outcome of this appeal (see majority reasons, at para. 108). This is precisely the result the AER sought to prevent by precluding GTL from selling only the valuable properties, without the disclaimed ones. GTL was able to do so only as a direct result of this litigation.

230 My colleague states that, if the AER "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" (para. 107). Thus, even on my colleague's interpretation of s. 14.06 — which I do not accept — an operational conflict does exist on the facts of this case, specifically as a result of the AER's application to the Alberta Court of Queen's Bench seeking to have GTL personally satisfy the environmental obligations associated with the disclaimed assets.

231 All of that being said, creditors with provable claims can still seek payment in accordance with the *BIA*'s priority scheme (*Abitibi*, at para. 98). As I discuss below, the AER's environmental claims remain valid as against the Redwater estate, and it may pursue those claims through the normal bankruptcy process. Thus, even if s. 14.06(4) does not permit GTL to disclaim the non-producing wells and relieve itself of the environmental obligations associated with them, it is nevertheless the case that the AER cannot compel GTL to satisfy its claims ahead of those of Redwater's secured creditors.

B. Frustration of Purpose

232 The second branch of the paramountcy test is frustration of purpose. Even where dual compliance with both federal and provincial law is, strictly speaking, possible, provincial legislation or provisions will nevertheless be rendered inoperative to the extent that they have the effect of frustrating a valid federal legislative purpose (*Moloney* , at para. 25; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121 (S.C.C.) , at pp. 154-55; *Canadian Western Bank* , at para. 73). The focus of the analysis is on the effect of the provincial legislation or provisions, not its purpose (*Moloney* , at para. 28; *Husky Oil* , at para. 39).

233 This Court has repeatedly recognized that one of the purposes of the *BIA* is "the equitable distribution of the bankrupt's assets among his or her creditors" (*Moloney* , at para. 32; *Husky Oil* , at para. 7). It achieves this goal through a collective proceeding model — one that maximizes creditors' total recovery and promotes order and efficiency by distributing the estate's assets in accordance with a designated priority scheme (*Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.) , at para. 22). All claims that are "provable in bankruptcy" are subject to this priority scheme. Exercises of provincial power that have the effect of altering bankruptcy priorities are therefore inoperative because they frustrate Parliament's purpose of equitably distributing the estate's assets in accordance with the federal statutory regime (*Abitibi*, at para. 19; *Husky Oil* , at para. 32).

234 The question here is whether the environmental claims asserted by the AER (i.e., the Abandonment Orders) are provable in bankruptcy. If they are, then the AER is not permitted to assert those claims outside of the bankruptcy process and ahead of Redwater's secured creditors because this would frustrate the purpose of the federal priority scheme. Rather, it must abide by the *BIA* and seek recovery from the estate through the normal bankruptcy procedures (*Abitibi*, at para. 40).

235 In *Abitibi*, this Court established a three-part test, rooted in the language of the *BIA*, to determine whether a claim is provable in bankruptcy: "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" (para. 26 (emphasis in original)). Since there is no dispute that Redwater's environmental obligations arose before it became bankrupt, I limit my analysis below to the first and third prongs of the *Abitibi* test: whether the liability is owed to a creditor, and whether it is possible to attach a monetary value to that liability.

236 The first prong of the *Abitibi* test asks whether the debt, liability or obligation at issue is owed by a bankrupt entity to a creditor. Deschamps J., writing for a majority of the Court, suggested that this is not an exacting requirement: "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" (para. 27 (emphasis added)). Though I would not go so far as to suggest that the analysis under the first prong is merely perfunctory or pro forma, and circumstances may well exist where it is not satisfied, Deschamps J. made clear in *Abitibi* that "*[m]ost* environmental regulatory bodies can be creditors", again stressing that government entities cannot systematically evade the priority requirements of federal bankruptcy legislation under the guise of enforcing public duties (para. 27 (emphasis added)). Even Martin J.A., writing in dissent at the Court of Appeal in this case, acknowledged that "*Abitibi* cast[s] the creditor net widely" (para. 186). The language of *Abitibi* admits of no ambiguity, uncertainty or doubt in this regard.

237 The majority suggests that applying *Abitibi* on its own terms will make it "impossible for a regulator *not* to be a creditor" (para. 136 (emphasis in original)). Without seeking to speculate on all possible scenarios, I would simply note that there will be many obvious circumstances in which regulators are not even exercising enforcement powers against particular debtors and the analysis from*Abitibi* can be concluded at a very early stage. Provincial regulators do many things that do not qualify as enforcement mechanisms against specific parties. For example, a regulatory agency may publish guidelines for the benefit of all actors in a certain industry or it may issue a license or permit to an individual. In such cases, any discussion of frustrating federal purposes will not go far. However, as Deschamps J. expressly acknowledged, the first prong of the test will have very broad application. This Court should not feel compelled to limit its scope when*Abitibi* employed clear language in full recognition of its wide-ranging effects.

238 Here, there is no doubt that the AER exercised its enforcement power against a debtor when it issued orders requiring Redwater to perform the environmental work on the non-producing properties. The reasoning is simple: Redwater owes a debt to the AER, and the AER has attempted to enforce that debt by issuing the Abandonment Orders, which require Redwater to make good on its obligation. If Redwater (or GTL, as the receiver and trustee) does not abide by those orders — to the detriment of the estate's other creditors — it can be held liable under provincial law. This is, by any definition, an exercise of enforcement power, which is precisely what *Abitibi* describes. In fact, the AER itself conceded this point *twice* — first before the Court of Queen's Bench, and again at the Court of Appeal (chambers judge reasons, at para. 164; C.A. reasons, at para. 73).

239 The conclusion that I reach with respect to the AER's status as a creditor follows from a straightforward application of *Abitibi*. My colleague, however, seeks to reformulate this prong of the test. He suggests that a regulator is acting as a creditor only where it is not acting in the public interest and where the regulator itself, or the general revenue fund, is the beneficiary of the environmental obligation. He endorses the holding allegedly made in *Northern Badger* that "a regulator enforcing a public duty by way of non-monetary order is not a creditor" (para. 130).

240 In my view, it is neither appropriate nor necessary in this case to attempt to redefine this prong of *Abitibi* and narrow the broad definition of "creditor" provided by Deschamps J. This Court should leave her clear description of the provable claim standard to stand on its own terms. Respectfully, I disagree with the manner in which the majority is attempting to reformulate the "creditor" analysis, for a number of reasons.

241 Firstly, I do not believe that this case represents an appropriate opportunity to revisit the "creditor" stage of the *Abitibi* test. The AER conceded in both of the courts below that it was in fact a creditor of GTL. As a direct result of these concessions, neither the Alberta Court of Queen's Bench nor the majority of the Court of Appeal directly addressed this issue; instead, they merely

provided cursory comments. This issue appears to have been raised for the first time by Martin J.A. in her dissenting judgment. However, even her analysis is relatively brief, comprising only three paragraphs and consisting mainly of the statement that the costs of abandonment are "not owed to the Regulator, or to the province" (para. 185). While it is true that the parties briefly addressed this issue in their written and oral submissions to this Court, it was clearly not a substantial focus of their arguments. Without the benefit of considered reasons from the lower courts or thorough submissions on the continued application of the first prong of the test formulated in *Abitibi*, this Court should not attempt to significantly alter it.

242 Secondly, the majority states that no fairness concerns are raised by disregarding the AER's concessions below. It makes this point predominantly because the issue was raised and argued before this Court and because of the AER's unilateral assertion in its letter to GTL in May 2015. However, it is important to note that the effect of the AER's concessions was that GTL and ATB Financial were no longer required to adduce any evidence on this issue (S. N. Lederman, A. W. Bryant and M. K. Fuerst, *The Law of Evidence in Canada* (5th ed. 2018), at p. 1387). This point is important given that the majority's reformulation of the "creditor" requirement under the first prong of the test is highly fact-specific and dependent on the circumstances of the particular case. As a direct result of the AER's concession in the Alberta Court of Queen's Bench, we cannot know what evidence GTL or ATB Financial could have adduced on this issue. Therefore, there may indeed be real prejudice occasioned to these parties by disregarding the AER's concession at this point in time.

243 Thirdly, my colleague relies on the fact that the chambers judge in*Abitibi* found that the Province had already expropriated three of the five sites for which it issued remediation orders and was likely using the orders as a means to offset AbitibiBowater's NAFTA claims. While the chambers judge did in fact make these findings, they were inconsequential to Deschamps J.'s analysis on the "creditor" prong of the test. When applying the test to the facts of*Abitibi*, she explained that the first prong was "easily satisfied" because "the Province had identified itself as a creditor by resorting to [*Environmental Protection Act*, S.N.L. 2002, c. E-14.2] enforcement mechanisms" (*Abitibi*, at para. 49). She placed no reliance on the fact that the Province might itself derive a financial benefit from its actions and was not enforcing a purely public duty. Her analysis was in no way based on a finding that the Province's actions were a "colourable attempt" to recover a debt or that they demonstrated an "ulterior motive" (majority reasons, at para. 128).

244 Fourthly, in my view, it is incorrect to rely on *Northern Badger* in this case. That decision does not support my colleague's position in the manner he alleges. The issue in *Northern Badger* was also whether environmental remediation orders could be considered claims provable in bankruptcy. However, the crux of the dispute was whether "enforcing the requirement for the proper abandonment of oil and gas wells" (p. 57) gave rise to a provable claim because it would require the receiver to expend funds. Laycraft C.J.A. never addressed the question of whether the regulator could be said to have a contingent claim because it would complete the abandonment work itself and assert a claim for reimbursement. It was in the context of the regulator requiring the receiver to fulfill the abandonment obligations *itself* that the Alberta Court of Appeal discussed the enforcement of a public duty. It is important to carefully examine what the Court of Appeal actually said in this regard:

> 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.
>
> It is true that this board has the power by statute to create in its own favour a statutory debt if it chooses to do so. It may, under Sections 91(1) and (2) of the *Oil and Gas Conservation Act* (discussed above) do the work of abandonment itself and become a creditor for the sums expended. But the Board has not done so in this case. Rather it is simply in the course of enforcing observance of a part of the general law of Alberta. [Emphasis added; paras. 33-34.]

245 As is evident from para. 34 of *Northern Badger*, quoted above, the Court of Appeal never stated in that case that a regulator is not — or cannot be — a creditor when it is acting to enforce a public duty. In *Abitibi*, when referring to *Northern Badger*, Deschamps J. explained that the Alberta Court of Appeal "found that the duty to undertake remediation work is owed to the public at large *until the regulator exercises its power to assert a monetary claim*" (*Abitibi*, at para. 44 (emphasis added)). Laycraft C.J.A. accepted that when the regulator fulfills an environmental obligation itself and asserts a claim for reimbursement, it does indeed "become a creditor for the sums expended". Even in this situation, the public is still the ultimate beneficiary of the remediation work. This is largely consistent with Deschamps J.'s formulation of the test for a provable claim. In fact, this Court simply extended this principle in *Abitibi*, concluding that a regulator may also be a creditor with a provable contingent claim when it is sufficiently certain that the regulator will perform the remediation work and advance a claim for reimbursement. This is precisely the situation with the AER and the OWA here, as I will explain in more detail below. The Alberta Court of Appeal did not frame the issue in terms of the three-part test that would later be developed in *Abitibi*; it did not divide its analysis of whether a provable claim existed. However, viewed properly, Deschamps J. dealt with the concerns raised in *Northern Badger* under the third prong of the *Abitibi* test. It is not appropriate to duplicate these principles under the first prong as well, as the majority proposes. For this reason, it is misguided to rely on *Northern Badger* in this appeal to conclude that the AER is not a creditor.

246 However, even if the majority were correct about the reasoning in *Northern Badger* with respect to whether regulators enforcing public duties can be creditors — which I do not concede — I do not accept its conclusion that*Abitibi* did not overturn that reasoning. The Court was well aware of the decision in *Northern Badger* and cited it directly. Despite this, Deschamps J., when formulating the first prong of the test, made no distinction between regulators acting in the public interest and regulators acting for their own benefit. Instead, she stated that "the only determination that has to be made" (para. 27) is whether the regulator is exercising its enforcement powers against a debtor. In referring to *Northern Badger*, she expressly noted that "*[t]he real question is not to whom the obligation is owed*, as this question is answered by the statute, which determines who can require that it be discharged" (paras. 27 and 46 (emphasis added)).

247 Finally, and perhaps most importantly, suggesting that a regulator is not acting as a creditor where its environmental enforcement activities are aimed at the public good and are for the benefit of the public effectively overrules the first prong of the *Abitibi* test. Under my colleague's approach, it is no longer the case that the *only* determination that has to be made at the creditor stage of the analysis is "whether the regulatory body has exercised its enforcement power against a debtor" (*Abitibi*, at para. 27). Instead, the court must consider whether the regulatory body is enforcing a public duty and whether it stands to benefit financially from the fulfillment of the obligation in question.

248 Provincial regulators, in exercising their statutory environmental powers, will, in some sense, virtually always be acting in some public interest or for the benefit of some segment of the public. Under my colleague's reformulation of the first prong of the *Abitibi* test, it will be nearly impossible to find that regulators acting to protect environmental interests are ever creditors, outside the facts of*Abitibi* itself. As a result, provincial entities will be able to completely disregard the *BIA*'s priority scheme as long as they can plausibly point to some public interest that is furthered by their actions. Such a result strips*Abitibi* of its central holding and entitles provincial regulators to easily upend Parliament's purpose of providing an equitable recovery scheme in bankruptcy for all creditors.

249 In my view, it is insufficient to simply note that the facts of *Abitibi*differ from those of the present appeal (majority reasons, at para. 136). Deschamps J.'s broad articulation of the first prong of the test was in no way made dependent upon the particular facts of *Abitibi*. She sought to provide a clear general framework for determining when a regulator will be classified as a creditor — a framework that the majority's reasons effectively rewrite.

250 Further, it is worth noting that this Court in *Moloney* followed *Abitibi* in applying the broad definition of "creditor". In *Moloney* , this Court concluded that the Province of Alberta was acting as a creditor even though the debt it was collecting was reimbursement for compensating a third party who had been injured by the debtor in a car accident (para. 55). I fail to see how any meaningful distinction can be drawn between that situation and a situation in which a regulator seeks reimbursement for the costs incurred to remedy environmental damage caused to the land of third parties by the debtor.

251 "[G]reat care should be taken" before this Court overturns or overrules one of its prior decisions (*Teva Canada Ltd. v. TD Canada Trust*, 2017 SCC 51, [2017] 2 S.C.R. 317 (S.C.C.) , at para. 65). It is "a step not to be lightly undertaken" (*Craig v. R.*, 2012 SCC 43, [2012] 2 S.C.R. 489 (S.C.C.) , at para. 24). In order to do so, "the Court must be satisfied based on compelling reasons that the precedent was wrongly decided and should be overruled" (*Craig* , at para. 25; see also *Teva* , at para. 65). The reasons for exercising such caution are clear and sound, namely to ensure "certainty, consistency and institutional legitimacy" and to recognize that "the public relies on our disciplined ability to respect precedent" (*Teva* , at para. 65). When this Court decides that it is necessary to depart from one of its past decision, it should be clear about what it is doing and why.

252 Despite these clear admonitions against this Court too easily overturning its own precedents, that is precisely what the majority proposes to do in this case. Its approach effectively overrules the unequivocal definition of "creditor" provided in*Abitibi* — a considered decision rendered by a majority of this Court a mere six years ago. Not only does the majority fail to provide compelling reasons why Deschamps J.'s clear definition is wrong, but it also does not acknowledge that it is overturning a recent decision of this Court, rejecting the suggestion that this is the impact of its reasoning (para. 136). Further, this is being done without complete and robust submissions on the issue. Such an approach to our own precedents does not serve the goals of certainty, consistency or institutional legitimacy.

253 This Court should continue to apply the "creditor" prong of the test as it was clearly articulated in *Abitibi*. Deschamps J.'s definition ensures that provincial regulators are not able to easily appropriate for themselves a higher priority in bankruptcy and undermine Parliament's priority scheme. It advances the goals of orderliness and fairness in insolvency proceedings. Under that broad standard, the AER plainly acted as a creditor with respect to the Redwater estate. That is likely why it conceded this point in both of the courts below.

254 Since there is no dispute that the second prong of the *Abitibi* test is satisfied, I turn next to the third prong, which asks whether it is sufficiently certain that the regulator will perform the work and make a claim for reimbursement. As explained in *Abitibi* in the context of an environmental order:

> 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*.
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> . . . . .
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> The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative (*Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). In the context of an environmental order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process. [Emphasis added; paras. 30 and 36.]

255 In my view, it is sufficiently certain that either the AER or the OWA will ultimately perform the abandonment and reclamation work and assert a monetary claim for reimbursement. Therefore, the final prong of the *Abitibi* test is satisfied. The chambers judge made three critical findings of fact — each of which is entitled to deference on appeal (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.) , at para. 10) — that easily support this conclusion.

256 First, Wittmann C.J. found that GTL was not in possession of the disclaimed properties and, in any event, "has no ability to perform any kind of work on these assets" because the environmental liabilities exceeded the value of the estate itself (para. 170; see also *Abitibi*, at para. 53 where the Court stated that: "Abitibi had no means to perform the remediation work"). He discounted the possibility that any of Redwater's working interest participants would step in to perform the work, even for the small number of Redwater's licensed assets for which such partners existed (chambers judge reasons, at para. 171). In sum, he concluded that "there is no other party who could be compelled to carry out the abandonment work" (para. 172).

257 Two decisions of the Ontario Court of Appeal highlight why this is important. In *Nortel Networks Corp., Re*, 2013 ONCA 599, 6 C.B.R. (6th) 159 (Ont. C.A.), Juriansz J.A. found that the "sufficient certainty" standard was *not* satisfied in respect of certain sites because those sites had already been sold so the purchasers could be compelled to carry out the work on the basis that they were jointly and severally liable for the remediation obligations (paras. 39-40). But in *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154 (Ont. C.A.), Juriansz J.A. found that the "sufficient certainty" standard *was* satisfied because there was no purchaser that could be compelled by the regulator to complete the work. While it is true that fresh evidence on appeal revealed that the Ministry of the Environment had commenced the remediation work, Juriansz J.A. found that the fact that there were no subsequent purchasers had grounded the application judge's implicit conclusion regarding sufficient certainty (paras. 16-17). The present case is like *Northstar*, which is perfectly applicable to the facts of this case: there is no purchaser to take on Redwater's assets, and the debtor itself is insolvent. The chambers judge in this case concluded that there was no other party who could be compelled to carry out the work.

258 Second, in light of the fact that neither GTL nor Redwater's working interest participants would (or could) undertake this work, Wittmann C.J. found as a fact that "the AER will ultimately be responsible for [the abandonment] costs" (para. 171). He concluded that "the AER has the power [to seek recovery of abandonment costs] and has actually performed the work on occasion" (para. 168). In fact, in this very case, "the AER has expressly stated an intention to seek reimbursement for the costs of abandoning the renounced assets" (para. 172). This conclusion finds ample support in the record. In a cover letter sent with the Abandonment Orders on July 15, 2015, the AER unambiguously stated that if Redwater failed to abandon the disclaimed properties in accordance with its instructions, "the AER *will, without further notice, use its process to have the properties abandoned*" (GTL's Record, vol. I, at p. 102 (emphasis added)). The letter further stated that "[t]he AER *will exercise all remedies available to it to recover the costs from the liable parties*" (p. 102 (emphasis added)). The chambers judge did not err in relying on these unequivocal statements from the AER itself — to the effect that it *will* have the abandonment work performed and seek reimbursement — to conclude that sufficient certainty existed in this case.

259 Although there is some contrary evidence in the record — principally, the remarks of an AER affiant, who stated that the AER would not abandon the properties — Wittmann C.J. did not commit any palpable and overriding error by giving more weight to the letter that the AER sent contemporaneously with the Abandonment Orders. Likewise, to the extent that the AER sent other correspondence stating that it was not a creditor and that it was not asserting a provable claim, Wittmann C.J. did not err in discounting these self-serving statements as insufficiently probative on the ultimate legal questions. There is therefore no basis to disturb these factual findings or to reweigh this evidence on appeal.

260 Even if the AER's admission that it would abandon the properties itself is not sufficient on its own, Wittmann C.J. made a third critical finding of fact: the AER's only "realistic alternativ[e] to performing the remediation work itself" was to deem the renounced assets to be orphan wells (para. 172). In this circumstance, he found that "the legislation and evidence shows that if the AER deems a well an orphan, *then the OWA will perform the work*" (para. 166 (emphasis added)).

261 In light of these factual determinations, Wittmann C.J. rightly concluded that the "sufficient certainty" standard of *Abitibi* was satisfied. He elaborated on the legal basis for that conclusion as follows:

> Does this situation meet the sufficient certainty criterion as described in *AbitibiBowater*? The answer is no in a narrow and technical sense, since it is unclear whether the AER will perform the work itself or if it will deem the properties subject to the orders, orphans. If so, the OWA will probably perform the work, although not necessarily within a definite timeframe. However, the situation does meet, in my opinion, what was intended by the majority of the Court in *AbitibiBowater*. ... In the result, I find that although not expressed in monetary terms, the AER orders are in this case intrinsically financial. [para. 173]

262 My colleague does not specify the standard of review he applies in overturning Wittmann C.J.'s application of the third prong of the *Abitibi* test to this case. Nevertheless, he disagrees with the chambers judge and holds that the "sufficient certainty" standard is not satisfied. He offers two reasons for overruling Wittmann C.J.'s finding; but in doing so, he does not identify

any palpable and overriding error (or, even under the non-deferential standard of correctness, *any* true error) in the chambers judge's ultimate conclusion.

263 The first reason — the purported legal error of determining that the Abandonment Orders are "intrinsically financial" — is little more than a distraction. Even if this is an erroneous application of *Abitibi*, it is evident that Wittmann C.J. was of the view, *at a minimum*, that either the AER or the OWA would complete the abandonment work. And as I describe below, this alone is enough to satisfy the "sufficient certainty" standard. My colleague overemphasizes the import of this stray comment in the context of a thorough set of reasons that otherwise faithfully applies the correct standard. Any legal error on this basis, to the extent that one exists, does not displace the result that the chambers judge reached.

264 The second reason is more substantial. According to Wagner C.J., whether the AER will perform the abandonment work itself or delegate that task to the OWA is dispositive, since it was the Province itself that undertook the reclamation work in*Abitibi*. Here, he suggests, "the OWA is not the regulator" (para. 147) and thus the involvement of the OWA "is insufficient to satisfy the 'sufficient certainty' test" (para. 146).

265 Accepting, for a moment, the potential relevance of this distinction, I am of the view that any uncertainty as to whether the AER *would* delegate the reclamation work to the OWA is questionable. My colleague's emphasis on the self-serving remarks of an AER affiant and the fact that the AER took no immediate steps to perform the abandonment work itself amounts to little more than *post hoc* appellate fact finding, especially in light of the AER's own statement. Although Wittmann C.J. suggested that it was "unclear" whether the AER would complete this work itself, his other findings of fact and law — that the AER has the statutory power to perform the work, that it has actually done so in the past, and that it expressly stated its intention to seek reimbursement here — suggest otherwise. Regardless, Wittmann C.J.'s remark that the "sufficient certainty" standard was not satisfied "in a narrow and technical sense" must be read in this context: he was simply suggesting that there was some uncertainty as to "whether the AER will perform the work itself" as opposed to delegating the work to the OWA (para. 173). He was *not* implying — let alone concluding as a matter of law — that GTL had failed to prove the third prong of the *Abitibi* test. That reading would vastly overstate, and completely decontextualize, the meaning of a few isolated words in his reasons.

266 The more important problem, though, is that any distinction between the performance of the abandonment work by the AER and its performance by the OWA is meaningless. Form is elevated over substance if it is concluded that the "sufficient certainty" standard is not satisfied when a regulatory body's delegate, as opposed to the regulatory body itself, performs the work. And despite my colleague's suggestion that a regulatory body cannot act strategically to evade*Abitibi*, that is precisely what his analysis permits.

267 We are told that the "OWA's true nature" (majority reasons, at para. 147) — and therefore what purports to distinguish this case from impermissible examples of strategic delegation — rests on four factors: (1) the OWA is a non-profit organization; (2) it has an independent board of directors; (3) it has its own mandate and determines "when and how it will perform environmental work" (para. 148); and (4) it is "financially independent" (para. 148) as it is funded "almost entirely" by a tax on the oil and gas industry (para. 23).

268 The first point is true, but irrelevant. Why does an organization's non-profit status have any bearing on whether it is being used as a vehicle to avoid the "sufficient certainty" standard under *Abitibi*?

269 The second point is not accurate. The AER appoints members of the OWA's board of directors, as does another provincial body, Alberta Environment and Parks — underscoring the extent to which the provincial government can influence the OWA's activities.

270 The third point overstates the OWA's level of independence. The *Orphan Fund Delegated Administration Regulation*, Alta. Reg. 45/2001, gives the AER substantial power to influence the OWA's decision making. Section 3(2)(b) of the regulation expressly states that, in fulfilling its delegated powers, duties and functions, the OWA must act in accordance with "applicable requirements, guidelines, directions and orders of the [AER]". The regulation also mandates that the OWA provide information to the AER on request and regularly submit reports indicating or containing its budget, "goals, strategies and performance

measures", activities for the previous year and financial statements (s. 6). The AER appears to be able to exercise substantial control and oversight over the OWA if it so chooses, including over the manner in which the OWA carries out its environmental work.

271 The fourth point is also inaccurate and would probably be irrelevant even if it were accurate. The Province has provided funding to the OWA in the past, including a $30 million contribution in 2009 and an additional $50,000 in 2012, and it has announced that it will loan the OWA an additional $230 million (see A.F., at para. 99 (alluding to this loan); recall *Abitibi*, at para. 58 where the Court stated that: "Earmarking money may be a strong indicator that a province will perform remediation work").

272 In any event, it is important to note the more salient features of the OWA and its relationship with the AER (and, more generally, with the provincial government). The OWA operates under legal authority delegated to it by the AER and in accordance with a Memorandum of Understanding it has signed with both the AER and Alberta Environment and Parks. The orphan fund itself is administered by the AER, which prescribes and collects industry contributions and remits the funds to the OWA. The OWA cannot increase the industry levy without first obtaining approval from the Alberta Treasury Board. In addition, the *OGCA* makes clear that abandonment costs incurred by any person authorized by the AER — which would include the OWA — constitute a debt payable to the AER (*OGCA*, s. 30(5)). The record shows that the AER has remitted abandonment costs to the OWA in the past, in the form of security deposits and amounts recovered through successful enforcement action against licensees.

273 The AER and the OWA are therefore inextricably intertwined. We should see this arrangement for what it is: when the AER exercises its statutory powers to declare a property an "orphan" under s. 70(2) of the *OGCA*, it effectively delegates the abandonment work to the OWA. Treating the OWA's work as meaningfully different from abandonment activities carried out by the AER turns a blind eye to this reality and does nothing to further the underlying principles of paramountcy. To the contrary, it provides provincial regulators with an easy way to evade the test of *Abitibi* through strategic behaviour, thereby undermining the legitimate federal interest in enforcing the *BIA*'s priority scheme. It should not matter which body carries out the work (see C.A. reasons, at para. 78; *OGCA*, s. 70(1)(a)(ii)).

274 The majority faults the chambers judge for "failing to consider whether the OWA can be treated as the regulator" (para. 153). However, the chambers judge cannot have erred by failing to appreciate a level of independence that simply does not exist.

275 The majority also offers an alternative conclusion: it is not sufficiently certain that even the OWA will perform the abandonment work (para. 149). Whether the chambers judge's conclusion to the contrary amounts to a palpable and overriding error, or something else, we are not told.

276 Again, such an approach would permit the AER to benefit from strategic gamesmanship by manipulating the timing of its intervention in order to escape the insolvency regime and strip Redwater of its assets. This arbitrary line-drawing exercise, in which a period of 10 years before the wells are abandoned is too long (but presumably some shorter time line would not be), has no basis in law. As Slatter J.A. convincingly observed in his reasons, the AER

> cannot insist that security be posted to cover environmental costs, but at the same time argue that it may be a long time before the Orphan Well Association actually does the remediation. If the Regulator takes security for remediating Redwater's orphan wells, those funds cannot be used for any other purpose. If security is taken, it is no answer that the security might be held for an indefinite period of time; the consequences to the insolvency proceedings and distribution of funds to the creditors are immediate and certain. Further, if security is taken, the environmental obligation has clearly been reduced to monetary terms. [Emphasis added; para. 79.]

277 Moreover, the OWA's estimate of 10 to 12 years was put forward at the start of this litigation more than 3 years ago. Whether that estimate remains accurate after the province's proposed infusion of nearly a quarter of a billion dollars into the orphan fund (A.F., at para. 99) [1] — money that will undoubtedly speed up the OWA's abandonment efforts — is an open question. In any case, the changing factual context highlights the essential problem with the majority's approach: pinning the

constitutional analysis on the timing of the OWA's intervention is arbitrary and irrational, as it causes the result to shift based on decisions made by the very actor that stands to benefit from a finding that the "sufficient certainty" standard is not satisfied.

278 All that aside, the chambers judge's recognition that the OWA will "probably" abandon the properties should be enough (chambers judge reasons, at para. 173). Concluding otherwise is not justified, since it would mean applying a stricter certainty requirement than is called for by *Abitibi* itself. Deschamps J. expressly rejected an alternative standard — a "likelihood approaching certainty" — adopted by McLachlin C.J. in dissent (*Abitibi*, at para. 60). But here, dismissing as insufficient the chambers judge's conclusion that the OWA would "probably" complete the work essentially means requiring a "likelihood approaching certainty". Since *Abitibi*does not require absolute certainty, or even a likelihood approaching certainty, Wittmann C.J. did not err in concluding that the third prong was satisfied (see the *Oxford English Dictionary* (online), which defines "probably" as "with likelihood (though not with certainty)"; "almost certainly; as far as one knows or can tell; in all probability; most likely" (online)).

279 After concluding that it is not sufficiently certain that the AER will abandon the sites, the majority goes on to find that the AER's licence transfer restrictions similarly do not satisfy the *Abitibi* test. This is so, it says, because the AER's refusal to approve a licence transfer does not give it a monetary claim against Redwater and because compliance with the Licensee Management Ratio ("LMR") conditions "reflects the inherent value of the assets held by the bankrupt estate" (para. 157). At the outset, I wish to make clear that I have already concluded that, since GTL lawfully disclaimed the non-producing properties under s. 14.06(4) of the *BIA*, an operational conflict arises to the extent that the AER included those disclaimed properties in calculating Redwater's LMR for the purpose of imposing conditions on the sale of Redwater's assets. In the analysis that follows, I reach that same conclusion under the frustration of purpose aspect of the paramountcy test as well.

280 I take issue with the majority's conclusion regarding the LMR conditions for two reasons. First, this approach elevates form over substance, disregarding Gascon J.'s admonition in *Moloney* that "[t]he province cannot do indirectly what it is precluded from doing directly" (para. 28; see also *Husky Oil* , at para. 41). Refusing to approve a sale of Redwater's assets unless GTL satisfies Redwater's environmental liabilities is no different, in substance, from directly ordering Redwater or GTL to undertake that work. This is because the AER achieves the exact same thing — the fulfillment of Redwater's environmental obligations — by making any sale conditional on GTL completing the work itself, posting security or packaging the non-producing assets into the sale, which reduces the sale price by the exact amount of those liabilities and ensures that the purchaser can be compelled, as the subsequent "licensee" under provincial law, to comply with the Abandonment Orders.

281 The only difference between these two exercises of provincial power is the means by which the AER has opted to enforce the underlying obligations. The Abandonment Orders carry a threat of liability for non-compliance; imposing conditions on the sale of Redwater's assets, on the other hand, does not create a liability in a formal sense, but it does preclude any sale from occurring unless and until those obligations are satisfied. Since the trustee must sell the assets in order to carry out its mandate, the *effect* of imposing conditions on the sale of Redwater's assets is the same as that of issuing abandonment orders — and, as my colleague acknowledges, it is the effect of provincial action, not its intent or its form, that is central to the paramountcy analysis (para. 116; see also *Husky Oil* , at para. 40). In either case, then, the effect of the AER's action is to create a debt enforcement scheme — one that requires the environmental obligations owed to the AER to be discharged ahead of the bankrupt's other debts.

282 Second, it is irrelevant to this analysis that the licensing requirements predate Redwater's bankruptcy and apply to all licensees. This is no different from*Abitibi*, where the obligation to close down and remediate the properties predated AbitibiBowater's bankruptcy and could also have been said to constitute an "inherent" limitation on the value of the regulatory licence. Yet the obligations at issue there were provable claims. So too here. Alberta is, of course, free to affect the priority of claims in non-bankruptcy contexts. For example, it can leverage its licensing power to condition the sale of assets by *solvent* corporations on the payment of outstanding debts to the province. But "once bankruptcy has occurred [the *BIA*] determines the status and priority of the claims" (*Husky Oil* , at para. 32, quoting A. J. Roman and M. J. Sweatman, "The Conflict between Canadian Provincial Personal Property Security Acts and The Federal Bankruptcy Act: The War is Over" (1992), 71 *Can. B. Rev.* 77, at p. 79).

283 In this case, imposing conditions on the sale of Redwater's valuable assets *does* result in a monetary debt in the AER's favour, whether in the form of: (1) the posting of security; (2) actual completion of the environmental work; or (3) the sale of the non-producing properties to another entity that is then regulated as a "licensee" and, as such, can be compelled under provincial law to complete the work. In each case, the result is the same: the AER is conditioning any sale of Redwater's assets on its ability to recover a pre-existing debt owed to it by the bankrupt.

284 An approach which artificially separates the Abandonment Orders and the transfer requirements in order to treat them as analytically distinct under the *Abitibi* test would cause the paramountcy analysis to turn on irrelevant subtleties in the manner or form in which the province has chosen to exercise its power. The two measures must be seen in tandem as the AER's means of enforcing a debt against the Redwater estate. As I have described, there is no meaningful difference in the bankruptcy context between a formal abandonment order directing a trustee to engage in remediation work and a rigid licensing system that imposes the exact same obligations as a condition of sale — a sale that, if the trustee is to carry out its mandate, *must* occur. The only effect of the majority's analysis is to encourage regulators to collect on their debts in more creative ways. None of this serves the purposes of paramountcy; and, more critically, nothing in that analysis offers insolvency professionals (or regulators, for that matter) clear guidance as to the types of obligations that will or will not satisfy the *Abitibi* test.

285 Since it is sufficiently certain that the AER (or the OWA, as its delegate) will complete the abandonment and reclamation work, all three prongs of the *Abitibi* test are satisfied. The Abandonment Orders are provable claims, and therefore the AER may not compel Redwater or its trustee to fulfill the obligations in question outside of the *BIA*'s priority scheme. Likewise, the AER may not condition the sale of Redwater's valuable assets on the performance of those same obligations.

286 Towards the end of its analysis, the majority makes the point that the AER's enforcement actions in this case facilitate, rather than frustrate, Parliament's intentions behind the *BIA* priority scheme due to the super priority for environmental remediation costs set out in s. 14.06(7) (para. 159). Respectfully, I completely reject this contention. No party attempted to argue that the super priority in subs. (7) was applicable on the facts of this case. Indeed, it is clear that it is not, as the majority itself acknowledges. I cannot accept that where Parliament has set out a particular super priority for the Crown for environmental remediation costs, secured against specific real property assets of the bankrupt, and where certain conditions are met, it somehow "facilitates" Parliament's priority scheme to, in effect, impose that super priority over other assets, in the absence of those statutory conditions being satisfied. It is wrong to rely on s. 14.06(7) to recognize an effective super priority for the AER in circumstances where the terms of that subsection are inapplicable. Doing so clearly undermines the detailed and comprehensive priority scheme that Parliament set out in the *BIA* to achieve its purposes. Had Parliament wished to extend a Crown super priority for environmental remediation costs beyond the circumstances in s. 14.06(7), it could have done so.

287 As a final note, GTL and ATB Financial advance alternative arguments that some aspects of Alberta's statutory regime, including the definition of "licensee", frustrate the purposes of the 1997 amendments to the *BIA* — purposes that, they say, include protecting insolvency professionals from liability and reducing the number of orphaned sites.

288 It is not strictly necessary for me to address these arguments, since I have already found that there is an operational conflict (the Alberta regime's failure to recognize the lawfulness of GTL's disclaimers) as well as a frustration of purpose on other grounds (interference with the *BIA*'s priority scheme). I would note, however, that GTL has stated that it would immediately seek a discharge if it were required to carry out the abandonment work, which would result in the remaining Redwater assets being surrendered to the OWA. The result in this circumstance, which does not appear to be acknowledged, or which appears to be ignored, in my colleague's reasons, would be *more* orphaned oil wells. To the extent, then, that the 1997 amendments were intended to reduce the number of orphaned properties, that purpose is also frustrated by preventing a receiver or trustee from disclaiming value-negative assets.

IV. Conclusion

289 There is much to be said in the context of this appeal about which outcome will optimally balance environmental protection and economic development. On the one hand, enforcing the AER's remediation orders would effectively wipe out

the estate's remaining value and leave all of its creditors (except the AER) without any recovery. It would also likely discourage insolvency professionals from accepting mandates in cases such as this one — potentially resulting in more orphaned properties across the province. On the other hand, permitting GTL to disclaim the non-producing wells and preventing the AER from enforcing environmental obligations before the estate's value is depleted would leave open the question of who, exactly, should foot the bill for remediating the affected land.

290 Whatever the merits of these competing positions, in matters of statutory interpretation this Court is one of law, not of policy. As the majority recognizes, at para. 30, "it is not the role of this Court to decide the best regulatory approach to the oil and gas industry"; decisions on these matters are made — indeed, they *have been made* — by legislators, not judges. And the law in this case supports only one outcome. But this does not mean that the AER is without options to protect the public from bearing the costs of abandoning oil wells. It could adjust its LMR requirements to prevent other oil companies from reaching the point of bankruptcy with unfunded abandonment obligations (as it has already done since this litigation began). It could adopt strategies used in other jurisdictions, such as requiring the posting of security up-front so that abandonment costs are not borne entirely at the end of an oil well's life cycle. One of the interveners, the Canadian Bankers' Association, noted that such systems of up-front bonding are prevalent in American jurisdictions. The AER could work with industry to increase levies so that the orphan fund has sufficient resources to respond to the recent increase in the number of orphaned properties. It could seek judicial intervention in cases where it suspects that a company is strategically using insolvency as a voluntary step to avoid its environmental liabilities (*Sydco Energy Inc (Re)*, 2018 ABQB 75, 64 Alta. L.R. (6th) 156 (Alta. Q.B.), at para. 84). And, as I have noted, it can continue to apply the province's statutory regime to all assets of an insolvent or bankrupt debtor that are retained by a receiver or trustee, including wells and facilities that the receiver or trustee seeks to operate rather than sell.

291 The AER may not, however, disregard federal bankruptcy law in the pursuit of otherwise valid statutory objectives. Yet that is precisely what it has done here by effectively displacing the "polluter-pays" principle enacted by Parliament in favour of a "lender-pays" regime, in which responsibility for the bankrupt's environmental liabilities is transferred to the estate's creditors. Our paramountcy jurisprudence does not permit that result.

292 For the foregoing reasons, I would dismiss the appeal and affirm the orders made by the chambers judge.

Appeal allowed.

Pourvoi accueilli.

Appendix

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

s. 14.06 (1) 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.

(1.1) 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.

. . . . .

(2) Notwithstanding anything in any federal or provincial law, a trustee is not personally liable in that position for any environmental condition that arose or environmental damage that occurred

(a) before the trustee's appointment; or

(b) after the trustee's appointment unless it is established that the condition arose or the damage occurred as a result of the trustee's gross negligence or wilful misconduct or, in the Province of Quebec, the trustee's gross or intentional fault.

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

(4) Notwithstanding anything in any federal or provincial law but subject to subsection (2), where an order is made which has the effect of requiring a trustee to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal or receivership, the trustee is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(a) if, within such time as is specified in the order, within ten days after the order is made if no time is so specified, within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, or during the period of the stay referred to in paragraph (b), the trustee

(i) complies with the order, or

(ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property, or any right in any immovable, affected by the condition or damage;

(b) during the period of a stay of the order granted, on application made within the time specified in the order referred to in paragraph (a), within ten days after the order is made or within ten days after the appointment of the trustee, if the order is in effect when the trustee is appointed, by

(i) the court or body having jurisdiction under the law pursuant to which the order was made to enable the trustee to contest the order, or

(ii) the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(c) if the trustee had, before the order was made, abandoned or renounced or been divested of any interest in any real property, or any right in any immovable, affected by the condition or damage.

(5) 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.

(6) 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.

(7) 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

(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.

(8) 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.

Footnotes

1 I am assuming that the AER's factum is accurate in referring to the existence and amount of this loan (which no other party contested).

End of Document

TAB 4

R.S.C. 1985, c. B-3, s. 2

s 2. Definitions

Currency

2.Definitions
In this Act

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

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

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

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

"bank" means

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

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

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

("banque")

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

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

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

"child" [Repealed 2000, c. 12, s. 8(1).]

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

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

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

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

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

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

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

"current assets" means cash, cash equivalents — including negotiable instruments and demand deposits — inventory or accounts receivable, or the proceeds from any dealing with those assets; *("actif à court terme")*

"date of the bankruptcy", in respect of a person, means the date of

(a) the granting of a bankruptcy order against the person,

(b) the filing of an assignment in respect of the person, or

(c) the event that causes an assignment by the person to be deemed;

("date de la faillite")

"date of the initial bankruptcy event", in respect of a person, means the earliest of the day on which any one of the following is made, filed or commenced, as the case may be:

(a) an assignment by or in respect of the person,

(b) a proposal by or in respect of the person,

(c) a notice of intention by the person,

(d) the first application for a bankruptcy order against the person, in any case

(i) referred to in paragraph 50.4(8)(a) or 57(a) or subsection 61(2), or

(ii) in which a notice of intention to make a proposal has been filed under section 50.4 or a proposal has been filed under section 62 in respect of the person and the person files an assignment before the court has approved the proposal,

(e) the application in respect of which a bankruptcy order is made, in the case of an application other than one referred to in paragraph (d); or

(f) proceedings under the *Companies' Creditors Arrangement Act*;

("ouverture de la faillite")

"debtor" includes an insolvent person and any person who, at the time an act of bankruptcy was committed by him, resided or carried on business in Canada and, where the context requires, includes a bankrupt; *("débiteur")*

"director" in respect of a corporation other than an income trust, means a person occupying the position of director by whatever name called and, in the case of an income trust, a person occupying the position of trustee by whatever name called; *("administrateur")*

"eligible financial contract" means an agreement of a prescribed kind; *("contrat financier admissible")*

"equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,

(a) a dividend or similar payment,

(b) a return of capital,

(c) a redemption or retraction obligation,

(d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d);

("réclamation relative à des capitaux propres")

"equity interest" means

(a) in the case of a corporation other than an income trust, a share in the corporation — or a warrant or option or another right to acquire a share in the corporation — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

("intérêt relatif à des capitaux propres")

"executing officer" includes a sheriff, a bailiff and any officer charged with the execution of a writ or other process under this Act or any other Act or proceeding with respect to any property of a debtor; *("huissier-exécutant")*

"financial collateral" means any of the following that is subject to an interest, or in the Province of Quebec a right, that secures payment or performance of an obligation in respect of an eligible financial contract or that is subject to a title transfer credit support agreement:

(a) cash or cash equivalents, including negotiable instruments and demand deposits,

(b) securities, a securities account, a securities entitlement or a right to acquire securities, or

(c) a futures agreement or a futures account;

("garantie financière")

"General Rules" means the General Rules referred to in section 209; *("Règles générales")*

"income trust" means a trust that has assets in Canada if

(a) its units are listed on a prescribed stock exchange on the date of the initial bankruptcy event, or

(b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the date of the initial bankruptcy event;

("fiducie de revenu")

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

("personne insolvable")

"legal counsel" means any person qualified, in accordance with the laws of a province, to give legal advice; *("conseiller juridique")*

"locality of a debtor" means the principal place

(a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event,

(b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event, or

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated;

("localité")

"Minister" means the Minister of Industry; *("ministre")*

"net termination value" means the net amount obtained after netting or setting off or compensating the mutual obligations between the parties to an eligible financial contract in accordance with its provisions; *("valeurs nettes dues à la date de résiliation")*

"official receiver" means an officer appointed under subsection 12(2); *("séquestre officiel")*

"person" includes a partnership, an unincorporated association, a corporation, a cooperative society or a cooperative organization, the successors of a partnership, of an association, of a corporation, of a society or of an organization and the heirs, executors, liquidators of the succession, administrators or other legal representatives of a person; *("personne")*

"prescribed"

(a) in the case of the form of a document that is by this Act to be prescribed and the information to be given therein, means prescribed by directive issued by the Superintendent under paragraph 5(4)(e), and

(b) in any other case, means prescribed by the General Rules;

("prescrit")

"property" means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property; *("bien")*

"proposal" means

(a) in any provision of Division I of Part III, a proposal made under that Division, and

(b) in any other provision, a proposal made under Division I of Part III or a consumer proposal made under Division II of Part III

and includes a proposal or consumer proposal, as the case may be, for a composition, for an extension of time or for a scheme or arrangement; *("proposition concordataire"* ou *"proposition")*

"public utility" includes a person or body who supplies fuel, water or electricity, or supplies telecommunications, garbage collection, pollution control or postal services; *("entreprise de service public")*

"resolution" or **"ordinary resolution"** means a resolution carried in the manner provided by section 115; *("résolution"* ou *"résolution ordinaire")*

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that property as security for a debt due or accruing due to the person from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable, and includes

(a) a person who has a right of retention or a prior claim constituting a real right, within the meaning of the *Civil Code of Québec* or any other statute of the Province of Quebec, on or against the property of the debtor or any part of that property, or

(b) any of

(i) the vendor of any property sold to the debtor under a conditional or instalment sale,

(ii) the purchaser of any property from the debtor subject to a right of redemption, or

(iii) the trustee of a trust constituted by the debtor to secure the performance of an obligation,

if the exercise of the person's rights is subject to the provisions of Book Six of the *Civil Code of Québec* entitled *Prior Claims and Hypothecs* that deal with the exercise of hypothecary rights;

("créancier garanti")

Editor's Note: S.C. 2001, c. 4, s. 25 replaced the definition of "secured creditor". S.C. 2001, c. 4, s. 177(1) provides as follows:

(1) The definition of "secured creditor" in subsection 2(1) of the Bankruptcy and Insolvency Act*, as enacted by section 25 of this Act [i.e. 2001, c. 4], applies only to bankruptcies or proposals in respect of which proceedings are commenced after the coming into force of that section, but nothing in this subsection shall be construed as changing the status of any person who was a secured creditor in respect of a bankruptcy or a proposal in respect of which proceedings were commenced before the coming into force of that section.*

Immediately before the replacement, the definition of ***"secured creditor"*** *read as follows:*

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable.

"settlement" [Repealed 2005, c. 47, s. 2(1).]

"shareholder" includes a member of a corporation — and, in the case of an income trust, a holder of a unit in an income trust — to which this Act applies; *("actionnaire")*

"sheriff" [Repealed 2004, c. 25, s. 7(3).]

"special resolution" means a resolution decided by a majority in number and three-fourths in value of the creditors with proven claims present, personally or by proxy, at a meeting of creditors and voting on the resolution; *("résolution spéciale")*

"Superintendent" means the Superintendent of Bankruptcy appointed under subsection 5(1); *("surintendant")*

"Superintendent of Financial Institutions" means the Superintendent of Financial Institutions appointed under subsection 5(1) of the *Office of the Superintendent of Financial Institutions Act*; *("surintendant des institutions financières")*

"time of the bankruptcy", in respect of a person, means the time of

(a) the granting of a bankruptcy order against the person,

(b) the filing of an assignment by or in respect of the person, or

(c) the event that causes an assignment by the person to be deemed;

("moment de la faillite")

"title transfer credit support agreement" means an agreement under which an insolvent person or a bankrupt has provided title to property for the purpose of securing the payment or performance of an obligation of the insolvent person or bankrupt in respect of an eligible financial contract; *("accord de transfert de titres pour obtention de crédit")*

"transfer at undervalue" means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor; *("opération sous-évaluée")*

"trustee" or **"licensed trustee"** means a person who is licensed or appointed under this Act. *("syndic"* ou *"syndic autorisé")*

R.S.C. 1985, c. 31 (1st Supp.), s. 69; 1992, c. 27, s. 3; 1995, c. 1, s. 62(1)(a); 1997, c. 12, s. 1; 1999, c. 28, s. 146; 1999, c. 31, s. 17; 2000, c. 12, s. 8; 2001, c. 4, s. 25; 2001, c. 9, s. 572; 2004, c. 25, s. 7(1), (3)-(8), (10); 2005, c. 3, s. 11; 2005, c. 47, s. 2(1), (3)-(5); 2007, c. 29, s. 91; 2007, c. 36, s. 1; 2012, c. 31, s. 414; 2018, c. 10, s. 82

Note:

S.C. 2000, c. 12, s. 8, amended s. 2(1) by repealing the definition of "child", and adding definitions of "common law partner" and "common law partnership". Pursuant to S.C. 2000, c. 12, s. 21, the amendments apply only to bankruptcies, proposals and receiverships commenced after the coming into force of S.C. 2000, c. 12, s. 21 on July 31, 2000. Prior to its repeal, the definition of "child" read as follows:

"child" includes a child born out of marriage;

Currency
Federal English Statutes reflect amendments current to March 17, 2021
Federal English Regulations are current to Gazette Vol. 155:4 (February 17, 2021)

End of Document

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part VII — Courts and Procedure(ss. 183-197)
Appeals

R.S.C. 1985, c. B-3, s. 193

s 193. Court of Appeal

Currency

193.Court of Appeal

Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

(a) if the point at issue involves future rights;

(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

(d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and

(e) in any other case by leave of a judge of the Court of Appeal.

Amendment History

1992, c. 27, s. 68

Currency

Federal English Statutes reflect amendments current to March 17, 2021
Federal English Regulations are current to Gazette Vol. 155:4 (February 17, 2021)

TAB 5

2019 ABQB 520
Alberta Court of Queen's Bench

Manitok Energy Inc (Re)

2019 CarswellAlta 1426, 2019 ABQB 520, [2019] A.W.L.D. 2998, 308 A.C.W.S. (3d) 99, 73 C.B.R. (6th) 203

In the Matter of the Notice of Intention to Make a Proposal of Manitok Energy Inc.

In the Matter of the Notice of Intention to Make a Proposal of Raimount Energy Corp.

In the Matter of the Notice of Intention to Make a Proposal of Corinthian Oil Corp.

B.E. Romaine J.

Judgment: July 11, 2019
Docket: Calgary B201-332583, B201-332610, B201-335351

Counsel: Howard A. Gorman, Q.C., D. Aaron Stephenson, for Receiver
Randal Van de Mossalaer, for Husky Oil Operations Limited
Isabel Langlois, for Encana Corporation
Charles Ang, for Canadian Natural Resources Limited
Caireen Hanert, for Persist Oil and Gas
Maria Lavelle, for Alberta Energy Regulator
Walker Macleod, for National Bank of Canada

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.b Rights
Headnote
Debtors and creditors --- Receivers — Conduct and liability of receiver — Rights
Receivership had been ongoing for 17 months — Receiver operated debtors' properties, sold property, and received proceeds which amounted to approximately $11 million — Receiver applied for order approving notice of partial discharge, authorizing receiver and trustee to issue subsequent notice to be discharged over any or all of retained assets at later date, allowing it to transfer books and records pertaining to renounced assets to association or surface rights board, and approving receiver's activities and its fees and expenses; three companies applied for adjournment — Receiver's application granted; companies' application dismissed — Lack of opportunity to review original list of renounced assets was not persuasive reason for adjournment of application — It appeared that one purpose of adjournment request was that companies seeking adjournment hoped to convince court and Alberta Energy Regulator (AER) that any funds that AER may agree should accrue to secured creditors or possibly to receiver's fees, and costs should instead be applied to end-of-life obligations of renounced assets, thus reducing risk and amount of companies' responsibilities for such obligations — In effect companies proposed that court and AER give priority to their interests and unsecured contingent claims they may have against debtors with respect to reclamation activities over interests of secured creditors — If companies seeking adjournment became liable for end-of-life obligation, they would become so by virtue of interests in renounced assets, in accordance with "polluter-pays" principle — While AER's orders may have had super-priority, unsecured, non-regulator creditors did not — Neither receiver nor AER had any obligation to prioritize interests of specific unsecured contingent creditors over secured creditors — There was no barrier to receiver's ability

to renounce assets in accordance with s. 14.06 of Bankruptcy and Insolvency Act and to be discharged from personal liability — Agreement between AER and receiver included receiver's agreement to market retained assets in attempt to reduce end-of-life obligations by transferring assets that would otherwise be renounced — Given receiver's valuable knowledge about retained assets and parties that may still be interested in purchasing them, that had potential of reducing claims against association fund at lowest cost in circumstances — Receiver's application did not seek to approve distribution of funds.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

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 (S.C.C.) — considered

Statutes considered:

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

Generally — referred to

s. 14.06 [en. 1992, c. 27, s. 9(1)] — considered

APPLICATION by receiver for order approving notice of partial discharge, authorizing receiver and trustee to issue subsequent notice to be discharged over any or all of retained assets at later date, allowing it to transfer books and records pertaining to renounced assets to association or surface rights board, and approving receiver's activities and its fees and expenses; APPLICATION by companies for adjournment.

***B.E. Romaine J.*:**

1 This application involves a receivership that has been ongoing for 17 months. It commenced before the Supreme Court decision in *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 (S.C.C.) ("*Redwater*"), when the law in Alberta was that the Alberta Energy Regulator (AER)'s orders with respect to end-of-life obligation were characterized as claims ranking with the claims of other unsecured debtors.

2 Under the law as it stood at that time, the Receiver, funded by the secured creditor, operated the debtors' properties, sold property to Persist Oil and Gas, and received proceeds which amount to roughly $11 million, net of disbursements and interim distributions to secured creditors previously made with the Court's approval.

3 Issues with respect to the priority, or lack of priority, of municipal tax claim have been adjourned sine die.

4 The Receiver seeks an order approving the Receiver's Notice of Partial Discharge and authorizing the Receiver and Trustee to issue a subsequent notice to be discharged over any or all of the retained assets at a later date. The Receiver also seeks an order allowing it to transfer books and records pertaining to the renounced assets to the Orphan Well Association (OWA) or the Surface Rights Board and approving the Receiver's activities and its fees and expenses.

5 Three parties, Husky Oil Operations Limited, Encana Corporation and Canadian Natural Resources Limited, appeared at the application and sought a lengthy adjournment.

6 The parties seeking the adjournment submitted:

7 First, that the application should be adjourned because they were only served on June 25, 2019, and require more time to review the lengthy list of renounced assets, asserting that they have already noted certain differences between their records and those of the debtors with respect to the interests identified. They submit that they need time to determine to what extent their interests are affected by the renunciation of the Receiver. At first blush, this seems reasonable, but the Receiver points out that any errors in the list of renounced assets do not prejudice the parties seeking the adjournment, because the Notice of Partial Disclosure now clarifies that the Receiver and Trustee are not retaining interests in any oil and gas assets except specified retained assets.

8 As the Receiver clearly cannot renounce any assets that the debtors do not own, there is no prejudice to the parties seeking an adjournment if the original list of renounced assets contains errors.

9 If, for instance, interests that are listed as being held by Husky are held by a third party, upon Husky being able to establish this, no harm will be done. If assets that the Receiver/Trustee purports to renounce are actually held in trust for Husky, Canadian Natural Resources or Encana, such a renunciation would not affect the ownership of the interest.

10 The Receiver also clarifies that all equipment not previously sold is now included in the list of retained assets, and that a small number of wells that were previously on the renunciation list are now included as retained assets. This clarification remedies some confusion over the renunciation.

11 In short, the lack of an opportunity to review the original list of renounced assets is not a persuasive reason for an adjournment of the application.

12 The second reason for the adjournment request is that the parties seeking the adjournment note that the Receiver does not intend to make any provision to fund the abandonment and reclamation obligations that may be associated with the renounced assets. Therefore, if the renounced assets are actually owned through a trust arrangement by Husky, Encana or Canadian Natural Resources or if they are joint venture parties with the debtors with respect to these renounced assets, responsibility for these obligations may fall on these parties.

13 As the Receiver notes in its Ninth Report, the AER is a significant stakeholder in the estate of these debtors as a result of the decision in *Redwater*, having priority to the assets from the debtors' estates to be used to satisfy provincial regulatory obligations.

14 The Receiver reports that the AER and the secured creditors have reached a tentative agreement with respect to the allocation of sale proceeds and revenues between the claims of the secured creditors, regulatory requirements for end-of-life obligations and the Receiver's fees and costs.

15 The Receiver reports that the Receiver and the AER have agreed:

(a) that the Receiver is able to seek Court approval (and inspection approval with respect to the debtor in bankruptcy) to issue its notice of renunciation and to be discharged over the assets being renounced;

(b) that the Receiver will turn over its records relating to the renounced assets to the OWA;

(c) that the Receiver will use estate funds to remedy public health and safety concerns regarding specific assets to be renounced, as determined by the AER and agreed to by the Receiver. The agreed upon remediation activities are described in the Ninth Report; and

(d) the Receiver will attempt to sell the remaining oil and gas assets that may only be marginally or non-accretive to the estate. It is hoped that such sales will reduce end-of-life obligations by transferring assets that would otherwise be renounced.

16 The renounced assets have already been marketed by Receiver, but no acceptable offers were received. The Receiver indicates that it is important to issue a notice of renunciation so that stakeholders can consider taking steps to pursue their interests, unencumbered by the stay.

17 These stakeholders include:

(a) surface lessors,

(b) freehold and crown mineral rights lessors,

(c) municipalities

and of course, working interest owners, the AER and the OWA.

18 The Receiver developed the list of renounced assets in conjunction with the AER.

19 It appears that one purpose of the adjournment request is that the parties seeking the adjournment hope to convince the Court and the AER that any funds that the AER may agree should accrue to the secured creditors or possibly to the Receiver's fees and costs should instead be applied to end-of-life obligations of the renounced assets, thus reducing the risk, and amount of the parties' responsibilities for such obligations.

20 In effect, they propose that the Court and the AER give priority to their interests and the unsecured contingent claims they may have against the debtors with respect to reclamation activities over the interests of the secured creditors.

21 That is not what the *Redwater* decision provides. If the parties seeking the adjournment become liable for end-of-life obligation, they will become so by virtue of their interests in the renounced assets, in accordance with the "polluter-pays" principle as it is characterized by the Supreme Court in *Redwater*.

22 While the Regulator's orders may have super-priority, unsecured non-regulator creditors do not. As the Supreme Court acknowledges in *Redwater* at para 40, the *Bankruptcy and Insolvency Act, RSC 1985, c B-3 ("BIA")* sets out a priority scheme for paying provable claims in bankruptcy, with secured creditors being paid first, preferred creditors, second and unsecured creditors last. Neither the Receiver nor the AER has any obligation to prioritize the interests of specific unsecured contingent creditors over the secured creditors.

23 If an adjournment of four weeks is granted, estate funds would be spent on reviewing and correcting the original list of renounced assets:

- the Receiver would continue to be responsible for these assets, may incur additional costs and will almost certainly be entitled to additional fees;
- all for the benefit of these specific potential unsecured creditors of the estate.
- It appears unlikely that there will be any funds available for unsecured creditors, and
- granting the adjournment would reduce the possibility that the secured creditors would recover some of what they are owed.

24 *Redwater* does not impose any barrier over the Receiver's ability to renounce assets in accordance with section 14.06 of the *BIA* and to be discharged from personal liability.

25 The parties seeking the adjournment also appear to be alleging that they are entitled to object to the absence of end-of-life arrangements for the renounced assets on the basis that they are responsible as industry participants for funding the OWA.

26 The OWA did not appear to request an adjournment. As *Redwater* makes clear, the OWA is not the Regulator: para 147. In fact, the OWA may not even be a creditor, for the reasons set out in *Redwater*: para 149.

27 At any rate, it is clear that the agreement between the AER and the Receiver includes the Receiver's agreement to market the retained assets in an attempt to reduce end-of-life obligations by transferring assets that would otherwise be renounced.

28 Given the Receiver's valuable knowledge about the retained assets and the parties that may still be interested in purchasing them, this has the potential of reducing claims against the OWA fund at the lowest cost in the circumstances.

29 The Notice of Partial Discharge does not operate retroactively, so that concern expressed by Canadian Natural Resources is not an issue.

30 Finally, the Receiver's application does not seek to approve the distribution of funds.

31 For all these reasons, I declined to grant a further adjournment, and I granted the orders sought by the Receiver

Receiver's application granted; companies' application dismissed.

TAB 6

2018 ABCA 48
Alberta Court of Appeal

2003945 Alberta Ltd. v. 1951584 Ontario Inc.

2018 CarswellAlta 160, 2018 ABCA 48, [2018] A.W.L.D. 779, 288 A.C.W.S. (3d) 18, 57 C.B.R. (6th) 272

2003945 Alberta Ltd. and 2021090 Alberta Ltd. (Respondents / Applicants / Appellants) and 1951584 Ontario Inc. operating as Maxium Financial Services and PricewaterhouseCoopers Inc. LIT, in its capacity as Receiver and Manager of the Corporate Defendants in the Court of Queen's Bench Action 1603 13294 (Applicants / Respondents / Respondents) and Loder Group of Companies Ltd., 1407004 Alberta Ltd., 1624165 Alberta Ltd., 1450816 Alberta Ltd., 733856 Alberta Ltd., S A Pharmacy Ltd., Quant Sat Holdings Ltd., 1401865 Alberta Ltd., North East Pharmacy (2013) Ltd., North East Clinic (2013) Ltd., Crossroads Pharmacy (1969) Ltd., 1441333 Alberta Ltd., and Harold Douglas Loder (Other Parties / Not Parties to the Appeal)

Sheila Greckol J.A.

Heard: February 1, 2018
Judgment: February 2, 2018
Docket: Edmonton Appeal 1703-0337-AC

Counsel: S.J. Livingstone, for Respondents / Applicants (Appellants)
K.J. Bourassa, for Applicant / Respondent (Respondent), PricewaterhouseCoopers Inc.
T.M. Warner, for Applicant / Respondent (Respondent), 1951584 Ontario Inc

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.e Miscellaneous
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — Miscellaneous
Plaintiff purchaser brought action related to agreement to purchase certain assets of bankrupt business — Chambers judge directed that matter be heard by way of summary trial — Purchaser began appeal proceedings — Receiver of bankrupt company brought motion to strike appeal, and plaintiff brought motion to extend time to file notice of appeal and for leave to appeal — Receiver's motion dismissed, purchaser's motion granted — Decision was made within receivership proceedings and was governed by procedure in Bankruptcy and Insolvency Act [BIA] — Plaintiff required leave to appeal under s 193(e) of BIA — Matter dealt with procedural unfairness — Plaintiff was out of time to file notice of appeal and application for leave to appeal, however, extension was granted — Plaintiff had reasonable explanation for not having filed application for leave to appeal, s. 193 of BIA is vague, and determining whether one has automatic appeal or requires leave is not simple — Proposed appeal was not frivolous and had apparent merit — Appeal would not delay receivership, "unduly" or otherwise — Issue of procedural fairness, involving right to make case through calling witnesses was significant to action itself but not generally.
Table of Authorities
Cases considered by *Sheila Greckol J.A.*:
Alberta Treasury Branches v. Conserve Oil 1st Corp. (2016), 2016 ABCA 87, 2016 CarswellAlta 548, 35 C.B.R. (6th) 6 (Alta. C.A.) — referred to

Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of) (1997), 1997 CarswellAlta 737, 48 C.B.R. (3d) 171, (sub nom. *Edo (Canada) Ltd. (Bankrupt), Re)* 206 A.R. 295, (sub nom. *Edo (Canada) Ltd. (Bankrupt), Re)* 156 W.A.C. 295, 1997 ABCA 273 (Alta. C.A. [In Chambers]) — followed

Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd. (2015), 2015 ABCA 206, 2015 CarswellAlta 1090, 602 A.R. 135, 647 W.A.C. 135 (Alta. C.A.) — referred to

Bearcat Explorations Ltd., Re (2003), 2003 ABCA 365, 2003 CarswellAlta 1741, 46 C.B.R. (4th) 189, 339 A.R. 376, 312 W.A.C. 376, 42 B.L.R. (3d) 222 (Alta. C.A.) — referred to

Cairns v. Cairns (1931), [1931] 3 W.W.R. 335, 26 Alta. L.R. 69, [1931] 4 D.L.R. 819, 1931 CarswellAlta 52 (Alta. C.A.) — followed

Elias v. Hutchison (1981), 14 Alta. L.R. (2d) 268, 37 C.B.R. (N.S.) 149, 27 A.R. 1, (sub nom. *Catalina Exploration & Development Ltd., Re)* 121 D.L.R. (3d) 95, 1981 CarswellAlta 183, 1981 ABCA 31 (Alta. C.A.) — referred to

Grotski v. Bank of Montreal (1991), 4 C.P.C. (3d) 197, (sub nom. *Bank of Montreal v. Grotski)* 120 A.R. 149, (sub nom. *Bank of Montreal v. Grotski)* 8 W.A.C. 149, 1991 CarswellAlta 374 (Alta. C.A.) — referred to

Kubota Canada Ltd. v. Case Credit Ltd. (2004), 2004 ABCA 41, 2004 CarswellAlta 230, (sub nom. *DCD Industries (1995) Ltd. (Bankrupt), Re)* 346 A.R. 166, (sub nom. *DCD Industries (1995) Ltd. (Bankrupt), Re)* 320 W.A.C. 166, 4 C.B.R. (5th) 174, 34 Alta. L.R. (4th) 1, 4 C.B.R. (4th) 174 (Alta. C.A.) — referred to

Moore, Re (2012), 2012 ONCA 569, 2012 CarswellOnt 10879, (sub nom. *Moore (Bankrupt), Re)* 295 O.A.C. 373, 95 C.B.R. (5th) 157, 354 D.L.R. (4th) 67 (Ont. C.A.) — referred to

Murphy v. Haworth (2016), 2016 ABCA 219, 2016 CarswellAlta 1376, 2 C.P.C. (8th) 201 (Alta. C.A.) — referred to

Nelson v. Balachandran (2015), 2015 ABCA 155, 2015 CarswellAlta 789, 6 E.T.R. (4th) 79, 645 W.A.C. 223, (sub nom. *Nelson Estate, Re)* 600 A.R. 223 (Alta. C.A.) — referred to

Simonelli v. Mackin (2003), 2003 ABCA 47, 2003 CarswellAlta 176, 39 C.B.R. (4th) 297, (sub nom. *Simonelli (Bankrupt), Re)* 320 A.R. 330, (sub nom. *Simonelli (Bankrupt), Re)* 288 W.A.C. 330 (Alta. C.A. [In Chambers]) — considered

2403177 Ontario Inc. v. Bending Lake Iron Group Ltd. (2016), 2016 ONCA 225, 2016 CarswellOnt 4553, 35 C.B.R. (6th) 102, 396 D.L.R. (4th) 635, 347 O.A.C. 226 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 183(2) — referred to

s. 193 — considered

s. 193(a) — considered

s. 193(a)-193(d) — referred to

s. 193(b) — considered

s. 193(c) — considered

s. 193(d) — considered

s. 193(e) — considered

s. 243 — referred to

Rules considered:

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

Generally — referred to

R. 14.37(2)(c) — referred to

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

Generally — referred to

R. 31(1) — considered

R. 31(2) — considered

MOTIONS by receiver to strike appeal, and by plaintiff to extend time to file notice of appeal and for leave to appeal.

***Sheila Greckol J.A.*:**

1 The Loder Group [1] was involved in the pharmaceutical business but went into receivership under s 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (*BIA*) on August 26, 2016.

2 The receiver, PricewaterhouseCoopers Inc. LIT (the "Receiver"), agreed to sell some of the Loder Group's assets to 2003945 Alberta Ltd. and 2021090 Alberta Ltd (collectively, "RX") under a purchase and sale agreement (PSA) which was approved by the Court on March 13, 2017. The PSA included a Transition Services Clause under which the Receiver was to pay RX for the performance of "Transition Services".

3 On November 21, 2017, RX filed an application in the Court of Queen's Bench for a declaration that the Receiver had breached the Transition Services Clause of the PSA and owed them up to $250,000.

4 In November 2017, the chambers judge set a date for the hearing of the RX application. On December 13, 2017, rather than hear the application, the chambers judge directed that it be heard by summary trial on March 7, 2018 (the December 13 Order). The December 13 Order also set out the procedure of the summary trial (filing deadlines, maximum number of witnesses, etc.). It limited the parties to calling one witness each.

5 On December 21, 2017, RX filed a civil notice of appeal alleging that the December 13 Order unfairly restricted it from presenting its case. The RX notice of appeal did not include an application for leave to appeal.

6 The Receiver now seeks an order striking out the RX notice of appeal because there is no appeal as of right from the decision in question. It also seeks a declaration that RX is time-barred from seeking leave to appeal, as the 10 day appeal period prescribed by rule 31(2) of the *Bankruptcy and Insolvency Rules*, CRC, c 368 (the "*BIA Rules*") has expired.

7 In short, the Receiver asks this Court to strike the RX appeal under rule 14.37(c) of the *Alberta Rules of Court*, Alta Reg 124/2010 [*Rules of Court*] because RX has not filed a valid application for leave to appeal within the time limit prescribed by the *BIA Rules*.

8 RX opposes the application to strike on the ground that it does not require leave to appeal. In the alternative, it brings cross-applications: (1) for an extension of time to file an application for leave to appeal; and (2) for leave to appeal.

Analysis

1. Do the BIA Rules govern whether leave to appeal is required?

9 The Receiver submits that the RX appeal is from a decision made in receivership proceedings instituted under the *BIA*. It submits that whether RX has an automatic appeal or requires leave to appeal is determined by the *BIA* and the *BIA Rules*, rather than the *Rules of Court*: see *Alberta Treasury Branches v. Conserve Oil 1st Corp.*, 2016 ABCA 87 (Alta. C.A.) at paras 1, 23, (2016), 35 C.B.R. (6th) 6 (Alta. C.A.); *Moore, Re*, 2012 ONCA 569 (Ont. C.A.) at para 19, (2012), 295 O.A.C. 373 (Ont. C.A.).

10 RX takes the position that the decision under appeal was not made in bankruptcy or receivership proceedings, but did not press this at the oral hearing.

11 The chambers judge's decision was made within receivership proceedings. Any appeal of that decision is governed by the *BIA* and the *BIA Rules*. The Court in the receivership proceedings approved the contract that is the subject of the action.

Further, the style of cause in the RX claim for damages, and in the order setting it down for summary trial, make it clear that the chambers judge's decision was made in receivership proceedings.

2. Did RX have an appeal as of right from the chambers judge's decision or did it have to seek leave to appeal before a single justice of this Court?

12 The right to appeal a decision made in a bankruptcy proceeding is set out in s 193 of the *BIA*:

> **193** Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;
>
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
>
> (e) in any other case by leave of a judge of the Court of Appeal.

13 The Receiver submits that the grounds of appeal in the RX notice of appeal are procedural in nature and, as a result, the RX appeal does not fall within paragraphs (a) to (d) of s 193. Its position is that the appeal comes within s 193(e) and therefore requires leave.

14 The Receiver argues that the RX appeal does not come within s 193(a) of the *BIA* because the point in issue - whether it should be able to call more witnesses - does not affect "future rights". The Receiver argues that "future rights" consist solely of future *legal* rights and not procedural rights or commercial advantages to appealing a decision: *Elias v. Hutchison*, [1981] A.J. No. 896, 14 Alta. L.R. (2d) 268 (Alta. C.A.), [*Elias*]; *Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of)*, 1997 ABCA 273 (Alta. C.A. [In Chambers]) at paras 9-10, (1997), 206 A.R. 295 (Alta. C.A. [In Chambers]) ; *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225 (Ont. C.A.) at paras 22-26, (2016), 347 O.A.C. 226 (Ont. C.A.) [*Bending Lake*]. It also argues that what is at stake in the appeal is the *present* right to call witnesses in a future trial, rather than a right not yet acquired.

15 The Receiver also argues that the RX appeal does not fall within s 193(b) because it is unlikely to affect other insolvency cases of a similar nature, nor within s 193(c) because the appeal is not "in substance" about the value of property: *Bearcat Explorations Ltd., Re*, 2003 ABCA 365 (Alta. C.A.) at paras 9-10, (2003), 339 A.R. 376 (Alta. C.A.).

16 RX responds that its appeal falls within s 193(a) of the *BIA* because it involves "future rights", namely its right in a *future* trial to call the necessary witnesses. RX argues its appeal falls within s 193(c) because it relates to an action claiming over $10,000. In oral submissions, counsel for RX did not oppose the Receiver's position that the proposed appeal does not fall within s 193(b).

17 Both parties agree that the RX appeal does not fall within s 193(d) of the BIA.

18 The Receiver's argument that the RX appeal does not come within s 193(a) of the *BIA* is sound. The parties have located no authorities, nor have I found any, in which an appeal alleging procedural unfairness has been categorized as an appeal involving procedural rights rather than legal rights. The cases that establish the distinction between legal rights and procedural rights, such as *Elias* at para 21 and *Bending Lake* at paras 22-26, did not involve any alleged breach of procedural fairness or natural justice. It remains an open question whether an appeal on the ground of procedural fairness involves a legal right for the purposes of s 193(a).

19 Nevertheless, I am satisfied that the RX appeal does not involve a future right, one that RX will acquire in the future. In *Simonelli v. Mackin*, 2003 ABCA 47 (Alta. C.A. [In Chambers]) at paras 10-11, (2003), 320 A.R. 330 (Alta. C.A. [In Chambers]), Wittmann JA (as he then was) held that an appeal from an order refusing to strike a bankruptcy petition on the ground that it violated the right to a fair hearing involved present rights, rather than future rights. The same is true here. The RX appeal concerns whether the chambers judge's order breached the existing right of RX to procedural fairness. If the appeal did not involve infringement of a current right to procedural fairness, it is difficult to understand how the appeal could succeed.

20 The appeal also does not fall within s 193(b) of the *BIA* because it does not raise an issue of precedential significance. Its outcome will be of interest to RX and the Receiver only.

21 The Receiver is also correct that the appeal cannot properly be described as one in which "the property involved in the appeal exceeds in value ten thousand dollars". As that phrase has been interpreted, the appeal must be "in substance" about the value of property: *Bearcat* at para 10. The RX appeal concerns the number of witnesses RX may call at trial. While this indirectly relates to the RX claim for over $250,000 in damages, those damages are not the subject of this appeal.

22 It follows that RX requires leave to appeal under s 193(e) of the *BIA*.

3. Since RX filed a notice of appeal without filing an application for leave to appeal, was its notice of appeal invalid?

23 The Receiver submits that RX was required to seek leave to appeal in accordance with s 193(e) of the *BIA*. Rule 31(2) of the *BIA Rule*s states that if an appeal is brought under s 193(e), the notice of appeal *must* include an application for leave. The Receiver submits that the RX notice of appeal is void due to its failure to comply with rule 31(2). RX made no submissions on this issue.

24 RX failed to comply with rule 31(2) of the *BIA Rules* when it filed a notice of appeal only. The Receiver is correct in its submission that the consequence is that the notice of appeal filed on December 13, 2017 is of no effect.

4. Is RX out of time to file a notice of an application for leave to appeal?

25 The Receiver argues that rule 31(1) of the *BIA Rules* requires an appellant to file a notice of appeal within 10 days after the day of the decision under appeal. The deadline also covers filing an application for leave to appeal, if the appeal is brought under s 193(e), because rule 31(2) of the *BIA Rules* requires an appellant to file both.

26 The decision in question was pronounced on December 13, 2017. The recent application by RX for leave to appeal was filed after expiry of the 10-day deadline prescribed by rule 31(1) of the *BIA Rules*. It follows that RX is out of time to file a notice of appeal and application for leave to appeal.

5. Should the Court grant RX an extension of time to file an application for leave to appeal?

27 The RX cross-application seeks permission to file an application for leave to appeal after the deadline in rule 31(1) of the *BIA Rules*. This Court has authority under rule 31(1), and possibly s 183(2) of the *BIA*, to extend the time for filing a notice of appeal or a notice of application for leave to appeal. Rule 31(1) states:

> **31(1)** An appeal to a court of appeal referred to in s 183(2) of the Act must be made by filing a notice of appeal at the office of the registrar appealed from, within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.

28 The considerations relevant to granting an extension of time to file a notice of appeal are derived from *Cairns v. Cairns*, [1931] 4 D.L.R. 819, 26 Alta. L.R. 69 (Alta. C.A.), and are applicable in the *BIA* context: *Kubota Canada Ltd. v. Case Credit Ltd.*, 2004 ABCA 41 (Alta. C.A.) at paras 9-12, (2004), 346 A.R. 166 (Alta. C.A.) (recognizing "an unfettered discretion [. . .] to do what is just having regard to the circumstances of the case"). Those considerations are:

a. Was there a *bona fide* intention to appeal while the right existed?

b. Is there a reasonable explanation for the delay?

c. Is there prejudice to the respondent?

d. Have the applicants taken the benefit of the judgment from which they are appealing?

e. Does the proposed appeal have a reasonable prospect of success?

29 The Receiver argues that RX lacks a reasonable explanation for the delay. It argues that its counsel advised RX of the defect in the notice of appeal filed on December 21, 2017 in a letter dated December 29, 2017, and submits that RX did not act on that letter. At the hearing of this application, RX submitted that the Receiver's letter of December 29, 2017 was not intended to alert RX to take action, but to advise that it was too late for RX to remedy the defect in its notice of appeal.

30 The Receiver also argues that it would "frustrate the completion of the receivership proceedings" if RX is allowed to file an application for leave to appeal. It also points to submissions by counsel for the secured creditor, made before the chambers judge, that the Receiver's costs of defending the RX claim are "coming out of the pocket of the secured creditor, who is already suffering a significant shortfall." (RX Book of Materials, Tab 9, 9/1-33)

31 RX contends that: (a) filing the notice of appeal within the 10-day period demonstrates its intention to appeal while the right existed; (b) an extension will not prejudice the receivership proceedings, as the receivership is already complete; and (c) the proposed appeal has a reasonable prospect of success since the chambers judge's order prevents RX from adequately presenting its case, which is clearly unfair.

32 As argued by the Receiver, the extent of the delay in filing the notice of appeal is relevant in determining whether to grant an extension of time to file an application. In this case, the delay begins from the end of the appeal period, which was 10 days after pronouncement of the chambers judge's decision. That would have been December 23 or 24, 2017. However, it was not possible for RX to file an application for leave to appeal on those dates because they fell on a weekend. Further, it was not possible for RX to file during the next week because the Registry was closed over the holidays. It follows that the appeal period prescribed by rule 31(1) of the *BIA Rules* ended on January 2, 2018, the first day the Registry re-opened.

33 At the date of hearing this application, one month had passed since the end of the appeal period. That is the period of delay in question.

34 The Receiver submits that if RX had acted immediately after receiving its letters, the period of delay would have been shorter. Nevertheless, I am of the view that RX has a reasonable explanation for not having filed an application for leave to appeal until recently. The language of s 193 of the *BIA* is vague, and determining whether one has an automatic appeal or requires leave is not simple. As McGillivray CJA remarked in *Elias* , at para 15, in relation to future rights: "I find the authorities leave me in a state of uncertainty as to what a future right is at all, leave alone what there is about a future right that would require a treatment of cases involving future rights different from cases that do not involve future rights".

35 As I have already noted above, the ability to call one's case is an aspect of natural justice and it is arguable that appeals raising natural justice involve legal rights. Based on the text of s 193 alone, it would have been plausible that RX had an automatic appeal under s 193(a) (involving future rights) or (c) (involving property exceeding $10,000). However, the case law establishes conclusively that its appeal does not fall within either of those categories.

36 In short, the interpretations of s 193(a) and (c) relied on by RX were incorrect. However, there is no rigid rule that a mistake by counsel is not a sufficient explanation for delay in filing: *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABCA 206 (Alta. C.A.) at para 7, (2015), 602 A.R. 135 (Alta. C.A.). In this case, the error was understandable given the vagueness of s 193, even if the preferable procedure in the face of uncertainty would have been for counsel to file both a notice of appeal and an application for leave to appeal.

37 The Receiver has provided limited evidence about prejudice that would be occasioned by an extension. The relevant question in an application to extend time is whether the delay in filing an appeal, rather than the existence of the appeal, will seriously prejudice the respondent or other parties: *Murphy v. Haworth*, 2016 ABCA 219 (Alta. C.A.) at para 14, (2016), 268 A.C.W.S. (3d) 717 (Alta. C.A.); *Bank of Montreal v. Grotski* (1991), 8 W.A.C. 149 (Alta. C.A.) at para 6, (1991), 4 C.P.C. (3d) 197 (Alta. C.A.). Counsel for the Receiver emphasized that the RX claim is against PWC in its capacity as Receiver, and that any expenses incurred opposing the RX claim would be taken from funds that would otherwise be available to the secured creditor. In this case, prejudice to the secured creditor in the form of reduced recovery would be caused by the potential RX appeal and not by granting an extension of time to file an application for leave to appeal. The Receiver has presented no evidence about the incremental prejudice to the secured creditor that may have been caused by the one month delay period.

38 Finally, counsel for the Receiver submitted that the proposed appeal lacks sufficient merit to justify granting leave to appeal, on the basis that the chambers judge's order was consistent with applicable case law such as *Nelson v. Balachandran*, 2015 ABCA 155, 600 A.R. 223 (Alta. C.A.) . Counsel for RX submitted that the chambers judge's order clearly infringes the right of RX to procedural fairness by preventing it from calling its case. I am satisfied that the proposed appeal is not frivolous and has apparent merit.

39 Weighing the factors, the interests of justice favour granting RX an extension of time to file an application for leave to appeal. Since RX has already filed an application for leave to appeal in anticipation of being successful, the grant of an extension retrospectively validates its notice of leave to appeal.

6. Should the Court grant RX leave to appeal?

40 RX has filed a cross-application for leave to appeal the decision of the chambers judge, in anticipation of permission to file it.

41 The factors to be considered in an application for leave to appeal under s 193(e) of the *BIA* are set out in *Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of)*, 1997 ABCA 273 (Alta. C.A. [In Chambers]) at para 12, (1997), 206 A.R. 295 (Alta. C.A. [In Chambers]):

> a. Is the point of appeal of significance to the bankruptcy practice?
>
> b. Is the point of significance to the action itself?
>
> c. Is the appeal *prima facie* meritorious?
>
> d. Will the appeal unduly hinder the progress of the action or the insolvency proceedings?
>
> e. Does the judgment appear to be contrary to law, amount to an abuse of judicial power, or involve an obvious error causing prejudice, for which there is no other remedy?

42 RX concedes that the appeal raises no point of general significance to bankruptcy practice. It submits that its ground of appeal is *prima facie* meritorious for the reasons mentioned above. As in the application for an extension of time, RX submits there is no prospect of the appeal delaying the progress of the receivership because it is already complete.

43 Certain factors favour granting leave to appeal. First, the RX appeal has apparent merit. Second, there is no evidence that an appeal will delay or hinder the progress of the receivership. At best, the Receiver's submissions show that if the appeal goes ahead, the Receiver will incur costs that will ultimately be borne by the secured creditor. Of course, if the Receiver succeeds on appeal, it will receive a costs award for some, but probably not all, of those costs. I am not satisfied that the RX appeal will delay the receivership, "unduly" or otherwise. Third, the issue on appeal is a matter of procedural fairness — the right of RX to prove its case through calling witnesses — and is significant to the action itself.

44 On the other hand, the appeal raises no point of general significance to bankruptcy practice and it is likely the appeal will delay the summary trial scheduled for March 7, 2018.

45 Often this Court refuses leave to appeal from interlocutory decisions that are likely to delay disposition of a claim. However, in this case, I am satisfied that this appeal will not "unduly hinder" the progress of the RX claim. The decision by the chambers judge that is subject to appeal is said to fundamentally affect the ability of RX to mount its case. If leave to appeal is denied, and the summary trial goes ahead as scheduled, RX would likely launch an appeal.

46 Weighing these considerations, I am satisfied that this is an appropriate case to grant leave to appeal.

47 Since RX has now received this indulgence, it must prosecute its appeal diligently. This is a fast-track appeal and the parties must comply with the shortened deadlines set out in the *Rules of Court*.

Conclusion

48 In conclusion, Receiver's application to strike the RX notice of appeal and to bar RX from filing an application for leave to appeal is dismissed. The RX application for an extension of time to file the application for leave to appeal is granted and leave to appeal is granted.

49 A successful party is usually entitled to costs. However, since the error by RX created the need for the application and cross-applications, there will be no costs to either party.

Order accordingly.

Footnotes

1 The Loder Group consists of The Loder Group of Companies Ltd., 1407044 Alberta Ltd., 1624165 Alberta Ltd., 1450816 Alberta Ltd., 733856 Alberta Ltd., S A Pharmacy Ltd. Quant Sat Holdings Ltd., 1401865 Alberta Ltd., North East Pharmacy (2013) Ltd., North East Clinic (2013) Ltd., Crossroads Pharmacy (1969) Ltd., and 1441333 Alberta Ltd. (the "Loder Group").

TAB 7

Canada Federal Regulations
Bankruptcy and Insolvency Act
Can. Reg. 368 — Bankruptcy and Insolvency General Rules
Appeal to Court of Appeal

C.R.C. 1978, c. 368, s. 31

s 31.

Currency

31.

31(1) An appeal to a court of appeal referred to in subsection 183(2) of the Act must be made by filing a notice of appeal at the office of the registrar of the court appealed from, within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.

31(2) If an appeal is brought under paragraph 193(e) of the Act, the notice of appeal must include the application for leave to appeal.

Amendment History
SOR/98-240, s. 1; SOR/2007-61, s. 63(j)

Currency
Federal English Statutes reflect amendments current to March 17, 2021
Federal English Regulations are current to Gazette Vol. 155:4 (February 17, 2021)

End of Document

TAB 8

2020 SKCA 66
Saskatchewan Court of Appeal

MNP Ltd. v. Wilkes

2020 CarswellSask 281, 2020 SKCA 66, 318 A.C.W.S. (3d) 354, 449 D.L.R. (4th) 439, 80 C.B.R. (6th) 1

MNP Ltd., receiver of King Edward Apartments Inc. and Atrium Mortgage Investment Corporation (Applicants to Strike / Respondents on Time and Leave / Prospective Respondents) and Cameron Wilkes, Hee Jung Koh, Allan Hall, and Bonnie Hall (Respondents on Strike / Applicants to Extend Time and for Leave / Prospective Appellants) and Holly Wilkes, Trent Fraser, Gaye Fraser, Dev Francis, Glenda Francis, Richard Coupal, Joanne Coupal, Ed's Backhoe Service Inc., City Wide Paving Ltd., Superior Homes, LCC, 101141214 Saskatchewan Ltd., Double Star Drilling (Saskatchewan) Ltd., De Integro Investment Group Inc., A-1 Rent-Alls Ltd., Cormode & Dickson Construction (Southern SK) Ltd., Certified Plumbing & Heating Ltd., KF Kambeitz Farms Inc., Rob Seay, and Voltz Electric Inc. (Interested Parties)

Jackson, Caldwell, Tholl JJ.A.

Heard: October 7, 2019
Judgment: May 29, 2020
Docket: CACV3427

Counsel: Curtis Onishenko, for Cameron Wilkes et al.
Jeffrey Lee, Q.C., for MNP Ltd.
Jared Epp, for Atrium Mortgage Investment Corporation
Jacey Safnuk, for Superior Homes, LLC

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.b To Court of Appeal
XVII.7.b.ii Availability
XVII.7.b.ii.C Leave by judge
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.b To Court of Appeal
XVII.7.b.iii Time for appeal
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Leave by judge
In context of insolvency proceedings, receiver obtained order approving sale of two lawsuits commenced by K Inc. to K Inc.'s principal secured creditor for $200,000 — Group of shareholders/guarantors filed notice of appeal — Receiver brought application to strike out notice of appeal, in part on basis that leave had not been sought — Group brought application for determination that they had appeal as of right — Receiver's application dismissed; group's application granted — While it was

well-established that there was no right of appeal under s. 193(c) of Bankruptcy and Insolvency Act from question involving procedure alone, courts should not start with that question — Issue in s. 193(c) is whether based on evidence there is at least $10,000 at stake, not whether order is procedural — Even applying most restrictive notion of what constituted right of appeal under s. 193(c), matter was not procedural in nature alone — Property involved in appeal was K Inc.'s lawsuits — Claim of group exceeded $200,000, but it was not that number alone that had to be considered — Sale, if approved, left them exposed to guarantee lawsuit, with no ability to minimize their liability, while at same time conferring on creditor potential for double recovery — Potential loss to group brought their appeal within s. 193(c) — Appeal was not only about procedure used to sell asset; it was about whether asset should have been sold for $200,000 in all of circumstances — Group had appeal as of right under s. 193(c), and leave was not required.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Time for appeal

In context of insolvency proceedings, receiver obtained order approving sale of two lawsuits commenced by K Inc. to K Inc.'s principal secured creditor for $200,000 — Group of shareholders/guarantors filed notice of appeal — Receiver brought application to strike out notice of appeal, in part on basis that it was filed 19 days after expiry of 10-day appeal period — Group brought application for order extending time to appeal to date that notice of appeal was actually filed — Receiver's application dismissed; group's application granted — Group's counsel had believed that statutory 30-day appeal period was applicable, rather than rules-based 10-day appeal period — Solicitor error did not always justify extending time to appeal, but there was no apparent reason to depart from general tenor of case law, which was to grant extension of time if it could be done without serious prejudice to other side — Group easily met criteria for extending time for filing notice of appeal — There was no reason not to accept evidence that group intended to appeal virtually from outset — Receiver provided no argument or evidence as to any potential prejudice caused by late filing — At issue on appeal would be whether chambers judge erred by not taking into account certain factors and issues concerning sale; it was arguable case — It was appropriate to extend time to appeal, as requested.

Held:

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s. 2 "property" — considered

s. 193 — considered

s. 193(a) — considered

s. 193(a)-193(d) — referred to

s. 193(b) — considered

s. 193(c) — considered

s. 193(d) — considered

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R. 31(1) — considered

R. 31(2) — considered

APPLICATION by group of shareholders/guarantors for determination that they had appeal as of right from order, and for extension of time to appeal; APPLICATION by receiver to strike out notice of appeal.

***Jackson J.A.*:**

I. Introduction

1 These reasons resolve three applications made under s. 193 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*], and the *Bankruptcy and Insolvency General Rules*, CRC, c 368 [the *General Rules*]. The applications play out in the context of the insolvency of a corporation, King Edward Apartments Inc. [KEAI]. At the core of the dispute is the sale of two lawsuits commenced by KEAI [KEAI Lawsuits] to KEAI's principal secured creditor, Atrium Mortgage Investment Corporation [Atrium].

2 In November of 2016, Atrium applied in the Court of Queen's Bench Chambers under s. 243(1) of the *BIA*, and related provincial statutes, to have MNP Ltd. appointed the receiver of KEAI. Atrium then bought KEAI's principal assets, not including the KEAI Lawsuits, by means of a credit bid, leaving a substantial continuing liability. In December of 2018, the receiver applied for an order approving the sale of the KEAI Lawsuits for $200,000 to Atrium.

3 Cameron Wilkes, Hee Jung Koh, Allan Hall, and Bonnie Hall [Wilkes Group] are some of the shareholders of KEAI and some of the guarantors of its remaining debt to Atrium. The Wilkes Group values the lawsuits at in excess of $10,000,000 and opposes the receiver's sale of the lawsuits to Atrium. In addition to asserting that the KEAI Lawsuits are worth much more than $200,000, they allege that Atrium bought the KEAI Lawsuits with the intention of compromising them, which will leave the Wilkes Group with no ability to reduce their liability to Atrium under their personal guarantees. They also assert that allowing Atrium to buy the lawsuits has the potential to result in Atrium receiving a windfall.

4 On April 16, 2019, a judge of the Court of Queen's Bench sitting in Chambers approved the sale of the KEAI Lawsuits to Atrium for $200,000 (*Atrium Mortgage Investment Corp. v. King Edward Apartments Inc.* (April 16, 2019), Doc. Regina QBG 2905/16 (Sask. Q.B.) [*Chambers Decision*]). On May 15, 2019, the Wilkes Group filed a notice of appeal of the *Chambers Decision*. By filing on that date, the Wilkes Group missed the appeal window. Rule 31(1) of the *General Rules* requires all appeals and applications for leave to appeal under s. 193 of the *BIA* to be brought within ten days.

5 The receiver then applied to strike the notice of appeal on the basis not only that it was out of time, but on the primary basis that the Wilkes Group did not have a right of appeal, and, as leave had not been sought, they should not be granted the double indulgence of being granted leave to appeal and leave to do so beyond the time period stipulated in the *General Rules*.

6 The receiver's application to strike resulted in the Wilkes Group applying for a determination that they had an appeal as of right. But, if they did not have a right of appeal, they asked that leave to appeal be granted to them. In any event, they sought an order extending the time to appeal under the *General Rules* to the date the notice of appeal was actually filed.

7 For the reasons that follow, I have concluded that the Wilkes Group have an appeal as of right under s. 193(c) of the *BIA*, which means they did not need to seek leave to appeal and the receiver's application to strike must be dismissed. I have also concluded that their application to extend the time to appeal should be granted.

II. Primary Provisions of the BIA and the General Rules

8 The primary provisions under consideration in this appeal are the definition of property in s. 2 and s. 193 of the *BIA*:

> **Definitions**
>
> **2** In this Act, ...
>
> **property** means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property; (*bien*)
>
> . . .
>
> **Appeals**
>
> ***Court of Appeal***
>
> **193** Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;
>
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
>
> (e) in any other case by leave of a judge of the Court of Appeal.
>
> RS, 1985, c B-3, s 193 1992, c 27, s 68.
>
> (Emphasis added)
>
> **Définitions et interprétation**
>
> **2** Les définitions qui suivent s'appliquent à la présente loi. ...

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

. . .

Appels

Cour d'appel

193 Sauf disposition expressément contraire, appel est recevable à la Cour d'appel de toute ordonnance ou décision d'un juge du tribunal dans les cas suivants:

a) le point en litige concerne des droits futurs;

b) l'ordonnance ou la décision influera vraisemblablement sur d'autres causes de nature semblable en matière de faillite;

c) les biens en question dans l'appel dépassent en valeur la somme de dix mille dollars;

d) la libération est accordée ou refusée, lorsque la totalité des réclamations non acquittées des créanciers dépasse cinq cents dollars;

e) dans tout autre cas, avec la permission d'un juge de la Cour d'appel.

LR (1985), ch B-3, art 193 1992, ch 27, art 68.

(Emphasis added)

9 The applicable provisions from the *General Rules* are as follows:

Appeal to Court of Appeal

31(1) An appeal to a court of appeal referred to in subsection 183(2) of the Act must be made by filing a notice of appeal at the office of the registrar of the court appealed from, within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.

(2) If an appeal is brought under paragraph 193(e) of the Act, the notice of appeal must include the application for leave to appeal.

SOR/98-240, s 1 SOR/2007-61, s 63(E)

Appels devant la cour d'appel

31(1) Un appel est formé devant une cour d'appel visée au paragraphe 183(2) de la Loi par le dépôt d'un avis d'appel au bureau du registraire du tribunal ayant rendu l'ordonnance ou la décision portée en appel, dans les 10 jours qui suivent le jour de l'ordonnance ou de la décision, ou dans tel autre délai fixé par un juge de la cour d'appel.

(2) En cas d'application de l'alinéa 193e) de la Loi, l'avis d'appel est accompagné de la demande d'autorisation d'appel.

DORS/98-240, art 1DORS/2007-61, art 63(A)

III. Background

10 In 2012, the Wilkes Group, along with others, formed KEAI for the purposes of pursuing the development of a five-building multi-family residential complex on land in Regina [Development]. The cost of the Development was estimated to be $18,000,000. The shareholders of KEAI invested $3,235,000. KEAI obtained financing for the balance of the cost from Atrium in the amount of $12,800,000 [the Loan]. In addition to the usual mortgages granted to Atrium, the Wilkes Group executed joint and several personal guarantees of the Loan.

11 According to the affidavit evidence of the Wilkes Group, the general contractor, Cormode & Dickson Construction (Southern SK) Ltd. [general contractor], after having been advanced approximately $11,000,000, failed to pay a significant subcontractor, placing the Development in jeopardy. On July 14, 2016, KEAI issued a claim against Cormode & Dickson Construction (1983) Ltd., the parent company of the general contractor. On November 9, 2016, KEAI issued a second claim against the general contractor and two of its principals. These are the two lawsuits previously referred to in the introduction using the term the "KEAI Lawsuits". These lawsuits claim, *inter alia*, damages for breach of contract, negligence and breach of trust plus an accounting of all funds received by the general contractor. The losses to KEAI are described in detail in the lawsuits, but the exact amount of the loss is not stated.

12 Meanwhile, on September 1, 2016, KEAI defaulted on its obligations to Atrium under the Loan. On October 6, 2016, Atrium formally demanded payment of the Loan from KEAI.

13 On November 25, 2016, Atrium applied in the Court of Queen's Bench Chambers for the appointment of MNP Ltd. as the receiver of the assets of KEAI. At that time, KEAI owed $11,958,129.52 to Atrium. The application was granted.

14 The following chronology recounts the progression of the receivership as it relates particularly to the KEAI Lawsuits:

Date	**Action**
July 19, 2017	Order granted in the Court of Queen's Bench Chambers authorizing the receiver to borrow up to $8,800,000 for the purposes of the receivership, including the completion of the Development. The receiver borrowed this amount from Atrium.
October of 2018	Order granted in the Court of Queen's Bench Chambers approving the sale of the Development to Atrium for a credit bid of $14,500,000.
November 23, 2018	Atrium served a statement of claim in QB 2495 of 2018 on the guarantors of KEAI's debt seeking recovery of $7,102,768.39 as of November 9, 2018, with interest at 8.50% compounded monthly [Guarantee Lawsuit] being the amount remaining from the Loan plus interest.
December 19, 2018	Atrium offered to buy the KEAI Lawsuits from the receiver for $200,000, which amount would be set off against the balance owing from KEAI to the receiver. Atrium reserved the right to enter into a competitive bidding process, if a greater offer were received.
February 7, 2019	The receiver sent Atrium's proposal to buy the KEAI Lawsuits to all parties on the service list in the receivership proceedings. The receiver invited all parties on the service list to submit a superior cash offer to purchase the KEAI Lawsuits on or before February 21, 2019. No bids were forthcoming.
March 22, 2019	The receiver applied in the Court of Queen's Bench Chambers for an order approving the sale of the KEAI Lawsuits to Atrium for $200,000. The Wilkes Group opposed the sale.

15 As I have indicated, on April 16, 2019, the Chambers judge approved the sale of the KEAI Lawsuits to Atrium for $200,000. The Wilkes Group appealed, resulting in the cross-applications described in the introduction to these reasons.

IV. Issues

16 The cross-applications before the Court result in the following issues:

(a) Does the Wilkes Group have an appeal as of right under s. 193 of the *BIA*?

(b) If no, should the Wilkes Group be granted leave to appeal under s. 193(e) of the *BIA*?

(c) If the answer to either of the above questions is yes, should leave be granted to allow the Wilkes Group to late file?

V. The Right of Appeal Under s. 193

17 The receiver's position is that the Wilkes Group was required to obtain leave to appeal under s. 193(e) because none of the other categories contained in s. 193(a) through s. 193(d) of the *BIA* apply. As to the application of s. 193(c) to this case, the receiver asserts that the law has changed. Whereas at one time s. 193(c) may have been given a wide and liberal interpretation, the receiver submits that it now must be construed narrowly. In support of its position, the receiver relies on, *inter alia*, *Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of)*, 1997 ABCA 273 (Alta. C.A. [In Chambers]) (CanLII) [*Alternative Fuel*], and *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225 (Ont. C.A.) at para 45, (2016), 396 D.L.R. (4th) 635 (Ont. C.A.) [*Bending Lake*]. The position of the Wilkes Group is that they have an appeal as of right under s. 193, such that they are not required to obtain leave to appeal. They do not seriously assert a right of appeal under any of the other clauses of s. 193 other than s. 193(c) — "the property involved in the appeal exceeds in value ten thousand dollars". In support of its position, the Wilkes Group relies on *Trimor Mortgage Investment Corp. v. Fox*, 2015 ABCA 44, 26 Alta. L.R. (6th) 291 (Alta. C.A.) (in Chambers) [*Trimor*], and the decisions referred to therein.

18 Unhindered by prior case law, and applying the principles of statutory interpretation, I would conclude that Parliament signaled a right of appeal under s. 193(c) that eliminates only a narrow class of cases from appellate review. Indeed, that is the approach that has been taken by this Court in the few cases from this jurisdiction: *Royal Bank v. Saskatoon Sound City Ltd.* (1989), 80 Sask. R. 226 (Sask. C.A. [In Chambers]) at para 1, and *Double D Construction Ltd. v. Rocky Meadows Transport Ltd.* (1999), 177 Sask. R. 264 (Sask. C.A. [In Chambers]) at para 5. See also *Wong v. Luu*, 2013 BCCA 547, [2014] 4 W.W.R. 504 (B.C. C.A.) (in Chambers), where the judge made these *obiter* comments regarding the breadth of s. 193(c): "The right of appeal under the *Bankruptcy and Insolvency Act* is broad, generous and wide-reaching. A right of appeal exists, for example, in respect of any matter if the property in question has a value greater than $10,000. This can hardly be thought of as a limited right of appeal; to the contrary, the bar is set low indeed" (at para 23).

19 That said, in recent times in particular, there has arisen a large body of case law regarding not only s. 193(c) but the interpretation of s. 193 generally. By way of a broad overview of this case law, there has been a steady narrowing of two of the separate categories of rights of appeal in s. 193. For example, since *Elias v. Hutchison* (1981), 121 D.L.R. (3d) 95 (Alta. C.A.), there have been few cases grounding a right of appeal in future rights under s. 193(a). On this point, see Kenneth David Kraft and Ethan Chang, *The Judge Got It Wrong? A Look at the Appeal Provisions of the BIA*, (2016) Ann Rev Insolv Law 15 at 615 — 642 (WL). According to these authors, the "only matter that appears unquestionably to be a 'future right' is the grant, or refusal to grant, of a bankruptcy order".

20 Similarly, the phrase "if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings" in s. 193(b) is now confined to similar cases in the context of the specific bankruptcy before the court: *Camirand Ltée v. Gagnon* (1924), 5 C.B.R. 518 (C.A. Que.), see also *Norbourg Gestion d'actifs inc., Re*, 2006 QCCA 752 (C.A. Que.) at paras 9 — 11, (2006), 33 C.B.R. (5th) 144 (C.A. Que.). Only s. 193(d) is interpreted precisely according to its terms, which provides a right of appeal "from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars".

21 The overarching issue presented by the applications before the Court is how s. 193(c) should be interpreted; and, in point of fact, whether it should be interpreted in a like manner to s. 193(a) and s. 193(b) so as to narrow access to the appeal court when a decision is made under the *BIA*. On this issue, the jurisprudence reveals two approaches as to how s. 193(c) might be interpreted.

A. Two approaches to interpretation

1. Orpen — Fallis line of authority

22 The Wilkes Group relies on a line of authority stemming from *Orpen v. Roberts*, [1925] S.C.R. 364 (S.C.C.) [*Orpen*]. In *Orpen*, on a preliminary motion, the Registrar of the Supreme Court of Canada had been called upon to interpret s. 39 of *The Supreme Court Act*, SC 1906, c 139, as amended by *An Act to amend the Supreme Court Act*, SC 1920, c. 32, to read as follows:

Restrictions.

39. Except as otherwise provided by sections thirty-seven and forty-three, notwithstanding anything in this Act contained, no appeal shall lie to the Supreme Court from a judgment rendered in any provincial court in any proceeding unless, —

Value over $2,000.

(a) the amount or value of the matter in controversy in the appeal exceeds the sum of two thousand dollars; or,

Special leave.

(b) special leave to appeal is obtained as hereinafter special provided.

RS c 139, ss 46, 48 and 49 in part.

(Emphasis added)

23 In applying this provision to determine whether the Court would have jurisdiction over an appeal from a *quia timet* action, the Registrar held that "in all *quia timet* actions relief can be given in this court, although the damages have not yet been incurred, if in consequence of the judgment in appeal they would amount to more than $2,000" (*Orpen* at 367). The reported decision records the words of the Court dismissing the appeal from the Registrar's decision (at 367):

> An appeal taken from the order made by the registrar was dismissed. The court said the subject matter of the appeal is the right of the respondent to build on the street line on Carlton street in the city of Toronto. "The amount or value of the matter in controversy" (section 40) is the loss which the granting or refusal of that right would entail. The evidence sufficiently shows that the loss — and therefore the amount or value in controversy — exceeds $2,000.
>
> (Emphasis added)

24 A long line of authority maintained the *Orpen* interpretation of *The Supreme Court Act*, as long as that Court's jurisdiction depended on a monetary limit, and has influenced the interpretation of similar statutes. *United Fuel Investments Ltd., Re*, [1962] S.C.R. 771 (S.C.C.) [*Fallis*], is the leading exemplar of this line.

25 In *Fallis*, the Supreme Court of Canada was interpreting s. 108 of the *Winding-up Act*, RSC 1952, c 296, which provided access to the Supreme Court of Canada in these terms:

> **Appeal to Supreme Court of Canada**
>
> **108.** An appeal, if the amount involved therein exceeds two thousand dollars, lies by leave of a judge of the Supreme Court of Canada to that Court from the highest court of final resort in or for the province or territory in which the proceeding originated.

26 On an application to quash an order granting leave to appeal to the Court under s. 108, Cartwright J. for the Court held that the "test to be applied in determining whether there is an amount involved in the proposed appeal exceeding $2000 is that set out in the judgment of this Court in *Orpen* ..." (at 774), i.e., what is the loss which the granting or refusal of that right would entail. It was accepted in *Fallis* that if the winding-up order were maintained the holders of the class "B" preferred shares would receive no more than $30 per share. In response to this evidence, the appellant, Mr. Fallis, had filed an affidavit "shewing that he is the owner of more than 1200 of the Class 'B' Preference shares and expressing the opinion that but for the order winding-up the company the market price of the Class 'B' shares would now exceed $80 per share" (at 773 — 774). With no contradiction of this evidence, and applying the *Orpen* test to those facts, the Supreme Court held that the appeal did involve more than $2,000 so as to bring it within the jurisdiction of the Court as fixed by s. 108.

27 All of the decisions that grant or refuse leave by focussing on the value of the property involved in the appeal as those words are used in s. 193(c) of the *BIA*, as opposed to some other question, are applications of the *Orpen — Fallis* test. A good example of the application of the *Orpen — Fallis* line of cases by provincial appeal courts determining jurisdiction under s. 193(c) is *McNeill v. Roe, Hoops & Wong* (1996), 71 B.C.A.C. 213 (B.C. C.A.) [*McNeill*], which the Chambers judge aptly summarizes in *Galaxy Sports Inc. v. Galaxy Sports Inc. (Trustee of)* (2003), 183 B.C.A.C. 192 (B.C. C.A. [In Chambers]) [*Galaxy*], as follows:

> [12] ... Finch J.A. (as he then was) [in *McNeill*] made the following helpful comments on behalf of the Court:
>
> > [11] An appeal lies as of right under s. 193(c) "... if the property involved in the appeal exceeds in value ten thousand dollars". In *Fallis et al. v. United Fuel Investments Ltd.* (1962), 4 C.B.R. (N.S.) 209, the Supreme Court of Canada considered the meaning of the words "amount involved" where they appeared in s. 108 of the *Winding-up Act*, R.S.C. 1952, c. 296. The court adopted the test enunciated in *Orpen v. Roberts*, [1925] S.C.R. 364, [1925] 1 D.L.R. 1101, namely that: "The amount or value of the matter in controversy, ... is the loss which the granting or refusal of that right would entail" (*Fallis* at 211). In a comment following the report of this case in the *Canadian Bankruptcy Reports*, it was said that the meaning of "amount involved" in the *Winding-up Act* was substantially the same as the meaning of "property involved" in the *Bankruptcy Act*. That interpretation has been adopted by Mr. Justice Hollinrake in *Ng v. Ng* (3 February 1995), Vancouver CA019800 (B.C.C.A.); by Mr. Justice Macfarlane in *Re Scott Road Enterprises* (1988), 68 C.B.R. (N.S.) 54 at 58 (B.C.C.A.); and by Mr. Justice Macdonald in *Kenco Developments Ltd. v. Miller Contracting Ltd.* (1984), 53 C.B.R. (N.S.) 297 (B.C.C.A.). I can see no reason to do otherwise.
>
> [13] Finch J.A. referred to the definition in s. 2 of the *Act* as including "money" and observed, at para. 13, that "the 'property involved in the appeal' ... may be determined by comparing the order appealed against the remedy sought in the notice of appeal". He concluded that, since the conditional discharge required the bankrupt to pay $168,750 to the creditors and he sought a variation to require him to pay only $40,000, the loss to the creditors if the appeal should succeed would far exceed the sum of $10,000, and the bankrupt accordingly had an appeal as of right under ss. 193(c) of the *Act*.
>
> [14] Here, in the opinion of the trustee, if the proposal succeeds the creditors will receive substantially more than they will if it is rejected. Further, if the orders made by Madam Justice Brown are not overturned, it is likely that the statutory criteria for acceptance of the proposal by the creditors, which had been met at the creditors' meeting, will not be met at a second meeting, with the result that Galaxy will be deemed to have assigned into bankruptcy. In my view, applying the above test, it follows that there is property of a value in excess of $10,000 involved in the appeals, and Galaxy has an appeal as of right pursuant to ss. 193(c) of the *Act*.
>
> (Emphasis added)

Other British Columbia decisions following *McNeill* and *Galaxy* include *Kostiuk, Re*, 2006 BCCA 371, [2006] 10 W.W.R. 259 (B.C. C.A. [In Chambers]) [*Kostiuk*], and *Farm Credit Canada v. West-Kana Farms Ltd.*, 2014 BCCA 501, 68 B.C.L.R. (5th) 333 (B.C. C.A.).

28 Two decisions outside of British Columbia bear particular mention: *Roman Catholic Episcopal Corp. of St. George's, Re*, 2007 NLCA 17, 265 Nfld. & P.E.I.R. 49 (N.L. C.A.) (in Chambers) [*John Doe*], and *Trimor*, relied on by the Wilkes Group, and recently receiving favourable commentary in *1905393 Alberta Ltd v. Servus Credit Union Ltd*, 2019 ABCA 269 (Alta. C.A.) at para 26, (2019), 72 C.B.R. (6th) 20 (Alta. C.A.) [*Servus*]. [1]

29 In *John Doe*, which follows *McNeill* as discussed in *Galaxy*, the Court dealt with a case where victims of sexual abuse had given proofs of claim to the trustee who rejected them on the basis that they had been filed after the claims bar date. On appeal, the issue of s. 193(c) was raised and the Court dealt with the matter as follows:

> [24] With respect to the argument of the Trustee that it is entitled to appeal as a matter of right because the property involved exceeds in value $10,000.00, counsel for the four respondents argues that the decision of the bankruptcy judge is procedural only and does not involve any sum of money. He submits that the bankruptcy judge made no determination as to

> entitlement of any of the respondents and, therefore, the issue in the appeal is only as to procedure. He also argues that there was no "property in peril" in the decision of the bankruptcy judge, and for that reason also, paragraph (c) is inapplicable.
>
> [25] On examination of the actual words of paragraph (c), I am unable to accept either of the arguments of counsel for the four respondents. Admittedly there was no "property in peril" but, in my view, the statute does not require a prospective appellant to establish property to have been in peril in the decision intended to be appealed. ...
>
> . . .
>
> [27] Relying on that definition, and applying the test adopted in *Fallis*, I can only conclude that "the loss which the refusal of a right of appeal would entail" in this case is clearly more than $10,000.00. From the point of view of Class 1 creditors, Class 3 creditors, and the Corporation, the loss is potentially $2,000,000.00. The Proposal, as noted above, provides that any funds in the Class 4 creditors trust fund not required for Class 4 creditors are to be available: first, for the Class 1 creditors; second, for the Class 3 creditors; and any residue for the Corporation. Unquestionably, refusal of a right of appeal potentially involves their interests in a significant sum of money. The Trustee is obligated to protect the interests of those parties to the Proposal, in the assets realized. In my view, therefore, the Trustee has a right of appeal pursuant to paragraph (c) of section 193.
>
> (Emphasis added)

30 In *Trimor*, the respondents were preferred shareholders of a debtor that had received a default judgment in the amount of $272,000 arising from a claim alleging breach of their shareholders' agreement, a breach of fiduciary duty by the bankrupt, fraud, misrepresentation and unlawful enrichment. The trustee disallowed the claim, taking the position that it had not been adjudicated. On application by the respondents, a Court of Queen's Bench Chambers judge found neither the court nor the trustee had the authority to challenge the default judgment. On the trustee's appeal, the respondents challenged the trustee's assertion that it had an appeal as a matter of right.

31 Applying *Orpen* and *Fallis*, and the line of authority based on these two decisions, the appeal court Chambers judge determined that the issue on appeal would be whether the trustee had the authority to consider the merits of the claim underlying the default judgment. In finding the appeal fell squarely within s. 193(c), the Chambers judge made these two statements of particular relevance to the applications before this Court:

> (a) "the amount or value of the matter in controversy is the loss which the granting or refusal of that right would entail" (at para 8); and
>
> (b) "[t]he focus of the inquiry under s 193(c) is the amount of money at stake" (at para 10).

Since the amount of money at stake was $272,000, the trustee had an appeal as of right.

32 Other authorities in the *Orpen — Fallis* line, which refer to the principles mentioned in those cases, include *Newfoundland & Labrador Refining Corp. v. IJK Consortium*, 2009 NLCA 23, 52 C.B.R. (5th) 8 (N.L. C.A.) [*IJK Consortium*], and *Friedland, Re*, 2011 BCCA 540 (B.C. C.A. [In Chambers]) at paras 7 — 8, (2011), 90 C.B.R. (5th) 155 (B.C. C.A. [In Chambers]) [*Temple Consulting*].

33 Particular note should be made of the approach in Quebec. A modern authority in Quebec is *Meublerie André Viger Inc., Re* [1993 CarswellQue 365 (C.A. Que.)], 1993 CanLII 4171 [*Wener*]. *Wener* relies on *Fogel v. Grobstein* (1945), 26 C.B.R. 248 (C.A. Que.) (WL) at paras 27 — 32 [*Fogel*], which preceded *Fallis*. In *Fogel*, a trustee in bankruptcy sold the assets and business of the bankrupt as a going concern, including the unexpired term of the lease and the right of option to renew it for a further period of five years. The landlord objected to the lease being sold. The Court held that the appeal did not come within s. 193(c). Justice Barclay, as part of a five-judge panel, indicated that the Quebec Court of Appeal had interpreted s. 193(c) as meaning "the value in jeopardy" (at para 6). For similar decisions see *Charron c. Charron*, 2020 QCCA 154 (C.A. Que.) at para 6 (in Chambers), and *Pelletier c. CAE Rive-Nord*, 2018 QCCA 1070 (C.A. Que.) at para 1 (in Chambers).

34 In an annotation to the reported decision in *Fallis*, the editors of the *Canadian Bankruptcy Reports* placed *Fogel* in the *Orpen — Fallis* line of authority (4 CBR (ns) 209 (WL)), as per this quote:

> [*Fallis*] has important implications so far as the *Bankruptcy Act* is concerned. Under s. 150(c) of the *Bankruptcy Act* an appeal lies to the Court of Appeal in bankruptcy matters if the property involved in the appeal exceeds in value $500. Section 108 of the *Winding-up Act* refers to "amount involved" rather than "property involved" but the meaning would appear to be substantially the same. Prior to the 1949 amendment the *Bankruptcy Act* also used the phrase "amount involved". See R.S.C. 1927, c. 11, s. 174(1)(c).
>
> In the case of *In re Andrew Motherwell Ltd.*, 5 C.B.R. 107, 55 O.L.R. 294, 3 Can. Abr. 594 the Ontario Court of Appeal following the *Cushing-Sulphite* [(1906), 37 SCR 427] case held that a monetary sum must be involved. In a number of subsequent cases it was decided that it was not necessary that the amount involved be represented by dollars but it was sufficient if the appellant could show that his rights might be affected in an amount exceeding $500: *Re Maple Leaf Brewery Ltd.* (1938), 20 C.B.R. 137, 65 Que. K.B. 304, 1 Abr. Con. (2nd) 448; *In re Succession Pierre Tetreault* (1947), 28 C.B.R. 224, 1 Abr. Con. (2nd) 448. On this basis "amount involved" or "property involved" means "amount in jeopardy" not that a monetary sum of $500 must be involved: *Fogel v. Grobstein*, 26 C.B.R. 248, [1945] Que. K.B. 571, 1 Abr. Con. (2nd) 447; *Deslauriers v. Brunet (Vermette)*, 30 C.B.R. 77, [1949] Que. K.B. 629, 1 Abr. Con. (2nd) 443.
>
> In Duncan & Honsberger "Bankruptcy in Canada" 3rd ed., at p. 853, it is stated: "The decisions in which it has been held that there is jurisdiction under this subsection cannot all be reconciled." [*Fallis*] would appear to have overcome this difficulty. It would seem that the *Andrew Motherwell* and *Cushing* cases are no longer good law. If the loss, which the granting or refusing of the right claimed, exceeds $500 then there will be an appeal.
>
> (Emphasis added)

See also *Ng v. Ng* (1995), 54 B.C.A.C. 307 (B.C. C.A. [In Chambers]) [*Ng*], where the Chambers judge quoted the above passages from the *Canadian Bankruptcy Reports* in support of a conclusion that an appeal from a decision preventing the spouse of a bankrupt from pursuing an action to enforce a separation agreement was an appeal falling in s. 193(c) because "the property involved in the lawsuit that the appellant seeks to continue by order of the court is in excess of $10,000" (at para 14).

35 A concise synthesis of much of the above case law may be found in Janis P. Sarra, Geoffey B. Morawetz and the L.W. Houlden, *The 2019-2020 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2019), as follows:

> "Property involved" means that the property in jeopardy as a result of the judgment must have a value in excess of $10,000, but it is not necessary that the judgment be for a monetary sum of $10,000: *Fogel v. Grobstein* (1945), 26 C.B.R. 248 (Que. C.A.); *Drislauriers v Brunet (Vermette)* (1949), 30 C.B.R. 77 (Que. C.A.); *Apex Lumber Co. v. Johnstone* (1925), 7 C.B.R. 157 (B.C. C.A.). In *Fallis v. United Fuel Investments Ltd.*, [1962] S.C.R. 771, 4 C.B.R. (N.S.) 209, 34 D.L.R. (2d) 175, the court said that the proper test is: What is the loss that the granting or refusing of the right claimed will entail?
>
> (Emphasis added)

2. Alternative Fuel — Bending Lake approach to s. 193(c)

36 As I have indicated, the receiver relies on *Alternative Fuel* and *Bending Lake*. Before considering these decisions, it is convenient to begin with a review of *Coast Shingle Mill Co., Re*, [1926] 2 W.W.R. 536 (B.C. C.A.) [*Coast*], as it is the start of a line of jurisprudence that seems to have been directed at narrowing the type of cases for which there would be a direct right of appeal when the appellant asserts a *claim* of loss, rather than an actual loss. In *Coast*, the issue was whether the judge in the court appealed from had erred by ordering that a matter proceed by way of an action rather than by way of an application brought in Chambers. A five-judge panel of the Court agreed that this was "a question of procedure *alone*" (emphasis added, at 537) and quashed the appeal. See also *Goupil v. Canadian Ice Machine Co.* (1922), 29 R.L.N.S. 102 (C.A. Que.), and *Cie de Ste Foye, Re* (1918), 1 C.B.R. 165 (Que. K.B.).

37 This line of authority was given new life in *Dominion Foundry Co., Re* (1965), 52 D.L.R. (2d) 79 (Man. C.A.) [*Dominion Foundry*]. A three-judge panel of the Manitoba Court of Appeal dealt with an appeal of a decision dismissing a motion (a) to set aside a trustee's proposed sale of the debtor's assets, (b) to restrain the trustee from completing the sale, and (c) directing that a further meeting of the inspectors be held to reconsider the method of advertising the sale. The Court expressed concern that a broad reading of s. 193(c), which at that point had set a threshold of only $500, would, in effect, give automatic rights of appeal in every case (at 81):

> When it comes to a matter of a complete disposition of all of the assets of a bankrupt estate, the question is bound to exceed $500 (otherwise there would be no bankrupt). Also, once the assets of the bankrupt have been disposed of, any future rights of creditors are non-existent, as a general rule. Thus, if we were to construe these two subsections in such a way as to authorize an appeal in this case, it seems to me we would have to do so in every case. There would be an automatic appeal from any judgment respecting the decision of a trustee in bankruptcy to sell all the assets of the bankrupt. This is clearly not intended by the *Bankruptcy Act* when read as a whole, because it would defeat the whole purpose of the *Act*, which provides for a trustee and inspectors and imposes a duty on them to dispose of the assets of the bankrupt and distribute the proceeds amongst the creditors.
>
> (Emphasis added)

38 The appeal court went on to distinguish *Fallis* (at 83 — 84):

> I am of the opinion that this decision is readily distinguishable from the case at bar. In the [*Fallis*] case, a voluntary winding-up was sought, and Fallis and his associates clearly established that if the company were wound up their interests in the company (greatly in excess of $2,000) would be in jeopardy.
>
> In the motion before us, we have passed beyond the realm of common law civil dispute. We are now under the statute law of the *Bankruptcy Act*. The company is actually found to be bankrupt and has been placed by the Court in the hands of a trustee with his attendant inspectors advising and assisting in the making of decisions relating to the duties imposed upon the trustee. The methods employed by the trustee and his inspectors to dispose of the assets of the bankrupt have been called in question. This is surely a matter of procedure. With respect, I adopt the language of Chief Justice Macdonald of the British Columbia Court of Appeal in *Re Coast Shingle Mill Co., Limited*, 7 C.B.R. 553, where he says, at p. 554:
>
> > There are a number of cases bearing upon different facts, but on this fact they seem to agree, that where the question is a question of procedure it does not fall within either (a) or (c) of subsec. (2) of sec. 74 [6 C.B.R. 208]; that is to say, no question of future rights arises, nor does any question of a specific sum of money.
>
> (Emphasis added)

39 Two aspects of *Dominion Foundry* are often cited by courts when finding there is no right of appeal under s. 193(c) in the context of a particular case:

> (a) s. 193(c) should not be read too broadly, otherwise there would be a right of appeal in all cases; and
>
> (b) questions of procedure do not fall within s. 193(c).

40 *Alternative Fuel*, relied upon by the receiver in this case, is an example of the second proposition. In *Alternative Fuel*, a judge of the Court of Queen's Bench sitting in bankruptcy directed the sale of certain equipment to company A, which had been allowed to submit a higher bid outside of the original tendering process. Company B, which had been the highest bidder within the tendering process, applied for a ruling that leave was not required, or alternatively, for leave to appeal. Relying on *Dominion Foundry*, the Chambers judge held that company B had no right of appeal under s. 193(c) because it was challenging "the method by which the equipment is to be sold, namely bypassing the tender procedure" (at para 11). The Chambers judge then went on to grant leave as the question was of significance to bankruptcy practice and to the parties.

41 *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617 (Ont. C.A.) [*Pine Tree*], cites both aspects of *Dominion Foundry*, i.e., the need to narrow access and that matters of procedure do not fall within s. 193(c). In *Pine Tree*, a judge of the Superior Court of Ontario had appointed a receiver to administer all the assets of the debtor. The debtor and the second mortgagee sought to appeal the order appointing the receiver. A judge sitting in Chambers held that neither the debtor nor the second mortgagee had a right of appeal. Relying on *Dominion Foundry* to so hold, the Chambers judge wrote as follows:

> [17] Nor do I accept the argument that the property in the appeal exceeds in value $10,000 for purposes of s. 193(c). As noted by the Manitoba Court of Appeal in *Dominion Foundry Co.*, at para. 7, to allow an appeal as of right in these circumstances would require doing so in almost every case because very few bankruptcy cases would go to appeal where the value of the bankrupt's property did not exceed that amount. More importantly, though, an order appointing a receiver does not bring into play the value of the property; it simply appoints an officer of the court to preserve and monetize those assets, subject to court approval.
>
> (Emphasis added)

42 That brings the Court to *Bending Lake*, which was an appeal of an order transferring all of the debtor's property to an unrelated purchaser. The Chambers judge determined that two contextual factors "militate against employing an expansive application of the automatic right of appeal contained in s. 193(c)" and "point to the need for an approach which is alive to and satisfies the needs of modern, 'real-time' insolvency litigation" (at para 53). The Chambers judge discussed the two contextual factors:

> [49] First, the predecessor section to the modern s. 193(c) was enacted in 1919, at a time when the then *Bankruptcy Act* did not include the right to seek leave to appeal in the event a decision did not fall within one of the categories giving automatic rights of appeal. As Doherty J.A. observed in *Re Ravelston Corp.* [(2005) 24 CBR (5th) 256 (Ont CA)], the earlier absence in s. 193 of an ability to seek leave to appeal prompted courts to give categories of appeals as of right a wide and liberal interpretation in order to avoid closing the door on meritorious appeals. The 1949 inclusion of the leave to appeal right now found in s. 193(e) removes the need for such a broad interpretative approach.
>
> [50] Second, Canada's other major insolvency statute, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"), contains, in s. 13, an across-the-board requirement to obtain leave to appeal from any order made under that Act. The automatic right of appeal provisions in ss. 193(a) to (d) of the *BIA* do not work harmoniously with the *CCAA*'s appeal regime.

From there, the Chambers judge described the approach he would follow in deciding the case before him:

> [53] In my view, these contextual factors militate against employing an expansive application of the automatic right of appeal contained in s. 193(c) and, instead, point to the need for an approach which is alive to and satisfies the needs of modern, "real-time" insolvency litigation. I shall employ such an approach in applying the following three principles that have emerged from the jurisprudence: s. 193(c) does not apply to (i) orders that are procedural in nature, (ii) orders that do not bring into play the value of the debtor's property, or (iii) orders that do not result in a loss.
>
> (Emphasis added)

43 The decision in *Bending Lake* has since been extensively followed in Ontario: see *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 ONCA 611, 49 C.B.R. (6th) 173 (Ont. C.A.); *First National Financial GP Corporation v. Golden Dragon HO 10 Inc.*, 2019 ONCA 873, 74 C.B.R. (6th) 1 (Ont. C.A.); and *Comfort Capital Inc. v. Yeretsian*, 2019 ONCA 1017, 75 C.B.R. (6th) 217 (Ont. C.A.).

44 Outside of Ontario, *Bending Lake* has been followed in *The McDonnell Group, LLC v. Control Mobile Inc.*, 2018 BCCA 309, [2019] 3 W.W.R. 689 (B.C. C.A.) [*McDonnell*]. In *McDonnell*, the debtor filed an action against one of its creditors. After

a receivership order was made, the creditor then offered to buy the debtor's assets, including the action. The debtor sought to prevent the sale but was unsuccessful, leading to an appeal. The Chambers judge held that the application did not fall under s. 193(c) as there was no evidence demonstrating the vesting of the action would result in a loss of more than $10,000. See also *7451190 Manitoba Ltd v. CWB Maxium Financial Inc et al*, 2019 MBCA 95 (Man. C.A.).

B. Approach to follow

45 *Bending Lake* rests on a line of Chambers decisions that have held that s. 193(c) should be construed narrowly but takes those cases further. It supports a narrow construction of s. 193(c) on the following bases:

> (a) by adding what is now s. 193(e) in 1949, Parliament signalled an intention to narrow the other categories in s. 193; and
>
> (b) s. 193 should be interpreted in a manner consistent with the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*], which permits access to an appeal court by means of a leave provision only.

In place of the *Orpen — Fallis* test, a court applying *Bending Lake* will ask whether the order under appeal is (a) procedural in nature, (b) brings into play the value of the debtor's property, or (c) results in a loss — in order to determine whether there is an appeal as of right. Having examined each of these three principles, and notwithstanding the receiver's arguments in this case, I see no reason to depart from the *Orpen — Fallis* line of authority based on *Alternative Fuel* and *Bending Lake*.

46 As a preliminary comment, every exercise of statutory interpretation begins with a review of the purposive obligation imposed by the modern principle of statutory interpretation as set out in *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para 21 — 22 [*Rizzo*], and as noted in Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed (Toronto: Butterworths, 1994), and s. 64 of the *Legislation Act, 2006*, SO 2006, c 21, Sch F, and s. 2-10(2) of *The Legislation Act*, SS 2019, c L-10.2. This purposive approach is supported by s. 12 of the *Interpretation Act*, RSC, 1985, c. I-21, which provides that "[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". In my respectful view, narrowing the right of access to appellate review is inconsistent with *Rizzo* and s. 12 of the *Interpretation Act*.

47 I am not certain that the addition of a right to appeal with leave in 1949 should be taken as signalling Parliament's intention that the other rights of appeal conferred by the *BIA* should thereafter be construed narrowly. One might conclude that, after 1949, it would no longer be necessary to give a strained interpretation to s. 193(a) through s. 193(d) because, with the addition of s. 193(e), it is now possible to grant leave to appeal a meritorious issue that does not fit easily into one of the other four categories for which the *Act* provides an as of right appeal. But, I do not see how adding a requirement to apply for leave on one ground can be used to narrow an existing, unqualified right of appeal on another. As was said recently in *Servus*, "The Parliament of Canada when enacting legislation can be taken to understand its own statute book and the common law and, if it intended therefore by virtue by creating a leave option to eliminate or narrow down the other statutory as of right provisions, it could have done so in a less mysterious way" (at para 25).

48 In my respectful view, the addition of s. 193(e) should lead neither to a narrow nor an expansive interpretation of the balance of the categories in s. 193. Rather, s. 193(c) and s. 193(e) must be interpreted according to their terms and within their context. As part of this context, it must be understood that prior to the enactment of the *Bankruptcy Act, 1949*, SC 1949, c 7 [*1949 Act*], the equivalent of s. 193 read as follows in s. 74(2) of *The Bankruptcy Act*, SC 1919, c 36 [*1919 Act*]:

> **Review and Appeal**
>
> ***Appeals in bankruptcy.***
>
> **74(2)** Any person dissatisfied with an order or decision of the court or a judge in any proceedings under this Act may, —
>
> (a) if the question to be raised on the appeal involves future rights; or,

(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy or authorized assignment proceedings; or,

(c) if the amount involved in the appeal exceeds five hundred dollars;

(d) if the appeal is from the grant or refusal to grant a discharge and the aggregate of the unpaid claims of creditors exceeds five hundred dollars;

appeal to the Appeal Court.

Revision et appel.

Appels en matière de faillite.

74(2) Quiconque est mécontent d'une ordonnance ou d'une décision du tribunal ou d'un juge, dans toutes procédures instituées sous le régime de la présente loi, peut,

(a) si la question qui doit être soulevée en appel implique des droits futurs; ou

(b) si l'ordonnance ou la décision doivent vraisemblablement influencer d'autres causes d'une nature semblable dans les procédures de faillite ou de cession autorisée; ou

(c) si la somme impliquée dans l'appel dépasse cinq cents dollars; ou

(d) s'il s'agit d'en appeler d'une libération accordée ou refusée et que les réclamations globales des créanciers non payées excèdent cinq cents dollars

se pourvoir en Cour d'Appel.

49 In 1949, in addition to adding a right to apply for leave, Parliament also changed *amount* in s. 150(c) to *property*, as follows:

Appeals

Court of Appeal

150 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

(a) if the point at issue involves future rights;

(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;

(c) if the property involved in the appeal exceeds in value five hundred dollars;

(d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred;

(e) in any other case by leave of a judge of the Court of Appeal.

(Emphasis added)

Appels.

Cour d'appel

> **150.** Sauf disposition expresse à l'effet contraire, appel est recevable à la Cour d'appel de toute ordonnance ou décision d'un juge du tribunal dans les cas suivants:
>
> a) si le point en litige concerne des droits futurs;
>
> b) si l'ordonnance ou la décision doit vraisemblablement influer sur d'autres causes de, nature semblable dans les procédures en faillite;
>
> c) si les biens en question dans l'appel dépassent en valeur la somme de cinq cents dollars;
>
> d) si est accordée ou refusée la libération lorsque la totalité des réclamations non acquittées des créanciers dépasse cinq cents dollars;
>
> e) dans tout autre cas, avec la permission d'un juge de la Cour d'appel.
>
> (Emphasis added)

50 In the annotation to *Fallis*, above-mentioned, and in *Dominion Foundry* and *McNeil*, it is stated that the *property involved* in the appeal means the same thing as the *amount involved* in the appeal. If this means that the change brought about by the *1949 Act* was of no consequence, I would respectfully disagree. The changes to the *Bankruptcy Act* in 1949, to provide a right of appeal when the property, rather than the amount, exceeds $500 (but currently $10,000), aligned itself with the balance of the *Act*, which had from the enactment of the first *Bankruptcy Act* turned on a definition of *property* in the English version and *bien* in the French (see *The Bankruptcy Act*, SC 1919, c 36, s 2(dd), and *Loi concernant la faillite*, SC 1919, c 36).

51 On this point, L.W. Houlden, Geoffrey B. Morawetz and Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, loose-leaf (Rel 2020-03) 4th ed (Toronto: Carswell, 2005) (WL), commented on the amendment: "Presumably the amendment was made to make it clear that it is unnecessary to have a monetary sum involved for an appellant to be entitled to appeal under s. 193(c)" (at para I§60). I agree. At the very least, the change from the *amount involved* to the *property involved* signalled that the law that had been developing with respect to access to the Supreme Court of Canada, i.e., in the 1925 decision of *Orpen*, was intended to apply to statutes that were in *pari materia*. The change was not intended to be a reversion to the law that existed prior to *Orpen*, i.e., *Cushing Sulphite Fibre Co. v. Cushing* (1906), 37 S.C.R. 427 (S.C.C.), which was expressly overruled by *Fallis*, albeit after the 1949 amendments.

52 This interpretation is supported by comments made before the Standing Committee of the House of Commons that was struck to review the proposed *1949 Act* (on December 1, 1949, nine days prior to the *1949 Act* receiving royal assent). With T.D. MacDonald as a witness, the following exchange occurred with Charles-Arthur Dumoulin Cannon, member for Îles-de-la-Madeleine, and Donald Fleming, member for Eglington (*Standing Committee on Banking and Commerce*, 21th Parl, 1st Sess, No 1 (1 December 1949) at 149 (Hon. Charles Cannon, Hon. Donald Fleming, and T.D. MacDonald)):

> **Mr. Cannon**: ... What about (b), Mr. Chairman, that is new?
>
> **The Vice-Chairman**: Yes.
>
> **Mr. Cannon**: Is there any particular reason given for that requirement?
>
> **The Witness**: That is 149 (1)(b)?
>
> **Mr. Cannon**: No, 150 (e).
>
> **The Witness**: Just to cover any case that might be worthy of appeal which does not fall within the enumeration. When the bill was first introduced in 1949, section 150 read like this: "Unless otherwise provided in this Act an appeal lies from the order or decision of a judge of a court to the Court of Appeal with leave of a judge thereof"; and that is all that was said. Now, the trouble when it was left that way was this, that it seemed to us that it was left too much up in the air as to the

> principles upon which a judge would proceed. I can very well see a judge of the court saying; well, you have not given me very much guidance to help me in determining when I should permit an appeal; so it was thought it would be well to leave it substantially as in the present section of the Act, which is now done in clause 150 of the bill, and then somewhat in line with clause 150 of the original draft bill, to put in paragraph (e) so that if the enumeration is not sufficient you provided that the judge can exercise a discretion.
>
> **Mr. Fleming**: It is a residuary right?
>
> **The Witness**: Yes. The enumeration is quite complete, but by adding this subclause (e) you afford the court a discretion so that he may permit an appeal should there be other cases in which justice is not covered by the enumeration.
>
> **Mr. Fleming**: Is this a residual jurisdiction?
>
> **The Witness**: Exactly.
>
> **The Vice-Chairman**: Does clause 150 carry?
>
> Carried
>
> (Emphasis added)

53 As a final observation in relation to the effect of the addition of a right to apply for leave to appeal under s. 193(e) on the interpretation of s. 193(c), Professor Russell describes what is meant by an appeal with leave (Peter H. Russell, "The Jurisdiction of the Supreme Court of Canada: Present Policies and a Programme for Reform" (October 1968) 6 Osgoode Hall Law Journal 1 at 23):

> The appeal with leave represents a fundamentally different conception of the Supreme Court's function than that embodied in *de plano* appeals. From the litigant's point of view it is both broader and narrower than the appeal as of right. It is broader in the sense that it is available in situations where there is no right to appeal; but it is narrower in that whether or not it is granted depends in the final analysis on the court's discretion and not on the litigant's right. This suggests that the basic rationale for appeals with leave has to do not with the rights or interests of private litigants but with the public interest in the authoritative resolution of difficult and important legal problems.

This provides a further clarification as to how s. 193(e) functions within legislation that, in addition to providing an avenue to apply for leave to appeal, also establishes rights of appeal.

54 I also question whether it is necessary or possible to construe s. 193 of the *BIA* so as to bring it into harmony with the *CCAA*. Parliament has provided different appeal rights in each of these statutes and must be taken to have done so for a reason. I will not repeat the *BIA* provisions, but the *CCAA* provisions are as follows:

> **Leave to appeal**
>
> **13** Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.
>
> R.S., 1985, c C-36, s 13; 2002, c 7, s 134.
>
> **Permission d'en appeler**
>
> **13** Sauf au Yukon, toute personne mécontente d'une ordonnance ou décision rendue en application de la présente loi peut en appeler après avoir obtenu la permission du juge dont la décision fait l'objet d'un appel ou après avoir obtenu la permission du tribunal ou d'un juge du tribunal auquel l'appel est porté et aux conditions que prescrit ce juge ou tribunal concernant le cautionnement et à d'autres égards.

LR (1985), ch C-36, art 132002, ch 7, art 134.

55 This is a distinctly different right of appeal than what exists in s. 193 of the *BIA*, which establishes four categories where an applicant has a right of direct access to the appeal court, plus an appeal with leave. The difference in statutory language is justified by the differing application of the two Acts. The *BIA* concerns both individual *and* commercial bankruptcies and insolvencies, sometimes including the remedy of a receivership, where the acting official is a receiver, with powers conferred by the security agreement, and supervised only to some extent by the courts.

56 The differing application of the *CCAA* and the *BIA*, even in the commercial context, has recently been made plain in *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 (S.C.C.) [*Callidus*]:

> [39] The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).
>
> (Emphasis added)

57 Quite clearly, where a corporation is the insolvent entity, the distinctions between the operational aspects of the two statutes narrow considerably. In particular, where a debtor corporation will never emerge from bankruptcy, the equitable distribution of the bankrupt's assets among its creditors is the *BIA's* only relevant purpose and it is a purpose shared with the *CCAA* (see *Callidus* at para 46).

58 Nonetheless, the *BIA* does not lose its character as being a statute that serves commercial as well as individual interests. The tension to provide flexibility and less supervision in the context of a commercial undertaking is in direct opposition to the need to protect more vulnerable debtors or multiple small and large creditors in the bankruptcy context. In my view, this explains the differing approaches to the rights of access to appellate courts.

59 As others have noted, s. 193 of the *BIA* is ripe for reform: see Frank Bennett, *Bennett on Bankruptcy*, 16th ed (Toronto: CCH Canadian, 2013) at 607. The interpretative problem represented by the conflicting jurisprudence is further exacerbated by two aspects of the *General Rules*: a short time period for appeal (ten days) and a requirement that the application for leave to appeal be brought and filed at the same time as the notice of appeal. These restrictions on the right of appeal regularly catch out counsel and then result in the type of cross-applications that exist in this case, thereby increasing cost, decreasing efficiency and affecting access to justice. To that extent, any attempt to provide a definitive interpretation of s. 193(c) is to be applauded. The issue is whether Parliament or the courts should be the instrument of change. On this point, see *Royal Bank of Canada v. Bodanis*, 2020 ONCA 185 (Ont. C.A.) at para 8.

60 Even if the courts are the proper place for reform, I do not believe the solution lies in construing s. 193(c) narrowly so as to reduce more appeals under the *BIA* to the need to apply for leave to appeal. It is also important not to move the analysis from interpreting the legislation to interpreting the judicially imposed criteria for access to the appellate courts. With much respect, it is preferable to construe the words of the statute and apply them to the context of a specific case, without applying either a narrow or broad interpretation of the statute.

61 While it is solidly established in the jurisprudence that there is no right of appeal under s. 193(c) from a question involving procedure *alone*, courts should not start with that question. The primary task is to answer the question raised by s. 193(c) and determine whether the property involved in the appeal exceeds $10,000. Courts have used different ways of giving meaning to s. 193(c), but it is still the words of the statute that govern. Thus, in *Fallis*, by its adoption of what the Court had said in *Orpen*, the test is stated as, What is the loss which the granting or refusing of the right claimed will entail? In *Fogel*, the Court asked what is "the value in jeopardy" (at para 6). In *McNeil*, the Chambers judge observed that "[t]he 'property involved in the appeal' ...

may be determined by comparing the order appealed against the remedy sought in the notice of appeal" (at para 13). In *Trimor*, the Chambers judge added to the *Orpen — Fallis* test by stating "[t]he focus of the inquiry under s. 193(c) is the amount of money at stake ..." (at para 10). All of these expressions are consistent with the statutory language present in s. 193(c).

62 In answering any of those questions, an appeal court may determine that there is no property involved in the appeal exceeding in value $10,000 but rather that the question in issue is procedural only. But merely because the question in issue is procedural, does not necessarily mean there is not property involved in the appeal that exceeds in value $10,000. An issue can be procedural while also having more than $10,000 at stake. In examining this principle further, it is helpful to look again at the three leading cases that put forward the proposition that the property involved in the appeal did not exceed $10,000 because the question in issue was procedural:

(a) *Coast* — the issue was whether the Chambers judge had erred by permitting the bringing of an action rather than requiring the matter to be heard in Chambers;

(b) *Dominion Foundry* — the issue pertained to the manner of sale; and

(c) *Pine Tree* — the issue was whether a receiver should have been appointed or not.

It should be noted that the reported decisions do not show that the proponent of a right of appeal in these cases put forward evidence to show that the procedural issue in question had resulted in or could result in a loss.

63 It is one thing to say there is no appeal as of right under s. 193(c) from an order that directs a receiver as to the *manner* of sale because the "property involved in the appeal [does not exceed] in value ten thousand dollars" where no claim of loss is alleged. Classifying such an order as procedural appears to have no consequence because the complaint is about the *choice* of procedure that the trustee or receiver made rather than about the value of the property (*Dominion Foundry*). It is quite another matter to say there is no *right* of appeal under s. 193(c) from any order that is procedural in nature when there is a claim of loss in excess of $10,000. In short, courts must be careful not to extrapolate from decided cases to reduce every choice that a trustee or a receiver makes to a question of procedure so as to deny a proposed appellant a right of appeal. The issue in s. 193(c) is whether based on the evidence there is at least $10,000 at stake, not whether the order is procedural.

64 According to the *Orpen — Fallis* line of authority, which I believe this Court should follow, an appellate court's task is to determine first and foremost whether the appeal involves property that exceeds in value $10,000, i.e., to answer the question posed by s. 193(c). It is not necessary that recovery of that amount be guaranteed or immediate. Rather the claim must be sufficiently grounded in the evidence to the satisfaction of the Court determining whether there is a right of appeal. As the Court in *Fallis* indicated, the determination of the amount or value may be proven by affidavit. It may be that a court will conclude that the appeal does not involve property that exceeds in value $10,000, but rather involves a question of procedure alone, but one does not begin with the second question first. In my view, this is an important distinction.

C. Applying s. 193(c) to this appeal

65 The notice of appeal filed on behalf of the Wilkes Group indicates that the appeal is taken on the following grounds:

(a) That the learned Chambers Judge erred by approving the sale and assignment of the two actions to Atrium.

(b) That the Learned Chambers Judge erred by failing to apply the proper legal test;

(c) That the Learned Chambers Judge erred by concluding that the Receiver made sufficient efforts to get the best price for the two actions and that the Receiver has not acted improvidently;

(d) That the Learned Chambers Judge erred by failing to consider the interests of all parties that would be impacted by the sale and assignment of the two actions to Atrium.

(e) That the Learned Chambers Judge erred by failing to conclude that the interests of the Applicants, other guarantors and KEAI in the two actions, were a sufficient reason to deny the sale and assignment of the two actions to Atrium.

(f) That the Learned Chambers Judge erred by failing to appropriately consider the efficacy and integrity of the process by which the offers for the two actions were made;

(g) That the Learned Chambers Judge erred by failing to conclude that Atrium's motives were a sufficient reason to deny the sale and assignment of the two actions to Atrium.

(h) That the Learned Chambers Judge erred by failing to appropriately consider if there was an unfairness in the working out of the process.

(i) And on such further and other grounds as counsel may advise and this Honourable Court may allow.

66 In my view, the Wilkes Group has placed this case squarely within such case law as *Fogel*, *Ng*, *McNeill*, *Kostiuk*, *IJK Consortium*, *Temple Consulting*, *John Doe*, *Trimor* and other cases relying on the *Orpen — Fallis* line of authority. According to the memorandum of law filed on behalf of the Wilkes Group, as of September 1, 2018, Atrium was owed $20,660,012.65. After the sale of the Development, KEAI continued to owe Atrium in excess of $7,000,000. Under the Guarantee Lawsuit, Atrium seeks to recover this amount from the guarantors of KEAI's debt. The Wilkes Group has defended this claim and the mandatory mediation session was completed on August 28, 2019.

67 Specifically, the Wilkes Group submits that the approval of the offer to sell the KEAI Lawsuits for $200,000 undervalued the asset and exposed them to liability under the Guarantee Lawsuit, without the shield of the potential recovery obtainable from the KEAI Lawsuits. The Wilkes Group makes these independent claims:

(a) In light of their unopposed claim that the KEAI Lawsuits were worth in excess of $10,000,000, and their exposure under the Guarantee Lawsuit, the sale to KEAI's secured creditor for $200,000 was improvident.

(b) If the sale of the KEAI Lawsuits to Atrium were to be approved, the order approving sale should have been made conditional on the guarantors' release from the Guarantee Lawsuit.

(c) Since the receiver had not acted on the KEAI Lawsuits during the two years of the receivership, and in light of the Guarantee Lawsuit, and the undervaluation of the KEAI Lawsuits, the Chambers judge erred by lending a court's approval to the sale, when the receiver's application should have been dismissed. If the receiver were uncomfortable with selling the KEAI Lawsuits without the Court's approval, which is a possibility under the order appointing the receiver, then the receiver should have proceeded to discharge.

68 In written submissions, the receiver put forward three arguments in support of its position that s. 193(c) does not apply. These arguments track the three categories in *Bending Lake*. For the first argument, the receiver, relying on *Alternative Fuel*, states the order is procedural in nature:

37. ... The Receiver had the choice of prosecuting the Subject Actions to maximize recovery or selling its right, title and interest in the Subject Actions. Either way, the Receiver had a duty to maximize recovery and the Receiver determined that the process of marketing and selling the Subject Actions was the most efficient and desirable means to maximize recovery. The Subject Order approved of the Receiver's exercise of professional judgment regarding the most appropriate means of maximizing the value of the Subject Actions.

69 The receiver's second argument is that the order under appeal "does not bring into play the value of KEAI's property in the relevant sense". The third argument is the order under appeal "does not result in or create a loss for the Appellants" for these reasons:

> 39. ... The Receiver sought to obtain the best price for the Subject Actions and did not act improvidently. The Receiver took appropriate efforts to obtain the maximum recovery possible for the Receivership estate by selling the right, title or interest of the Receiver in the Subject Actions to Atrium (after testing the market value of the Subject Actions through an informal tender process involving all other interested parties). In the result, the Receiver proceeded with a course of action which immediately monetized the Subject Actions for the highest available fair market value. Rather than creating a loss for the Appellants, the Subject Order reduced their exposure as guarantors of the Loan and advanced their economic interests.

70 To my mind, the receiver's submissions combine a standard of review argument with the question of whether there is a right of appeal. Even applying the most restrictive notion of what constitutes a right of appeal under s. 193(c), the receiver's decision was not procedural in nature alone. Granted, it is not apparent from the order that a particular amount is involved, but, in my respectful view, the property involved in the appeal is the KEAI Lawsuits. The claim of the Wilkes Group exceeds $200,000, but it is not that number alone that must be considered. The sale, if approved, leaves them exposed to the Guarantee Lawsuit, with no ability to minimize their liability while, at the same time, conferring on Atrium the potential for double recovery.

71 This potential loss to the Wilkes Group brings their appeal within s. 193(c). The central issue on appeal will be whether the receiver was entitled to assign the KEAI Lawsuits for $200,000 in the face of these assertions:

> (a) the lawsuits were worth in excess of $10,000,000;
>
> (b) the receiver had undertaken no independent evaluation of them; and
>
> (c) the loss to KEAI and its shareholders, and therefore the guarantors, could extend to the amount of the company's continuing indebtedness to the purchaser of the asset.

In my view, the affidavit evidence sufficiently supports these assertions for the purposes of the applications at hand.

72 Applying the approach from the *Orpen — Fallis* line of authorities, if one compares the order appealed against, an order approving the sale if the KEAI Lawsuits for $200,000, with the remedy sought in the notice of appeal, which is that the sale not be approved or be approved with conditions, it is clear that the appeal involves property that exceeds in value $10,000. The appeal is not only about the procedure used to sell the asset; it is about whether the asset should have been sold for $200,000 in all of the previously outlined circumstances of this case. Thus, the Wilkes Group has an appeal as of right under s. 193(c).

VI. Leave to File Late

73 When counsel for the Wilkes Group filed his clients' notice of appeal, he believed that the 30-day appeal period fixed by s. 9 of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1, applied rather than the 10-day appeal period fixed by Rule 31(2) of the *General Rules*. As a result, the appeal was filed 19 days late. He has accepted full responsibility for the error.

74 In *Royal Bank v. Paulsen & Son Excavating Ltd.*, 2012 SKCA 101, 399 Sask. R. 283 (Sask. C.A. [In Chambers]), Richards J.A. (as he then was) dealt with a late appeal of an order approving a taxation of accounts of the receiver. Justice Richards applied the traditional test for extending time to file a notice of appeal, stating as follows:

> [18] I turn, therefore, to Paulsen's application to extend the time for filing a notice of appeal. This issue is governed by the factors identified in *Bank of Nova Scotia v. Saskatoon Salvage Co*. (1954) 29 Sask. R. 285 (Sask. C.A.). They were summarized as follows in *Dutchak v. Dutchak*, 2009 SKCA 89, 337 Sask. R. 46at para. 12:
>
> > [12] According to these decisions, in determining whether leave should be granted the applicant must persuade the Court that: (i) there is a reasonable explanation for the delay; (ii) he or she possessed a bona fide intention to appeal within the time limited for appeal; (iii) there is an arguable case to be made to a panel of the Court; and (iv) there will be no prejudice to the respondent, if leave is granted beyond what would be incurred in the usual appeal process. In any given case, one or more factors may be more important than another.

75 The Wilkes Group bring themselves easily within these criteria. Indeed, to his credit, Mr. Lee for the receiver did not strenuously argue to the contrary. Solicitor error does not always justify extending the time to appeal, but I see no reason to depart from the general tenor of the case law, which is to grant an extension of time if it can be done without serious prejudice to the other side: see *Daniels v. Canada (Attorney General)*, 2003 SKCA 25 (Sask. C.A. [In Chambers]) at para 5, (2003), 232 Sask. R. 64 (Sask. C.A. [In Chambers]), and *Taheri v. Vujanovic*, 2018 SKCA 40 (Sask. C.A.) at para 30, (2018), 36 C.P.C. (8th) 82 (Sask. C.A.). As to the intention to appeal, Mr. Wilkes attested to the intention of the Wilkes Group to appeal virtually from the outset. I have no reason not to accept this evidence. The receiver has not provided any argument or evidence as to any potential prejudice caused by the late filing. With respect to the need to establish an arguable case, as I have indicated, the issue will be whether the Chambers judge erred by not taking into account the factors and issues listed above. It is an arguable case. Having considered and applied the relevant criteria, it is appropriate to extend the time to appeal to the date the notice of appeal was actually filed.

VII. Conclusion

76 Since the Wilkes Group have an appeal as of right under s. 193(c) of the *BIA*, the receiver's application to strike their notice of appeal is dismissed and the application to apply for leave to appeal filed on behalf of the Wilkes Groupe is dismissed as being unnecessary. The application to extend the time to file the notice of appeal to the date of actual filing is granted. In the circumstances, there will be no order as to costs.

***Caldwell J.A.*:**

I concur.

***Tholl J.A.*:**

I concur.

Group's application granted; receiver's application dismissed.

Footnotes

1 In *Servus*, among other matters, leave to appeal was granted to determine whether s. 193(a) or s. 193(c) obviated the need to apply for leave to appeal. When the matter was heard, the Alberta Court of Appeal found it unnecessary to address that question (see *Pricewaterhousecoopers Inc v. 1905393 Alberta Ltd*, 2019 ABCA 433 (Alta. C.A.) at para 19, (2019), 98 Alta. L.R. (6th) 1 (Alta. C.A.)).

TAB 9

2007 NLCA 17
Newfoundland and Labrador Court of Appeal

Roman Catholic Episcopal Corp. of St. George's, Re

2007 CarswellNfld 96, 2007 NLCA 17, [2007] N.J. No. 100, 156 A.C.W.S. (3d) 18, 265 Nfld. & P.E.I.R. 49, 31 C.B.R. (5th) 61, 805 A.P.R. 49

In the Matter of the Amended Proposal of the Roman Catholic Episcopal Corporation of St. George's, an Insolvent

Ernst & Young Inc., as Trustee Pursuant to the Amended Proposal of the Roman Catholic Episcopal Corporation of St. George's (Intended Appellant) and John Doe - 49 - GBS (Intended First Respondent) and John Doe - 51 - GBS (Intended Second Respondent) and John Doe - 48 - GBS (Intended Third Respondent) and John Doe - 50 - GBS (Intended Fourth Respondent)

C.K. Wells C.J.N.L.

Heard: March 6, 2007
Oral reasons: March 6, 2007
Written reasons: March 14, 2007
Docket: 07/07

Counsel: John Stringer, Q.C., Ms Stacey O'Dea, for Intended Appellant
Mr. Harry Mugford, for Intended, First, Second, Third, Fourth Respondents

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.b To Court of Appeal
XVII.7.b.i General principles

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — General principles

Religious corporation was found liable to several plaintiffs for sexual abuse committed by priest in one of its parishes — Corporation filed proposal under Bankruptcy and Insolvency Act and held meeting of creditors who approved proposal, with exception of creditor who objected to timing of pay-outs and creditor whose claim had not been proven — Trustee brought successful application for endorsement of proposal — Claims of certain creditors were denied on basis that they were received after claims bar date set out in proposal — Four creditors brought applications seeking to file claim against corporation after claims bar date in proposal — Bankruptcy judge held that four additional claims should be accepted by trustee for determination through process established under proposal, although they were filed after claims bar date — Trustee sought to appeal bankruptcy judge's decision pursuant to s. 193 of Act — Issue arose as to whether trustee was entitled to appeal as of right or whether leave to appeal was required — Trustee was entitled to appeal as of right pursuant to s. 193(c) of Act — Alternatively, leave to appeal should be granted pursuant to s. 193(e) of Act — Trustee had right of appeal pursuant to s. 193(c), as loss which refusal of right of appeal would entail was clearly more than $10,000, relying on definition and test adopted in certain Supreme Court of Canada case — Alternatively, discretion as to whether to grant or refuse leave to appeal should be exercised in favour of granting trustee leave to appeal as there was clearly arguable case on appeal — Circumstances of case were different than those of usual bankruptcy and insolvency cases, and none of authorities considered by bankruptcy judge dealt with proposal that contemplated unknown creditors and established process for dealing with them as case at bar did.

Table of Authorities

Cases considered by *C.K. Wells C.J.N.L.*:

Bank of British Columbia v. 1st National Investments Ltd. (1980), 1980 CarswellBC 454, 34 C.B.R. (N.S.) 282 (B.C. C.A.) — considered

Blue Range Resource Corp., Re (2000), 2000 ABCA 285, 2000 CarswellAlta 1145, [2001] 2 W.W.R. 477, (sub nom. *Enron Canada Corp. v. National-Oilwell Canada Ltd.)* 193 D.L.R. (4th) 314, 271 A.R. 138, 234 W.A.C. 138, 87 Alta. L.R. (3d) 352 (Alta. C.A.) — considered

Elias v. Hutchison (1981), 37 C.B.R. (N.S.) 149, 27 A.R. 1, (sub nom. *Catalina Exploration & Development Ltd., Re)* 121 D.L.R. (3d) 95, 1981 CarswellAlta 183, 14 Alta. L.R. (2d) 268 (Alta. C.A.) — followed

Fallis v. United Fuel Investments Ltd. (1962), (sub nom. *United Fuel Investments Ltd., Re)* [1962] S.C.R. 771, 4 C.B.R. (N.S.) 209, 34 D.L.R. (2d) 175, 1962 CarswellOnt 54 (S.C.C.) — followed

Kenco Developments Ltd. v. Miller Contracting Ltd. (1984), 1984 CarswellBC 584, 53 C.B.R. (N.S.) 297, 58 B.C.L.R. 142 (B.C. C.A.) — considered

Kostiuk, Re (2006), 379 W.A.C. 292, 229 B.C.A.C. 292, [2006] 10 W.W.R. 259, 24 C.B.R. (5th) 160, 55 B.C.L.R. (4th) 276, 2006 CarswellBC 2001, 2006 BCCA 371 (B.C. C.A. [In Chambers]) — followed

McNeill v. Roe, Hoops & Wong (1996), 39 C.B.R. (3d) 147, 20 B.C.L.R. (3d) 274, (sub nom. *McNeill (Bankrupt), Re)* 71 B.C.A.C. 213, (sub nom. *McNeill (Bankrupt), Re)* 117 W.A.C. 213, 1996 CarswellBC 306 (B.C. C.A.) — considered

Nautical Data International Inc., Re (2005), 16 C.B.R. (5th) 235, 2005 CarswellNfld 272, 2005 NLCA 62, 250 Nfld. & P.E.I.R. 201, 746 A.P.R. 201 (N.L. C.A.) — followed

Noma Co., Re (2004), 2004 CarswellOnt 5033 (Ont. S.C.J. [Commercial List]) — considered

Orpen v. Roberts (1925), 1925 CarswellOnt 89, [1925] S.C.R. 364, [1925] 1 D.L.R. 1101 (S.C.C.) — followed

518494 Ontario Ltd. (Petrochem), Re (1985), 57 C.B.R. (N.S.) 272, 12 O.A.C. 392, 1985 CarswellOnt 215 (Ont. C.A.) — considered

Statutes considered:

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

Generally — referred to

s. 37 — considered

s. 135(4) — considered

s. 193 — considered

s. 193(a) — considered

s. 193(a)-193(d) — referred to

s. 193(b) — considered

s. 193(c) — considered

s. 193(e) — considered

Winding-up Act, R.S.C. 1952, c. 296

Generally — referred to

s. 2 "property" — considered

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

R. 31(2) — considered

RULING by Court of Appeal as to whether trustee was entitled to appeal from decision of bankruptcy judge as of right pursuant to s. 193 of *Bankruptcy and Insolvency Act*.

***C.K. Wells C.J.N.L.*:**

1 The appellant (the Trustee) seeks to appeal a decision of a judge of the Trial Division sitting in bankruptcy. That decision reversed an earlier determination the Trustee made in the course of administering a proposal (the Proposal) made by the Roman Catholic Episcopal Corporation of St. George's (the Corporation) and approved by the bankruptcy judge pursuant to the provisions of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the *Act*).

2 The Trustee relies on section 193 of the *Act* which provides as follows:

> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;
>
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
>
> (e) in any other case by leave of a judge of the Court of Appeal.

3 Rule 31(2) of the *Bankruptcy and Insolvency General Rules*, C.R.C. 1978, c. 368 (the *General Rules*) provides that:

> Where an appeal is brought under paragraph 193(e) of the Act, the notice of appeal must include the application for leave to appeal.

The notice filed by the Trustee gives notice that the Trustee,

> ... pursuant to paragraph 193(a)(c) or alternatively paragraph 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 (BIA), appeals, and if necessary, seeks leave to appeal the decision of the Honourable Justice Faour delivered on the 18th day of January, 2007 ...

Background Facts

4 As a result of being held liable in the case of some claims, and having a total of some four dozen claims made against it, for damages arising out of alleged sexual abuse, the Corporation made a proposal pursuant to the *Act*. During the course of proceedings it was amended and, as amended, was accepted by the parties as the Proposal. It establishes four classes of creditors, as follows:

> Class 1: All Creditors of the Corporation known to the Corporation as of the Court Approval Date, whose Claims against the Corporation arose prior to the Filing Date as a result of the sexual abuse of such Creditor by priests, employees, or agents of the Corporation or any other person where the Corporation is either directly or vicariously liable for such Claims;
>
> Class 2: All regular trade creditors, Preferred Creditors, Crown Claim Creditors and Secured Creditors of the Corporation;
>
> Class 3: All Creditors of the Corporation [agreeing] to postpone their Claims to the Claims of the Class 1, Class 2 and Class 4 Creditors ...
>
> Class 4: All Unknown Creditors who the Corporation becomes aware of after the Court Approval Date whose Claims against the Corporation arose prior to the Filing Date as a result of the sexual abuse of such Creditor by priests, employees or agent of the Corporation or any other person where the Corporation is either directly or vicariously liable for such

> Claims. Such Unknown Creditors shall file Proofs of Claim with the Trustee not later than two months following the last advertising date set out in the Unknown Creditor identification process described in Article 12.1 herein, otherwise, their claims shall be barred and they shall not be entitled to participate in any distributions hereunder ...

The Proposal also provided that Class 4 creditors would not vote because, by definition, at the time of voting they would be unknown to the Corporation.

5 The Proposal put in place an alternate dispute resolution process, (ADR Process) for determination of all claims based on sexual abuse in respect of which liability has not previously been determined. It also requires the realization of all the assets of the Corporation and immediate payment of all Class 2 creditors, after bankruptcy court approval of the Proposal. With the exception of an amount set aside for certain specified purposes of the Corporation, the Proposal provides that 95% of the remaining proceeds of asset realization be placed in a Class 1 creditors trust fund, and the remaining 5% in a Class 4 creditors trust fund. With respect to the Class 4 creditors trust fund it also provides that:

> ... Should no claims be received from Class 4 Creditors pursuant to the Unknown Creditors identification process described in Article 12.1 herein, or should such Claims not exceed the Class 4 Creditors' Trust Fund, then any balance remaining in such Class 4 Creditors' Trust Fund shall be first transferred to the Class 1 Creditors' Trust Fund, to the limit of the Class 1 Creditor's Trust Fund Total, and second to fund any Class 3 Creditors' Claims, and third, to be returned to the Corporation.
>
> [Emphasis added]

6 The "Unknown Creditor's identification process" referred to in the foregoing excerpt is that set out in the Proposal. It provides for identification of potential Class 4 creditors through a course of newspaper advertising over a stated period of time. It also established a date after which no further claims could be made (the Claims Bar Date). With respect to finality of potential claims, the Proposal provides that:

> The effect of this Proposal shall be to fully and forever satisfy and extinguish the Claims of all Creditors, as against the Corporation, upon performance of the proposal. Any Creditor who has not submitted a Proof of Claim pursuant to the terms hereof, with[in] the time limit set out herein, or whose Proof of Claim has been disallowed, and such Creditor has not appealed such disallowance, shall not be entitled to any distribution hereunder and such Creditor shall be forever barred from asserting such Claims. ... Nothing in the Release or this Proposal shall impair the ability of a Class 1 or Class 4 Creditor to pursue an action against the Corporation, with leave of the Court and with the prior consent of the Corporation, to obtain a final money judgement [sic] in respect of damages for which the Corporation is liable but no such judgement [sic] shall alter the entitlement of any Class 1 or Class 4 Creditor to payment in respect [of] his Claim under this Proposal. It is acknowledged that for Class 1 Creditors the amount of such damages may not equal the amount reflected in Schedule "A" hereto.
>
> [Emphasis added]

7 The Proposal was approved at a meeting of all identified creditors. Of the Class 1 creditors 42, representing claims of more than $14,000,000.00, voted in favour and one creditor, representing a claim of $2,500,000.00, voted against it. One hundred percent of the Class 2 and Class 3 creditors voted in favour of the Proposal. The Proposal was approved by the bankruptcy judge.

8 All parties are agreed that the Claims Bar Date is March 15, 2006. The Trustee received proofs of claim from two of the four respondents on March 29, 2006, one other on April 26, 2006 and the fourth on May 5, 2006. Each of the four claimed $500,000.00 damages for alleged sexual abuse of them by a priest. The Trustee rejected all four because they had not been presented by the Claims Bar Date. The four respondents appealed to the bankruptcy judge.

Decision of the bankruptcy judge now sought to be appealed

9 The bankruptcy judge noted the authority conferred by subsection 135(4) of the *Act* "to deal with the actions of the trustee". He also noted the authority conferred by section 37 "to confirm, reverse or modify the act or decision complained of". With respect to the manner in which he should exercise his jurisdiction, the bankruptcy judge decided:

> [20] Whether I should view this as an appeal where my task would be to determine whether the trustee made an error of law in disallowing the claims, or approve a late claim *nunc pro tunc*, or with retroactive effect, the effect is the same. Either the claims may be made, or they were out of time. I prefer the approach which would permit me to deal with the substantive issue of whether the claims ought to be considered rather than rule on whether the trustee has made an error at law. My preference is to take the approach that I should not let the procedures chosen by the applicants dictate the outcome of the proceeding, but deal with the substantive effect of filing the claims after the claims bar date. In taking this approach it may be necessary to consider that the application to set aside the trustee's decision is in reality an application to give leave *nunc pro tunc* to the applicants to file their claims after the deadline. I'm satisfied that whether or not I find an error of law I can deal with the substance of whether it's appropriate to permit these claims to be made rather than focus this proceeding on whether there was an error of law in the decision to disallow.

However, later in his reasons, he also observed that:

> [50] I do want to say that I do not believe the trustee could have acted differently. The trustee was obligated to follow the terms of the proposal. The proposal created a deadline and gave him no discretion to vary it. The Court in its role of supervision of the process can authorize a variation of these terms.

10 The bankruptcy judge stated that he had to "consider two approaches taken in Canada on the question of delay in these circumstances". He identified one approach as being that approved by the Alberta Court of Appeal in *Blue Range Resource Corp., Re* (2000), 193 D.L.R. (4th) 314, 2000 ABCA 285 (Alta. C.A.) (referred to by the bankruptcy judge as *Re Blue Range Resources*). That decision set out four factors to be considered in deciding whether to allow late claims. They are: (1) if inadvertence is involved, did the claimant act in good faith; (2) any relevant prejudice that might be caused by permitting the claim; (3) can any relevant prejudice be alleviated; and (4) if relevant prejudice cannot be alleviated, are there other factors which would permit late filing.

11 The alternative approach identified by the bankruptcy judge is that which he described as being exemplified in the case of *Noma Co., Re*, [2004] O.J. No. 4914 (Ont. S.C.J. [Commercial List]). That approach, the bankruptcy judge concluded, would "place emphasis on the contractual nature of the proposal and the inherent unfairness which would result if a late creditor could prejudice the delicate balance between the corporation and the creditors who were part of the arrangement."

12 Ultimately, the bankruptcy judge chose the approach set out in *Blue Range Resource Corp., Re*. On application, of the factors identified in that case, to the facts of this case, the bankruptcy judge decided the four additional claims should be accepted by the Trustee for determination through the ADR Process established under the Proposal, notwithstanding that they were filed after Claims Bar Date. It is that decision which the Trustee seeks to appeal.

13 At the conclusion of the hearing I directed that an appeal as of right existed and, if I were wrong in so concluding, I would grant leave to appeal. I also indicated I would file a fuller expression of my reasons for so deciding. What follows are those reasons.

Is there an appeal as of right and, if not, should leave to appeal be granted?

14 At the hearing before me, the Trustee argued that it was entitled to appeal as of right by virtue of paragraphs (a) and (c) of section 193. In the alternative, the Trustee argued that if it was not entitled to appeal as of right then leave should be granted pursuant to paragraph (e) of section 193. Counsel for the respondents argued that the decision of the bankruptcy judge was purely a procedural one and there was no basis for appeal, as of right, under any one of paragraphs (a) to (d) of section 193. He also argued that the bankruptcy judge made no error in following *Enron Canada Corp.*, and exercising his discretion as he did. Therefore, he submitted, there was no basis for granting leave to appeal under paragraph (e) of section 193.

15 There was one aspect of the interpretation of section 193 which the parties did not specifically address. While it cannot alter the substantive outcome of this application, I have to consider it because it impacts the approach to be taken in deciding the application. That aspect is the question of whether I should consider, *first*, whether there is a right of appeal or, *first*, whether leave should be granted. That also leads to a question of whether, if it is determined that there is an appeal as of right, the question of leave can or should also be determined. There are inconsistent, if not conflicting, decisions, one from this Court, relating to these matters.

16 In *Kenco Developments Ltd. v. Miller Contracting Ltd.* (1984), 53 C.B.R. (N.S.) 297 (B.C. C.A.)], Macdonald J.A. followed an earlier decision of that court (*Bank of British Columbia v. 1st National Investments Ltd.* (1980), 34 C.B.R. (N.S.) 282 (B.C. C.A.)) in which an application for leave was dismissed "because the material showed that the subject of the proceedings was substantially in excess of $500 in value". Justice Macdonald then observed:

> If such is the case leave should not be given. Leave should only be given in any other case, that is, a case not falling within provisions *(a)* to *(d)* inclusive.

17 In *McNeill v. Roe, Hoops & Wong* (1996), 39 C.B.R. (3d) 147, 20 B.C.L.R. (3d) 274 (B.C. C.A.), Finch J.A., as he then was, held it was not necessary to decide whether leave to appeal should have been granted because there was an appeal as of right. He noted, but did not discuss, the above quoted conclusion of Macdonald J.A. in *Kenco Developments*.

18 In *Nautical Data International Inc., Re* (2005), 250 Nfld. & P.E.I.R. 201, 2005 NLCA 62 (N.L. C.A.), Welsh J.A., in an application for leave to appeal from a decision of a judge sitting in bankruptcy, decided:

> [8] For the reasons which follow, I have concluded that leave to appeal should be granted. Accordingly, it is unnecessary to consider the application of section 193(a) or (c).

19 That is a markedly different approach than that taken by the judges of the British Columbia Court of Appeal. While I can understand the thinking leading to the conclusion of Macdonald J.A. in *Kenco Developments*, I can see nothing in the *Act* that would require that leave be given only "in a case not falling within the provisions of (a) to (d) inclusive". In my view, the approach of Welsh J.A., in *Nautical Data International Inc.*, is an equally valid approach and not inconsistent with any provision of the statute.

20 As a practical matter, as this case will demonstrate, it may be in the interest of all parties, and the courts, that a judge be able to take either approach and, in an appropriate case, also make a decision in the alternative. It may well be that an appeal court, upon hearing the fuller argument and considering the whole of the record during the course of an appeal, might conclude that the decision of an applications judge, that an appeal as of right existed, was not sound. In that circumstance, even though the facts of the case may be such that leave to appeal would have been given, the appeal could be dismissed on the basis that there was no jurisdiction to hear it, because there was no appeal as of right and leave had not been obtained. In *518494 Ontario Ltd. (Petrochem), Re* (1985), 57 C.B.R. (N.S.) 272 (Ont. C.A.) Houlden J.A. decided:

> In this case the appellant combined its notice of appeal and application for leave as required by R. 49(2); but, instead of applying to a single judge for leave, it brought its application, for leave and its appeal before a full panel of this Court. This was wrong. The appellant should first have moved before a single judge for leave. It is only if leave to appeal is granted that the appellant can proceed with its appeal. ...

21 I can find nothing in the *Act* that would prevent a judge, hearing an application for leave combined with a notice of appeal as Rule 31(2) of the *General Rules* requires, from coming to a conclusion that an appeal exists as a matter of right under one or more of paragraphs (a) to (d) of section 193, while also making a decision, *in the alternative*, as to whether or not, in that particular case, leave ought to be granted. In fact, for the reason set out above, it seems to me that that would be the most efficient way to approach such an application. Accordingly, I propose to deal with the application in this case in that manner.

Appeal as of right

22 With respect to the argument of the Trustee that it has an appeal as of right under paragraph (a), I have not been satisfied that this appeal involves future rights. I come to that conclusion after considering the views expressed in *Kostiuk, Re* (2006), 24 C.B.R. (5th) 160, 2006 BCCA 371 (B.C. C.A. [In Chambers]), *Cameron, Re*, 2002 ABCA 183 (Alta. C.A.); and *Elias v. Hutchison* (1981), 37 C.B.R. (N.S.) 149, 121 D.L.R. (3d) 95 (Alta. C.A.). I would adopt the conclusion to be drawn from those cases that, "A present right exists presently; a future right is inchoate in that while it does not now exist, it may arise in the future". A current allegation on existing facts, although for some reason procedurally blocked, is an existing claim. It cannot be said to involve future rights. Future rights are rights which *may* come into existence in the future but are not yet in existence. While the claims of the four respondents have not yet been proven, they are allegations based on existing facts. The right to assert claims in respect of those allegations are rights that now exist. If it were otherwise they could not now be asserted. Therefore, no right of appeal can be asserted by the Trustee, pursuant to paragraph (a), as the point in issue does not involve future rights.

23 During the hearing I raised with counsel the question of whether there might be a right to appeal under paragraph (b) on the basis that the decision is likely to affect claims of a similar nature in the bankruptcy proceedings, i.e. the claims of the Class 1 creditors. As counsel for the Trustee is not relying on paragraph (b), I will make no determination. I mention it simply to ensure that this decision is not taken to be an acknowledgement by the Court that, in the circumstances of this case, the Class 1 claims were considered not to be "cases of a similar nature in the bankruptcy proceedings."

24 With respect to the argument of the Trustee that it is entitled to appeal as a matter of right because the property involved exceeds in value $10,000.00, counsel for the four respondents argues that the decision of the bankruptcy judge is procedural only and does not involve any sum of money. He submits that the bankruptcy judge made no determination as to entitlement of any of the respondents and, therefore, the issue in the appeal is only as to procedure. He also argues that there was no "property in peril" in the decision of the bankruptcy judge, and for that reason also, paragraph (c) is inapplicable.

25 On examination of the actual words of paragraph (c), I am unable to accept either of the arguments of counsel for the four respondents. Admittedly there was no "property in peril" but, in my view, the statute does not require a prospective appellant to establish property to have been in peril in the decision intended to be appealed. In *Fallis v. United Fuel Investments Ltd.*, [1962] S.C.R. 771 (S.C.C.), the Court was considering a similar phrase in the *Winding-up Act*, R.S.C. 1952, c. 296. The phrase was: "An appeal, if the amount involved therein exceeds two thousand dollars, lies by leave of a judge ...". There, the Court referred to and followed its approach in an earlier decision, *Orpen v. Roberts*, [1925] S.C.R. 364 (S.C.C.). The Court in *Orpen* was quoted as concluding that:

> ... the subject matter of the appeal is the right of the respondent to build on the street line on Carlton street in the city of Toronto. "The amount or value of the matter in controversy" (section 40) is the loss which the granting or refusal of that right would entail. The evidence sufficiently shows that the loss — and therefore the amount or value in controversy — exceeds $2,000.
>
> [Emphasis added]

26 Finch J.A. applied the *Fallis* decision in interpreting section 193(c) in *McNeill*. He adopted the test underlined in the above excerpt from *Fallis*. He also noted that it had been adopted by other judges of the British Columbia Court of Appeal, and drew attention to the fact that section 2 of the *Act* defines "property" as including money.

27 Relying on that definition, and applying the test adopted in *Fallis*, I can only conclude that "the loss which the refusal of a right of appeal would entail" in this case is clearly more than $10,000.00. From the point of view of Class 1 creditors, Class 3 creditors, and the Corporation, the loss is potentially $2,000,000.00. The Proposal, as noted above, provides that any funds in the Class 4 creditors trust fund not required for Class 4 creditors are to be available: first, for the Class 1 creditors; second, for the Class 3 creditors; and any residue for the Corporation. Unquestionably, refusal of a right of appeal potentially involves their interests in a significant sum of money. The Trustee is obligated to protect the interests of those parties to the Proposal, in the assets realized. In my view, therefore, the Trustee has a right of appeal pursuant to paragraph (c) of section 193.

Leave to appeal

28 The Trustee has asked that, if I conclude that there is no appeal as a matter of right then, in the alternative, I grant leave to appeal. Having decided that there is an appeal as of right, it is not, strictly speaking, necessary for me to decide the question of leave. However, I have also to be concerned about efficient use of court time and efficient conclusion of proceedings for the benefit of all parties. There remains the possibility that the panel of this Court that ultimately hears the appeal may come to a conclusion that there is no appeal as a matter of right. For the reasons expressed above I consider it prudent, especially where the four respondents have so strongly contested the Trustee's claim to an appeal as of right, and where the issue of leave has been fully argued, that I consider, as an alternative, whether or not leave to appeal should be granted.

29 As noted above, the bankruptcy judge recognized the possibility of two different approaches to his review of the decision of the Trustee. He chose not to consider whether the Trustee had made an error in law. In fact, he acknowledged that the Trustee had no alternative but to decide as he did. Instead, the bankruptcy judge chose to decide, himself, the substantive issue that was before the Trustee. He also recognized that there were two lines of authority with respect to the approach to be taken in deciding the substantive issue of whether to permit or reject the late claims of the four respondents. He chose to follow the approach *Blue Range Resource Corp., Re* instead of giving priority to the contractual nature of the Proposal and its overwhelming acceptance at a meeting of the creditors. In the process he wrote:

> [33] In considering all the arguments I reviewed the cases submitted. It is hard to find cases directly on point as the circumstances reflect different situations. First, virtually all of the cases reflect commercial creditors, and not the kind of creditors we have in this case. Second, none of the cases cited dealt with a proposal that contemplated unknown creditors and established a process for dealing with them as this one did.
>
> [Emphasis added]

30 The circumstances referred to in the preceding paragraph satisfies me that my discretion, as to whether to grant or refuse leave to appeal, should be exercised in favour of granting the Trustee leave to appeal. Clearly, there is an arguable case on appeal. The issues which the bankruptcy judge identified as being before him are of importance to the parties in this case and appellate court guidance on the issues would be of benefit to bankruptcy and insolvency practice generally. As well, as the bankruptcy judge noted, the circumstances of this case are different than the usual bankruptcy and insolvency cases, and none of the authorities he was considering dealt with a proposal that contemplated unknown creditors and established a process for dealing with them as this one did. In these circumstances, even if I am in error in concluding that there is an appeal as of right under paragraph (c) of section 193, I would grant leave to appeal under paragraph (e).

31 Accordingly, it is ordered that:

(a) The Trustee is entitled to appeal as of right pursuant to paragraph 193(c);

(b) in the event that the court hearing the appeal concludes otherwise, leave to appeal is granted pursuant to paragraph 193(e); and

(c) costs are in the cause.

Order accordingly.

TAB 10

2015 ABCA 44
Alberta Court of Appeal

Trimor Mortgage Investment Corp. v. Fox

2015 CarswellAlta 121, 2015 ABCA 44, [2015] A.W.L.D. 1096, 249 A.C.W.S. (3d) 13, 26 Alta. L.R. (6th) 291

Deloitte Restructuring Inc., in its Capacity as the Trustee in Bankruptcy of Trimor Mortgage Investment Corporation, Applicant and Robert Fox, White Rain Corporation, the R. Fox Self-Administered RSP and Darlene Shelest, Respondents

Marina Paperny J.A.

Heard: January 27, 2015
Judgment: January 30, 2015
Docket: Calgary Appeal 1401-0318-AC

Counsel: J.P. Flanagan, for Applicant
L.C. Snowball, for Respondents

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.e Miscellaneous
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — Miscellaneous
Applicant was trustee in bankruptcy — Applicant sought to appeal chambers decision overturning its disallowance of claim of respondents — Applicant brought application seeking declaration that permission to appeal was not required — Application allowed — Leave to appeal was not required — Issue on appeal was whether trustee was entitled to disallow claim of $272,000 by looking beyond default judgment to circumstances of its granting and merits of claim — Focus of inquiry under s. 193(c) of Bankruptcy and Insolvency Act was amount of money at stake, which here was $272,000 — Claim fell squarely within section.
Table of Authorities
Cases considered by *Marina Paperny J.A.*:
Galaxy Sports Inc. v. Galaxy Sports Inc. (Trustee of) (2003), 44 C.B.R. (4th) 218, 2003 CarswellBC 1305, 2003 BCCA 322, *(*sub nom. *Galaxy Sports Inc. (Bankrupt), Re)* 183 B.C.A.C. 192, *(*sub nom. *Galaxy Sports Inc. (Bankrupt), Re)* 301 W.A.C. 192 (B.C. C.A. [In Chambers]) — referred to
Kostiuk, Re (2006), 379 W.A.C. 292, 229 B.C.A.C. 292, [2006] 10 W.W.R. 259, 24 C.B.R. (5th) 160, 55 B.C.L.R. (4th) 276, 2006 CarswellBC 2001, 2006 BCCA 371 (B.C. C.A. [In Chambers]) — referred to
Newfoundland & Labrador Refining Corp. v. IJK Consortium (2009), 2009 CarswellNfld 76, 2009 NLCA 23, 284 Nfld. & P.E.I.R. 53, 875 A.P.R. 53, 52 C.B.R. (5th) 8 (N.L. C.A.) — referred to
Orpen v. Roberts (1925), 1925 CarswellOnt 89, [1925] S.C.R. 364, [1925] 1 D.L.R. 1101 (S.C.C.) — followed
United Fuel Investments Ltd., Re (1962), [1962] S.C.R. 771, *(*sub nom. *Fallis v. United Fuel Investments Ltd.)* 4 C.B.R. (N.S.) 209, *(*sub nom. *Fallis v. United Fuel Investments Ltd.)* 34 D.L.R. (2d) 175, 1962 CarswellOnt 54 (S.C.C.) — followed
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 2 "property" — considered

s. 193(c) — considered

s. 193(e) — considered

Rules considered:

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

Generally — referred to

APPLICATION by applicant seeking declaration that permission to appeal was not required.

***Marina Paperny J.A.*:**

1 The applicant seeks a declaration that permission to appeal is not required; in the alternative, if permission is required, the applicant asks that it be granted. The applicant is the trustee in bankruptcy of Trimor Mortgage Investment Corporation (Trimor) and wishes to appeal a chambers decision overturning its disallowance of the claim of the respondents Robert Fox, White Rain Corporation, the R. Fox Self-Administered RSP and Darlene Shelest.

2 I endeavour to distill complicated facts to their basics. The respondents obtained a default judgment of $272,000 against Trimor just prior to its bankruptcy. The default judgment was obtained as a result of the failure to file a statement of defence within the time parameters set out by the *Rules of Court*. Trimor says that the failure to file a defence was inadvertent and as soon as it became aware of the judgment, it moved promptly to set it aside. Before the application was heard, Trimor assigned itself into bankruptcy.

3 The respondents are all preferred shareholders of Trimor. Their default judgment arose from a claim alleging breach of their shareholders' agreement with Trimor, breach of fiduciary duty by Trimor, fraud, misrepresentation and unlawful enrichment. The claims all arise from their positions as preferred shareholders. The amount claimed represents each of the claimant's views as to the value of their preferred shares at the time of their respective acquisitions, coinciding with their capital contributions to Trimor. The claim does not seek rescission of the contract. It purports to quantify unliquidated damages based on share value.

4 The respondents tendered their default judgment as proof of their claims to the trustee. The trustee disallowed the claims, taking the position that they were not proper claims because the claims were not adjudicated upon, the claimants were in reality equity claimants and the effect of the default judgment was to prefer the respondent shareholders over other shareholders by having converted their entire equity claim into a debt claim.

5 The respondents successfully appealed the disallowance to the Court of Queen's Bench. The chambers judge accepted their position that there was no power on the part of the court or the trustee in these circumstances to challenge the default judgment.

6 The trustee seeks to appeal and submits it can do so as of right. Section 193(c) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 specifically allows for a right to appeal if the property involved in the appeal exceeds $10,000 in value. Section 2 of the *Act* defines property to include money. The trustee submits that, if the appeal is successful, the estate will recover $272,000 and the respondents will lose that same amount. Thus, it says, the section is clearly engaged.

7 The respondents submit that in the circumstances of this case, there is going to be recovery of 100% to all creditors, including unsecured creditors, and that accordingly there will be no monetary loss to the creditors. As a result, there is no appeal as of right. The respondents' position rests on two propositions: first, that to appeal under s 193(c) the only loss to be considered is that of the party applicant and not the respondent and second, that a loss to an estate is insufficient if there is no ultimate loss to creditors.

8 In my view, neither proposition is supported in law. The test to be applied under this section was originally articulated in *Orpen v. Roberts*, [1925] S.C.R. 364 (S.C.C.), at 367, [1925] 1 D.L.R. 1101 (S.C.C.), and confirmed in *United Fuel Investments Ltd., Re*, [1962] S.C.R. 771, 4 C.B.R. (N.S.) 209 (S.C.C.), which set out that the amount or value of the matter in controversy is the loss which the granting or refusal of that right would entail. The test has been explained and applied in numerous cases: see *Galaxy Sports Inc. v. Galaxy Sports Inc. (Trustee of)*, 2003 BCCA 322, 183 B.C.A.C. 192 (B.C. C.A. [In Chambers]); *Kostiuk,*

Re, 2006 BCCA 371, 55 B.C.L.R. (4th) 276 (B.C. C.A. [In Chambers]); *Newfoundland & Labrador Refining Corp. v. IJK Consortium*, 2009 NLCA 23, 52 C.B.R. (5th) 8 (N.L. C.A.).

9 Though a loss to the creditors may be common in most bankruptcy cases, there is no principled basis to limit the trustee from appealing where the granting or refusal of the right would lead only to loss to the bankrupt's estate. If all creditors are paid in full, after all costs and expenses incurred are paid, the balance will be distributed to the bankrupt on discharge. Here, it is conceded by the respondents that the preferred shareholders will likely receive approximately 40 cents on the dollar of their initial investment. Similarly, if the disallowance is upheld, the respondents will lose $272,000.

10 The issue on this appeal is whether the trustee was entitled to disallow the claim of $272,000 by looking beyond the default judgment to the circumstances of its granting and the merits of the claim. The focus of the inquiry under s 193(c) is the amount of money at stake: here $272,000. This claim falls squarely within the section.

11 Had I concluded otherwise, I would nevertheless have granted permission to appeal. The test under s 193(e) has been met. The legal issue ultimately to be determined is under what circumstances a trustee is entitled to go behind a default judgment obtained before a bankruptcy; specifically, whether fraud or a miscarriage of justice is required, as put forward by the respondents, or whether some lower threshold, such as where there has been no adjudication on the merits, will suffice.

12 Leave to appeal is not required.

Application allowed.

End of Document

TAB 11

2021 ABCA 33
Alberta Court of Appeal

DGDP-BC Holdings v. Third Eye Capital Corp, PricewaterhouseCoopers

2021 CarswellAlta 205, 2021 ABCA 33, [2021] A.W.L.D. 714, [2021] A.W.L.D. 715, 327 A.C.W.S. (3d) 321

DGDP-BC Holdings Ltd. (Applicant) and Third Eye Capital Corporation (Respondent) and PricewaterhouseCoopers Inc. (Respondent)

Third Eye Capital Corporation (Applicant) and DGDP-BC Holdings Ltd. (Respondent)

Thomas W. Wakeling J.A.

Heard: January 27, 2021
Judgment: January 29, 2021
Docket: Calgary Appeal 2001-0241AC

Counsel: Terry Czechowskyj, Q.C., Ian Aversa, Sam Babe, for Applicant
Chris Simard, for Respondent, Third Eye Capital Corporation
Jessica Cameron, for Respondent, PricewaterhouseCoopers Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.4 Stay of proceedings
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.e Miscellaneous
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — Miscellaneous
Insolvent companies AEC Ltd. and ACH Ltd. (collectively "A Ltd.") filed notices of intention to make proposals to their creditors under Bankruptcy and Insolvency Act ("BIA") — Proceedings were continued under Companies' Creditors Arrangement Act ("CCAA") — A Ltd. borrowed money under debtor-in-possession loan in which applicant DG Ltd. acquired interest — Court-ordered priority charge secured interim lenders' charge — Respondent TEC Corp.'s bid for A Ltd.'s assets and request for appointment of receiver approved by court — Receiver borrowed funds from TEC Corp. to continue operation of A Ltd. — TEC Corp. informed court that it and receiver would close TEC Corp.'s en bloc bid in two stages: first sale would be assets of AEC Ltd., and second stage would be assets of ACH Inc. — On December 4, 2020, court approved purchase and sale agreement relating to AEC Ltd.'s assets and, in paragraph 4 of order, granted priority to receiver's borrowing charge over interim lenders' charge ("December order") — This extinguished DG Ltd.'s security interest in assets, property and undertakings of AEC Ltd. — DG Ltd. objected on basis that interim lenders' charge should remain on AEC Ltd. assets until amount ACH Ltd. borrowed was repaid in full — DG Ltd. sought leave to appeal paragraph 4 of December order — Leave to appeal granted — Question to be decided was whether interim lender, with court-ordered super-priority interim lenders' charge and status as unaffected creditor, could be stripped of those protections when CCAA proceeding was converted into receivership proceeding — This was significant question to insolvency practice — Interim lenders advance funds in reliance on protection prescribed by super-priority interim lenders' charges and must know if their reliance is misplaced — DG Ltd.'s prospects of succeeding on appeal met low merit-based standard of showing that appeal was not frivolous — DG Ltd. did not ask receiver and manager of A Ltd. to refrain from closing sale of AEC Ltd.'s assets — Receiver and purchaser stated that transaction would still proceed if DG

Ltd.'s application for leave to appeal was granted — Proposed appeal would not unduly hinder insolvency proceedings — Stay of proceedings associated with successful leave to appeal application was vacated.

Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings

Insolvent companies AEC Ltd. and ACH Ltd. (collectively "A Ltd.") filed notices of intention to make proposals to their creditors under Bankruptcy and Insolvency Act ("BIA") — Proceedings were continued under Companies' Creditors Arrangement Act ("CCAA") — A Ltd. borrowed money under debtor-in-possession loan in which applicant DG Ltd. acquired interest — Court-ordered priority charge secured interim lenders' charge — Receiver borrowed funds from TEC Corp. to continue operation of A Ltd. — TEC Corp. informed court that it and receiver would close TEC Corp.'s en bloc bid in two stages: first sale would be assets of AEC Ltd., and second stage would be assets of ACH Inc. — On December 4, 2020, court approved purchase and sale agreement relating to AEC Ltd.'s assets and, in paragraph 4, of order, granted priority to receiver's borrowing charge over interim lenders' charge ("December order") — This extinguished DG Ltd.'s security interest in assets, property and undertakings of AEC Ltd. — DG Ltd. objected on basis that interim lenders' charge should remain on AEC Ltd. assets until amount ACH Ltd. borrowed was repaid in full — DG Ltd. sought leave to appeal paragraph 4 of December order — Leave to appeal granted — Successful leave application resulted in stay of proceedings — TEC Corp. applied to have stay of proceedings lifted — Application granted — DG Ltd. took no position on application to lift stay of proceedings — DG Ltd. did not ask court-appointed receiver and manager of A Ltd. to refrain from closing sale of substantially all of AEC Ltd.'s assets to purchaser — Receiver and purchaser stated that transaction would still proceed if DG Ltd.'s application for leave to appeal was granted — TEC Corp. met stay standard — Stay of proceedings cancelled as result of s. 195 of BIA.

Table of Authorities

Cases considered by *Thomas W. Wakeling J.A.*:

Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of) (1997), 1997 CarswellAlta 737, 48 C.B.R. (3d) 171, (sub nom. *Edo (Canada) Ltd. (Bankrupt), Re)* 206 A.R. 295, (sub nom. *Edo (Canada) Ltd. (Bankrupt), Re)* 156 W.A.C. 295, 1997 ABCA 273 (Alta. C.A. [In Chambers]) — followed

DGDP-BC Holdings Ltd v. Third Eye Capital Corporation (2020), 2020 ABCA 442, 2020 CarswellAlta 2308 (Alta. C.A.) — considered

First Leaside Wealth Management Inc., Re (2012), 2012 ONSC 1299, 2012 CarswellOnt 2559 (Ont. S.C.J. [Commercial List]) — considered

Harper v. Canada (Attorney General) (2000), 2000 SCC 57, 2000 CarswellAlta 1158, 2000 CarswellAlta 1159, 193 D.L.R. (4th) 38, [2000] 2 S.C.R. 764, 271 A.R. 201, 234 W.A.C. 201, [2001] 9 W.W.R. 201, 92 Alta. L.R. (3d) 1 (S.C.C.) — followed

Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832 (1987), 38 D.L.R. (4th) 321, 73 N.R. 341, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* [1987] 3 W.W.R. 1, 46 Man. R. (2d) 241, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* 25 Admin. L.R. 20, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores (M.T.S.) Ltd.)* 87 C.L.L.C. 14,015, 18 C.P.C. (2d) 273, [1987] D.L.Q. 235, 1987 CarswellMan 176, (sub nom. *Manitoba (Attorney General) v. Metropolitan Stores Ltd.)* [1987] 1 S.C.R. 110, 1987 CarswellMan 272 (S.C.C.) — followed

Mudrick Capital Management LP v. Lightstream Resources Ltd. (2016), 2016 ABCA 401, 2016 CarswellAlta 2416, 43 C.B.R. (6th) 175 (Alta. C.A.) — followed

R. v. Fuhr (2017), 2017 ABCA 266, 2017 CarswellAlta 1451, 58 Alta. L.R. (6th) 1 (Alta. C.A.) — considered

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 54 C.P.R. (3d) 114, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — followed

143471 Canada Inc. c. Québec (Procureur général) (1994), 31 C.R. (4th) 120, 167 N.R. 321, (sub nom. *143471 Canada Inc. v. Quebec (Attorney General))* 61 Q.A.C. 81, 90 C.C.C. (3d) 1, [1994] 2 S.C.R. 339, (sub nom. *Quebec v. 143471 Canada Inc.)* 21 C.R.R. (2d) 245, [1995] 1 C.T.C. 27, 2 G.T.C. 7112, 1994 CarswellQue 112, 1994 CarswellQue 84, [1995] R.D.F.Q. 1 (S.C.C.) — followed

2003945 Alberta Ltd. v. 1951584 Ontario Inc. (2018), 2018 ABCA 48, 2018 CarswellAlta 160, 57 C.B.R. (6th) 272 (Alta. C.A.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 193(e) — pursuant to

s. 195 — considered
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

APPLICATION for leave to appeal from order granting priority to receiver's borrowing charge over interim lenders' charge; APPLICATION to lift stay of proceedings.

***Thomas W. Wakeling J.A.*:**

I. Introduction

1 DGDP-BC Holdings Ltd. seeks leave under section 193(e) of the *Bankruptcy and Insolvency Act* [1] to appeal paragraph 4 of a sale approval and vesting order pronounced on December 4, 2020 that extinguished the applicant's security interest in the assets, property and undertakings of Accel Energy Canada Limited, an insolvent corporation. [2]

2 In the event that this Court grants DGDP leave to appeal under section 193(3) of the *Bankruptcy and Insolvency Act*, Third Eye Capital Corporation seeks an order under section 195 of the *Bankruptcy and Insolvency Act* [3] vacating the stay of proceedings associated with a successful leave to appeal application. DGDP takes no position on this application.

II. Questions Presented

A. Leave To Appeal Application

3 Should this Court grant the DGDP leave to appeal?

4 To answer this general question, more specific questions must be posed. [4]

5 Is the question the applicant seeks permission to appeal of significance to those who practice at the insolvency bar?

6 Is the question of significance to the parties to the appeal?

7 There is a merit-based component to the test. It makes no sense to grant an applicant permission to appeal if the likelihood of success is extremely low or hopeless. But is the standard more onerous? Must the prospects of success exceed fifty percent? If this is too high a standard, what is the appropriate standard?

8 Will the appeal unduly hinder the progress of the insolvency proceedings?

B. Stay Application

9 Should this Court exercise its authority under section 195 of the *Bankruptcy and Insolvency Act* and cancel the stay of proceedings created by section 195? [5]

10 Has Third Eye Capital demonstrated that there is a serious issue to be tried?

11 Will it suffer irreparable harm if a stay is not granted?

12 Will the harm Third Eye Capital suffers, if a stay is not granted, exceed the harm DGDP will suffer if a stay is granted?

III. Brief Answers

A. Leave To Appeal Is Granted

13 I grant DGDP leave to appeal against paragraph 4 of the December 4, 2020 order.

1. The Question Is of Significance to the Insolvency Bar

14 In its memorandum of argument DGDP identified the question it wished to present to the Court of Appeal this way: [6]

> The question of whether an interim lender, with a standard, Court-ordered, super-priority Interim Lenders' Charge and Court-ordered status as an unaffected creditor in any CCAA plan of arrangement or compromise, can have those protections and "certainties" stripped from it when the CCAA proceeding is converted into a receivership proceeding, and, if so, under what conditions . . . .

15 This question must be of significance to the insolvency practice. Interim lenders advance funds relying on the protection prescribed by the super-priority interim lenders' charge. In doing so, they are not unlike the professionals and directors who derive a benefit from the provisions in the initial order under the *Companies' Creditors Arrangement Act* [7] proceedings.

16 Those who rely on protection provided in the "Validity and Priority of Charges" parts of an initial order must know if their reliance is misplaced.

17 Mr. Aversa, co-counsel for DGDP, argued that "[n]o lender would risk participating in such a loan if the Court-ordered priority was subject to variation later in the process". [8] This strikes me as a sound observation. The form of security a lender has is a vital consideration when assessing the merits of a loan. Justice Brown, as he then was, forcefully reinforced this proposition in *First Leaside Wealth Management Inc., Re*: [9]

> [A]bsent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a *CCAA* proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges.

2. The Question Is of Significance to The Parties

18 Christopher Morris, DGDP's president, expressed the opinion in his November 30, 2020 affidavit, that DGDP's position would be "significantly" prejudiced if the only collateral for its outstanding loan was the assets of Accel Canada Holdings. [10] He relies on two telephone conversations with the chief executive officer of Third Eye Capital [11] to the effect that "TEC intended to offer only equity to the Interim Lenders in satisfaction of the obligations TEC allocated to . . . [Accel Canada Holdings Limited] under the DIP facility". [12]

19 I note that others have expressed the opinion that DGDP will be paid in full.

20 Taking everything into account, I am satisfied that paragraph 4 of the contested order may adversely affect the interests of DGDP. As such, the question is of significance to DGDP.

3. The Proposed Appeal Passes the Merit-Based Component of the Test

21 The parties could not agree on the level of scrutiny required in the merit-based component of the test.

22 Ms. Cameron, counsel for PricewaterhouseCoopers Inc., argued that the leave-to-appeal applicant must convince the adjudicator-gatekeeper that its appeal was more likely to succeed than fail.

23 I do not agree.

24 The merit-based component of the test requires the applicant to satisfy the adjudicator-gatekeeper that its appeal is not frivolous. In a comparable context, I opined that "[a] position is frivolous if . . . the likelihood it will succeed is extremely low. It makes no sense to ask an appeal court to hear appeals that are frivolous". [13]

25 The more onerous standard that Ms. Cameron favored places unrealistic demands on the adjudicator-gatekeeper. Asking an adjudicator-gatekeeper to decide if the applicant's appeal is more likely to succeed than fail without the assistance of facta and full oral argument in a compressed time period is unreasonable. [14]

26 In my opinion, the DGDP's prospects of succeeding on appeal meet the low merit-based standard I have adopted.

4. The Proposed Appeal Will Not Unduly Hinder the Insolvency Proceedings

27 The fourth component of the leave-to-appeal test focuses on the effect granting leave to appeal will have on the insolvency process. Will an appeal unduly hinder the progress of the insolvency proceedings?

28 It will not.

29 The applicant has not asked PricewaterhouseCoopers Inc., in its capacity as the Court-appointed receiver and manager of Accel Canada Holdings and Accel Energy, to refrain from closing the transaction involving the sale of substantially all the assets of Accel Energy to Conifer Energy Inc. [15] In addition, the applicant takes no position on the application by Third Eye Capital to lift the stay of proceedings, in effect, as a result of section 195 of the *Bankruptcy and Insolvency Act*.

30 Ms. Cameron informed me that PricewaterhouseCoopers and Conifer Energy Inc. will close the Accel Energy-Conifer Energy Inc. transaction if I grant DGDB's application for permission to appeal and Third Eye Capital's stay application. [16]

31 The argument that an appeal will distract PricewaterhouseCoopers and impair its ability as the Court-appointed receiver is of minimal force.

32 I am satisfied that the proposed appeal will not unduly hinder the insolvency proceedings.

B. The Stay Is Vacated

33 Third Eye Capital has met the stay standard and I cancel the stay of proceedings in effect as a result of section 195 of the *Bankruptcy and Insolvency Act*. As a result, the Accel Energy- Conifer Energy Inc. transaction can close on February 1, 2021 as planned.

34 This Court will hear an appeal involving these parties on May 3, 2021. [17] If possible, this appeal should be heard at the same time.

35 Counsel's written and oral submission were excellent and I thank them for their very able assistance. They did a lot of work in a very short time.

Application for leave granted; application to lift stay granted.

Footnotes

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

2 This is a brief background overview. Accel Energy Canada Limited and Accel Canada Holdings Limited are private Canadian companies engaged in oil and natural gas production and development. On October 21, 2019 the two companies were insolvent and filed notices of intention to make proposals to their creditors under the *Bankruptcy and Insolvency Act*. On November 27, 2019

the *Bankruptcy and Insolvency Act* proceedings were continued under the *Companies' Creditors Arrangement Act*. The Court of Queen's Bench appointed PricewaterhouseCoopers Inc. as the monitor of Accel Energy and Accel Canada Holdings. On November 27, 2019 the Court of Queen's Bench granted an amended and restated initial order. A term of this order allowed Accel Energy and Accel Canada Holdings to enter into debtor-in possession financing and to continue to operate during the *Companies' Creditors Arrangement Act* proceedings. Third Eye Capital Corporation was the administrative and collateral agent under the court-approved debtor-in possession financing term sheet. A court-ordered priority charge secured the interim lenders' charge. On December 13, 2019 the Court of Queen's Bench authorized Accel Energy and Accel Canada Holdings to conduct a sales and solicitation process. On May 29, 2020 the Court of Queen's Bench approved Third Eye Capital's bid for substantially all the assets of Accel Energy and Accel Canada Holdings. During the *Companies' Creditors Arrangement Act* proceedings, Accel Energy borrowed $14,126,159.33 and Accel Canada Holdings borrowed $21,885,840.67 under the debtor-in-possession loan. On June 10, 2020 DGDP acquired an interest in the debtor-in-possession loan. On June 12, 2020 the Court of Queen's Bench appointed PricewaterhouseCoopers as the receiver over all the assets, properties and undertakings of Accel Energy and Accel Canada Holdings. The receiver needed to borrow more funds to continue the operation of Accel Energy and Accel Canada Holdings. DGDP declined an invitation to participate in this loan. Third Eye Capital agreed to provide the additional funds and requested a receiver's borrowings charge to secure its funding, ranking in priority to other charges, including the interim lenders' charge. Over the objection of DGDP, the Court granted the order Third Eye Capital requested. DGDP sought leave to appeal the order that granted priority to the receiver's borrowing charge over the interim lenders' charge. On December 2, 2020 Justice McDonald granted leave to appeal. 2020 ABCA 442 (Alta. C.A.). On October 30, 2020 Third Eye Capital informed the Court of Queen's Bench that Third Eye Capital and the receiver would close the Third Eye Capital en bloc bid in two stages. The first sale would be the assets of Accel Energy. The assets of Accel Canada Holdings would be sold in the second stage. On December 4, 2020 the Court of Queen's Bench approved the purchase and sale agreement relating to the assets of Accel Energy between the purchaser Conifer Energy Inc. and the receiver. DGDP objected on the basis that the interim lenders' charge should remain on the Accel Energy assets until the amount Accel Canada Holdings borrowed was repaid in full. On December 14, 2020 DGDP applied for leave to appeal paragraph 4 of the December 4, 2020 order.

3 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 195 ("Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper").

4 See *2003945 Alberta Ltd. v. 1951584 Ontario Inc.*, 2018 ABCA 48 (Alta. C.A.), 41; (2018), 57 C.B.R. (6th) 272 (Alta. C.A.) (chambers) & *Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of)*, 1997 ABCA 273 (Alta. C.A. [In Chambers]), 12; (1997), 206 A.R. 295 (Alta. C.A. [In Chambers]), 299 (chambers). See also *Mudrick Capital Management LP v. Lightstream Resources Ltd.*, 2016 ABCA 401 (Alta. C.A.), 48-63; (2016), 43 C.B.R. (6th) 175 (Alta. C.A.), 201-09 (chambers).

5 See *Harper v. Canada (Attorney General)*, 2000 SCC 57 (S.C.C.), 4; [2000] 2 S.C.R. 764 (S.C.C.), 768; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), 334; *143471 Canada Inc. c. Québec (Procureur général)*, [1994] 2 S.C.R. 339 (S.C.C.), 376 & *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.), 128-29.

6 Memorandum of Argument of the Appellant, DGDP-BC Holdings Ltd., 17.

7 R.S.C. 1985, c. C-36, s. 9.

8 Memorandum of Argument of the Appellant, DGDP-BC Holdings Ltd., 14.

9 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]), 51.

10 Affidavit of Christopher Morris sworn November 30, 2020, 3.

11 Id. 48 & 59.

12 Id. 59.

13 *Mudrick Capital Management LP v. Lightstream Resources Ltd.*, 2016 ABCA 401 (Alta. C.A.), 51; (2016), 43 C.B.R. (6th) 175 (Alta. C.A.), 202-03 (chambers).

14 I have adopted the onerous standard in bail-pending appeal applications. In that context counsel are usually in a position to provide sufficient argument that the adjudicator is comfortable assessing the merits of an appeal using a more demanding measure. *R. v. Fuhr*, 2017 ABCA 266 (Alta. C.A.), 49; (2017), 58 Alta. L.R. (6th) 1 (Alta. C.A.), 19-20, (chambers). This position is consistent with the principles that the English Court of Appeal, the High Court of Australia, and the American federal law apply in bail-pending-appeal applications.

15 Affidavit of Damian Lu sworn January 25, 2021, 3.

16 See Affidavit of Rhonda Lastockin sworn January 24, 2021, exhibit E (January 21, 2021 letter from Borden Ladner Gervais LLP to Aird & Berlis LLP) ("Should either i) DGDP's application for leave be dismissed, or ii) its application for leave be granted, but the Court of Appeal grants TEC/Conifer's application to lift the automatic stay of proceedings, we confirm that the Receiver is ready, willing and able to close the Energy Transaction on February 1, 2021. We also understand that Conifer is ready to close the Energy Transaction at that time").

17 *DGDP-BC Holdings Ltd v. Third Eye Capital Corporation*, 2020 ABCA 442 (Alta. C.A.).

End of Document

TAB 12

2009 ABCA 287
Alberta Court of Appeal

Decker Estate (Trustee of) v. Alberta (Superintendent of Bankruptcy)

2009 CarswellAlta 1334, 2009 ABCA 287, [2009] A.W.L.D. 3786, 180 A.C.W.S. (3d) 566, 464 A.R. 40, 467 W.A.C. 40, 59 C.B.R. (5th) 221

In the Matter of the Bankruptcy of Allan John Decker, Cameron Okolita Inc., Trustee in Bankruptcy of the Estate of Allan John Decker (Applicant) and Superintendent of Bankruptcy, Allan John Decker, Snyder & Associates LLP, Canada (Customs and Revenue Agency) and Alberta (Minister of Health and Wellness) (Respondents)

Jack Watson J.A.

Heard: September 1, 2009
Judgment: September 9, 2009
Docket: Edmonton Appeal 0903-0178-AC

Counsel: B.W. Summers for Applicant, Cameron Okolita Inc., Trustee in Bankruptcy of the Estate of Allan John Decker
No one for Respondents

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.b To Court of Appeal
XVII.7.b.ii Availability
XVII.7.b.ii.C Leave by judge
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Leave by judge
Bankrupt made voluntary assignment into bankruptcy — Bankrupt's application for discharge was adjourned sine die — Four proofs of claim were filed in bankruptcy and allowed by trustee — Distribution was made by applicant trustee to creditors — Applicant was discharged as trustee — Subsequent to discharge of trustee, Canada Revenue Agency ("CRA") took action against bankrupt — Bankrupt turned to trustee for assistance — Applicant applied to registrar for order reappointing applicant as trustee — Order was granted — Other than CRA, no other creditor took any action against bankrupt, either before bankrupt's assignment or after applicant's discharge — Applicant realized further funds in bankrupt's estate and dividend would be available for distribution — Applicant applied to Court of Queen's Bench for advice as to whom net proceeds realized in bankruptcy after re-appointment of trustee were to be paid — Applicant trustee brought application for leave to appeal Queen's Bench order pursuant to s. 193(e) of Bankruptcy and Insolvency Act — Application granted — There was some significance to case itself to support grant of leave — There was no action that would be hindered by grant of leave.
Table of Authorities
Cases considered by *Jack Watson J.A.*:
B. (A.) v. D. (C.) (2008), 2008 ABCA 51, 85 Alta. L.R. (4th) 18, 50 C.P.C. (6th) 304, 429 A.R. 89, 421 W.A.C. 89, 2008 CarswellAlta 169, 425 D.L.R. (4th) 359 (Alta. C.A.) — referred to

Devcor Investment Corp., Re (2001), 22 C.B.R. (4th) 65, 2001 ABCA 40, 2001 CarswellAlta 74, (sub nom. *Devcor Investment Corp. (Bankrupt), Re)* 277 A.R. 93, (sub nom. *Devcor Investment Corp. (Bankrupt), Re)* 242 W.A.C. 93 (Alta. C.A.) — referred to

Dyrland, Re (2008), 2008 CarswellAlta 1049, 2008 ABQB 356, 96 Alta. L.R. (4th) 27, [2009] 1 C.T.C. 48, 47 C.B.R. (5th) 243, [2009] 1 W.W.R. 153 (Alta. Q.B.) — followed

Fantasy Construction Ltd., Re (2007), 2007 ABCA 335, 2007 CarswellAlta 1849, [2008] 5 W.W.R. 475, (sub nom. *Fantasy Construction Ltd. (Bankrupt), Re)* 410 W.A.C. 255, (sub nom. *Fantasy Construction Ltd. (Bankrupt), Re)* 417 A.R. 255, 40 C.B.R. (5th) 212, 89 Alta. L.R. (4th) 93 (Alta. C.A.) — considered

Kingstreet Investments Ltd. v. New Brunswick (Department of Finance) (2007), 2007 CarswellNB 6, 2007 CarswellNB 7, 2007 SCC 1, 355 N.R. 336, 25 B.L.R. (4th) 1, 51 Admin. L.R. (4th) 184, (sub nom. *Kingstreet Investments Ltd. v. New Brunswick)* [2007] 1 S.C.R. 3, 2007 D.T.C. 5041 (Fr.), 2007 D.T.C. 5029 (Eng.), 276 D.L.R. (4th) 342, 309 N.B.R. (2d) 255, 799 A.P.R. 255 (S.C.C.) — referred to

Yellowbird v. Samson Cree Nation No. 444 (2008), 433 A.R. 350, 429 W.A.C. 350, 56 C.P.C. (6th) 24, 92 Alta. L.R. (4th) 235, 2008 CarswellAlta 998, 2008 ABCA 270 (Alta. C.A.) — referred to

Statutes considered:

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

s. 69.3 [en. 1992, c. 27, s. 36(1)] — referred to

s. 193 — considered

s. 193(e) — considered

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

s. 222 — referred to

Limitations Act, R.S.A. 2000, c. L-12

Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 390/68

R. 38(3) — referred to

R. 44 — considered

R. 505(4) — referred to

R. 510(2) — referred to

APPLICATION by trustee for leave to appeal Queen's Bench order.

***Jack Watson J.A.*:**

1 The applicant, Cameron Okolita Inc., Trustee in Bankruptcy of the Estate of Allan John Decker, applies for leave to appeal a Queen's Bench Order pursuant to section 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended. That section states:

> 193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;

(d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and

(e) in any other case by leave of a judge of the Court of Appeal.

2 The applicant says that the present case is governed by s. 193(e) of the *Act* as it cannot appeal under another part of the section. The test for leave under s. 193(e) of the *Act* is most recently set out in *Fantasy Construction Ltd., Re* (2007), 417 A.R. 255, [2007] A.J. No. 1182, 2007 ABCA 335 (Alta. C.A.) at paras. 10 to16 which draws from *Devcor Investment Corp., Re* (2001), 277 A.R. 93, [2001] A.J. No. 158, 2001 ABCA 40 (Alta. C.A.) at paras. 8 to 12, as follows:

> 10 As noted above, the governing test is set out in ***West Edmonton Mall***, itself drawing on L.W. Houlden and C.H. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 3rd ed. (revised) [Scarborough: Carswell], Vol. II, p. 57. Picard J.A. wrote that the test has four elements:
>
> (a) whether the point on appeal is of significance to the practice;
>
> (b) whether the point on appeal is of significance to the action itself;
>
> (c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous;
>
> (d) whether the appeal will unduly hinder the progress of the action.

3 There is no "action" as such under this test as no other parties have taken a position, as yet, on the present motion. The applicant's counsel advises that "courtesy copies" of the Notice of Motion and supporting Affidavit and Memorandum on this application were served upon the following potential parties: the bankrupt, Allan John Decker; the Superintendent of Bankruptcy (Industry Canada); and several creditors of the bankruptcy estate being Canada (by the Customs and Revenue Agency), Alberta (by the Minister of Health and Wellness) and Snyder & Associates LLP. Counsel advises that he has spoken to counsel for other potentially interested parties but that, so far, none of those parties have expressed an intention to take part in this motion, nor, for that matter, an appeal should one be authorized. Nonetheless, the applicant contends that the other three factors under *Fantasy Construction* militate in favour of granting leave here.

4 The relevant facts, taken from affidavit evidence filed in the Court of Queen's Bench, are as follows:

(a) The bankrupt made a voluntary assignment into bankruptcy on May 17, 1996 and the applicant is trustee of his estate;

(b) The bankrupt's application for discharge was adjourned *sine die* on February 25, 1997;

(c) Four Proofs of Claim were filed in the bankruptcy and allowed by the Trustee. The creditors and the amounts of their admitted claims are as follows:

(i) Alberta Health and Wellness - $2,721.42;

(ii) Canada Revenue Agency ("CRA") - $18,432.54;

(iii) CRA - $685.71;

(iv) Snyder & Company - $4,927.37.

(d) A distribution was made by the applicant to the creditors on January 18, 1998;

(e) The applicant was discharged as trustee on October 8, 1998;

(f) Subsequent to the applicant's discharge as trustee, CRA took action against the bankrupt, including garnishing his wages;

(g) The bankrupt returned to the applicant for assistance. On December 10, 2008, the applicant applied to the presiding Registrar for an order reappointing the applicant as trustee. That order was granted;

(h) Other than CRA, no other creditor took any action against the bankrupt, either before the bankrupt's assignment or after the applicant's discharge;

(i) The applicant has realized further funds in the bankrupt's estate and a dividend will be available for distribution.

5 The applicant applied to the Court of Queen's Bench for advice as to whom the net proceeds realized in the bankruptcy after the re-appointment of the trustee are to be paid - all creditors, some creditors or the bankrupt. The main issue for which directions were sought was whether or not creditors, whose claims may have become wholly or partly limitation barred between the date of the discharge of the trustee and the date of re-appointment of the trustee, should share in the dividends now to be distributed from the estate.

6 The applicant asserts that the Alberta Association of Insolvency and Restructuring Professionals has, in effect, selected this case to seek this Court's guidance on this point, notably in light of Veit J.'s decision in *Dyrland, Re* (2008), 96 Alta. L.R. (4th) 27, [2008] A.J. No. 856, 2008 ABQB 356 (Alta. Q.B.). The applicant expresses concern about the implications of *Dyrland* and, indeed, wishes to challenge it for several reasons. Here, the applicant sought advice and directions from Burrows J. who ruled that he would follow *Dyrland*, whether he agreed with it or not:

> And I can see that Madam Justice Veit, who obviously is a highly respected judge, and who has done a lot of work on this, practically - and if what you need is a Court of Appeal decision, wouldn't it be better not to have me agree with her after lengthy reasons, or disagree with her and produce two inconsistent Queen's Bench judgments, but to simply say I am following her and send you to the Court of Appeal.
>
> . . . . .
>
> Well, we have had a considerable expenditure of judicial resources to come up with the decision that currently exists. I am just thinking that that really is, practically speaking, enough from the Court of Queen's Bench. Go to the Court of Appeal and get them to use some of their resources to give a definitive answer. You know, I just do not see the practicality of me figuring out whether Madam Justice Veit is — whether I agree with her or not, when the resulting judgment is not going to — is going to give those who need direction a choice, not a compelling - not an authority.

7 What *Dyrland* said was that once a trustee is discharged, the statutory stay of proceedings against the bankrupt lifts pursuant to s. 69.3 of the *Act*. Veit J. found this means that claims against the bankrupt may proceed. Veit J. went on to conclude that a relevant limitation period under the *Limitations Act*, R.S.A. 2000, c. L-12, on such claims would then start to run again. In her view, however, claims by Canada under s. 222 of the *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1 as amended, would not be statute barred by the *Limitations Act* on the basis of *vires* grounds. The applicant's counsel advises that a ten year limitation period would apply to Canada's claims. In light of that, it is not too surprising that Canada has, to this point, not taken part in this motion.

8 The applicant submits that *Dyrland* obliges trustees to ascertain the legal status of claims against a bankruptcy estate before being in a position to make a decision as to notice, let alone a distribution. This, the applicant says, would involve a voyage of discovery which itself would diminish the estate. The applicant also says that *Dyrland* effectively substitutes variable dates for the validity of "claims provable". The applicant says it is not entirely clear from *Dyrland* that the date of re-appointment of the trustee is that date. The applicant says that different Proof of Claim forms would presumably have to be provided to eligible claimants who would subdivide into different classes. For example, only part of some claims may be barred by limitations: see by analogy, *Kingstreet Investments Ltd. v. New Brunswick (Department of Finance)*, [2007] 1 S.C.R. 3, [2007] S.C.J. No. 1,

2007 SCC 1 (S.C.C.) at para. 60; *Yellowbird v. Samson Cree Nation No. 444* (2008), 433 A.R. 350, [2008] A.J. No. 818, 2008 ABCA 270 (Alta. C.A.). The applicant further suggests that the situation is now unclear as to what extent and how bankrupts may have to complete their duties.

9 It is not necessary for me to decide if any of the applicant's contentions are strong, let alone compelling. If any part of it is arguable, leave can be justified if the group of factors in *West Edmonton Mall* so says.

10 As to significance to the practice, the applicant says that this is not a small question but rather one that has significant practical implications for the administration of bankruptcy estates. The applicant says that approximately 20% of bankrupts remain undischarged even after the trustee has been discharged and that, consequently, the situation in the present case is not unusual. On the other hand, the question is evasive of review in light of the typical circumstances in which it arises. Here, the major creditor is Canada for whom diminished claims of others leaves an estate more available for Canada. Thus, Canada's position is to some extent improved by *Dyrland*. But whether Canada would think it efficient to take part in this case is unknown. Other creditors seem unlikely to wish to invest in this legal debate. The applicant's counsel advises that no new creditors emerged during the period when the limitation clock was running. Overall, I am persuaded that the correctness of *Dyrland* is of significance to the practice such as to support a grant of leave.

11 As to significance to the case, the circumstances do not suggest that there is a lot at stake from the perspective of the case itself. However, it cannot be said that the decision would be without significance to the case. Were this case governed by Rule 505(4), and were it merely an ordinary dispute between two persons, a leave grant would not be a matter of routine. Nonetheless, I am persuaded that there is some significance to the case itself such as, in combination with the other factors (though certainly not by itself), to support a grant of leave. As noted above, there is no "action" which would be hindered by grant of leave.

12 Accordingly, leave to appeal is granted on the issue of whether or not Burrows J. was correct to apply the decision in *Dyrland*, wholly or partly.

13 On this appeal, it is desirable to have parties present to debate contrary views. Rule 44 of the *Rules of Court*, AR 390/68 as amended provides that the Court may make a judgment or order for the administration of an estate without making any person interested other than the trustee a party. Accordingly, this leave motion may be dealt with, and has been dealt with, in the absence of any of those potential parties although they received notice. A one-sided appeal is not the optimal route for the legal end product even though it is sometimes unavoidable: see e.g. *B. (A.) v. D. (C.)* (2008), 429 A.R. 89, [2008] A.J. No. 126, 2008 ABCA 51 (Alta. C.A.).

14 With that in mind, and in order to encourage voluntary participation, pursuant to Rule 38(3) I direct that the parties thus served by the applicant shall be described as respondents in the style of cause of these proceedings as set out above. I direct this in part to make abundantly clear that they have standing to participate henceforth in this appeal. I also direct pursuant to Rule 510(2) that the respondents thus named in the style of cause shall be served with the notice of appeal.

15 Should any respondent following service elect to take part in the appeal, that respondent may do so with the full rights of a respondent. The applicant has agreed that should the Superintendent in Bankruptcy or Canada elect to participate voluntarily in these proceedings after the date of these reasons, that respondent may do so at no risk of costs being awarded against that respondent in favour of the applicant. Indeed, I would anticipate that the voluntary participation of the Superintendent of Bankruptcy would be of great assistance to the Court as it could bring expertise to bear on the questions. Similarly, Canada (Customs and Revenue Agency) would bring expertise and possibly an opposing view to the appeal as well.

16 Accordingly, I would ask counsel for the applicant to provide these reasons to counsel for the Superintendent and to counsel for Canada (who has been in contact with the applicant's counsel) so that my encouragement to their participation in the appeal is conveyed to them. One option may be to have one or other of such respondents take part in writing only, or for the entire appeal to be dealt with in writing. I make no direction in that regard, but perhaps counsel might discuss that option and, if appropriate, seek a direction from the Court.

Application granted.

End of Document

TAB 13

2021 ABCA 16
Alberta Court of Appeal

PricewaterhouseCoopers Inc v. Perpetual Energy Inc

2021 CarswellAlta 119, 2021 ABCA 16, [2021] A.W.L.D. 640, [2021] A.W.L.D. 641, [2021] A.W.L.D. 642, [2021] A.W.L.D. 643, [2021] A.W.L.D. 644, [2021] A.W.L.D. 645, 327 A.C.W.S. (3d) 20, 86 C.B.R. (6th) 9

PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity (Appellant / Plaintiff) and Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp. and Susan Riddell Rose (Respondents / Defendants) and Orphan Well Association (Intervenor) and Canadian Natural Resources Limited (Intervenor) and Cenovus Energy Inc. (Intervenor) and Torxen Energy Ltd. (Intervenor)

PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity (Respondent / Plaintiff) and Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp. and Susan Riddell Rose (Appellants / Defendants)

PricewaterhouseCoopers Inc., in its personal capacity (Appellant / Not Party to Application) and PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity (Respondent / Plaintiff) and Perpetual Energy Inc., Perpetual Operating Trust, Perpetual Operating Corp. and Susan Riddell Rose (Respondents / Defendants)

Marina Paperny, Jack Watson, Frans Slatter JJ.A.

Heard: December 10, 2020
Judgment: January 25, 2021
Docket: Calgary Appeal 1901-0255-AC, 1901-0262-AC, 2001-0174-AC

Proceedings: reversing in part *PricewaterhouseCoopers Inc v. Perpetual Energy Inc* (2020), 2020 ABQB 6, 2020 CarswellAlta 62, 6 B.L.R. (6th) 211, D.B. Nixon J. (Alta. Q.B.); additional reasons at *PricewaterhouseCoopers Inc v. Perpetual Energy Inc* (2020), 2020 ABQB 513, 2020 CarswellAlta 1732, 83 C.B.R. (6th) 206, D.B. Nixon J. (Alta. Q.B.); and reversing *PricewaterhouseCoopers Inc v. Perpetual Energy Inc* (2020), 2020 ABQB 513, 2020 CarswellAlta 1732, 83 C.B.R. (6th) 206, D.B. Nixon J. (Alta. Q.B.)

Counsel: R. de Waal, L. Rasmussen, for Appellant / Cross-Respondent, PricewaterhouseCoopers Inc., LIT, in its capacity as the Trustee in Bankruptcy of Sequoia Resources Corp. and not in its personal capacity
D.J. McDonald, Q.C., P.G. Chiswell, for Respondents / Cross-Appellants Perpetual Energy Inc., Perpetual Operating Trust, and Perpetual Operating Corp.
S.H. Leitl, G. Benediktsson, for Respondent / Cross-Appellant, Susan Riddell Rose
C.C.J. Feasby, Q.C., M. Wasserman, for Appellant, PricewaterhouseCoopers Inc., in its personal capacity
K.T. Lentz, Q.C., for Intervenor, Orphan Well Association
G.S. Watson, C.W. Ang, for Intervenors, Canadian Natural Resources Limited, Cenovus Energy Inc., Torxen Energy Ltd.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.8 Costs
XVII.8.h Miscellaneous

Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.9 Miscellaneous
Business associations
III Specific matters of corporate organization
III.1 Directors and officers
III.1.g Fiduciary duties
III.1.g.ix Miscellaneous
Business associations
III Specific matters of corporate organization
III.3 Shareholders
III.3.e Shareholders' remedies
III.3.e.ii Relief from oppression
III.3.e.ii.B Standing to apply
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Business associations
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V.3 Practice and procedure in proceedings involving corporations
V.3.q Costs
V.3.q.ii Scale and quantum of costs
Civil practice and procedure
XXIV Costs
XXIV.5 Persons entitled to or liable for costs
XXIV.5.f Non-party

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Miscellaneous

Proceedings concerned transaction that was part of disposition of oil and gas assets owned by defendant group of companies — Trustee in bankruptcy brought action challenging one step in pre-bankruptcy, multi-step corporate reorganization and sale of assets (aggregate transaction) — Trustee challenged component (asset transaction) of aggregate transaction, on basis that it was at undervalue under s. 96 of Bankruptcy and Insolvency Act — Transaction was also challenged on public policy grounds — Trustee applied for summary judgment, and defendants responded with applications to summarily dismiss or strike out claims — Case management judge held that claim under s. 96 of Act could neither be struck out nor summarily dismissed — Pleading respecting public policy claim was struck out for failure to disclose cause of action — Trustee appealed, and defendants cross-appealed — Appeal allowed; cross-appeal dismissed — Section 96 claim would have to be resolved at trial — There was no legally relevant evidence to rebut presumption that related members of defendant group who were engaged in asset transaction were not operating at arm's length — If transaction was entered into in violation of s. 96 of Act, it was no defence that it was connected to number of other transactions that did not engage s. 96 — "Public policy" pleadings should not have been struck out — They set out and engaged important underlying issue in litigation that could only be resolved at trial.

Business associations --- Specific matters of corporate organization — Shareholders — Shareholders' remedies — Relief from oppression — Standing to apply — Miscellaneous

Proceedings concerned transaction that was part of disposition of oil and gas assets owned by defendant group of companies — Plaintiff trustee in bankruptcy brought action challenging one step in pre-bankruptcy, multi-step corporate reorganization and sale of assets — Transaction was also challenged under statutory corporate oppression provisions — Trustee applied for summary judgment, and defendants responded with applications to summarily dismiss or strike out claims — Oppression claim was struck out for failure to disclose cause of action, because trustee was not "proper person" to be complainant, or alternatively because oppression claim lacked merit — Trustee appealed — Appeal allowed — It was unhelpful to blend analysis of "complainant" status of trustee with substance of oppression claim — Former was not matter of "striking pleading" — On record, it was unreasonable to conclude that trustee was not "proper person" — As to merits of oppression claim, case management judge erred in his analysis for several reasons — Judge misread certain case law in finding that it was complete

answer to claim — Contrary to judge's finding, abandonment and reclamation obligations were real obligation and liability of oil and gas company — While oppression claim may have been narrower than trustee anticipated, pleadings disclosed cause of action — Trustee was to be granted complainant status if it elected to pursue claim.

Business associations --- Specific matters of corporate organization — Directors and officers — Fiduciary duties — Miscellaneous

Proceedings concerned transaction that was part of disposition of oil and gas assets owned by defendant group of companies — Defendant SR was director of related corporate entity that assigned itself into bankruptcy — Plaintiff trustee in bankruptcy brought action challenging one step in pre-bankruptcy, multi-step corporate reorganization and sale of assets — Trustee challenged component (asset transaction) of aggregate transaction, on basis that it was at undervalue under s. 96 of Bankruptcy and Insolvency Act — There was related claim against SR for breach of her duties as director — Trustee applied for summary judgment, and defendants responded with applications to summarily dismiss or strike out claims — Claim against SR was struck out for failure to disclose cause of action, and it was also summarily dismissed on merits, and, in any event, because resignation and mutual release that had been signed was found to be complete defence — Trustee appealed — Appeal allowed — While there was facial merit to claim of breach of director's duties, most of SR's potential liability to corporate entity in question was released by resignation and mutual release — While some portions of claim as against SR were properly summarily dismissed, there was no basis on which claim could be struck for failing to disclose cause of action — It was not possible, on this record, to dispose of alternative of Act claim that was made against SR; this and related issues had to be referred back to trial court.

Bankruptcy and insolvency --- Practice and procedure in courts — Costs — Miscellaneous

Proceedings concerned transaction that was part of disposition of oil and gas assets owned by defendant group of companies — Defendant SR was director of related corporate entity that assigned itself into bankruptcy — Plaintiff trustee in bankruptcy brought action challenging one step in pre-bankruptcy, multi-step corporate reorganization and sale of assets (aggregate transaction) — Transaction was also challenged under statutory corporate oppression provisions — There was related claim against SR for breach of her duties as director — Trustee applied for summary judgment, and defendants responded with applications to summarily dismiss or strike out claims — Case management judge struck out or summarily dismissed large parts of claim — Judge heard subsequent application by SR for enhanced costs — Judge concluded trustee should pay 85 per cent of SR's solicitor and client costs, and that trustee should be personally liable for those costs — Trustee appealed — Appeal allowed — Award of 85 per cent of solicitor and client costs was not justified — Claim against SR was arguable; case law did not "nullify" this claim — Case management judge overstated implications of trustee being officer of court — There was no litigation misconduct to justify enhanced costs — Awards of costs for dismissal application and application to set costs were to be set aside and referred back to case management judge.

Business associations --- Legal proceedings involving business associations — Practice and procedure in proceedings involving corporations — Costs — Scale and quantum of costs

Proceedings concerned transaction that was part of disposition of oil and gas assets owned by defendant group of companies — Defendant SR was director of related corporate entity that assigned itself into bankruptcy — Plaintiff trustee in bankruptcy brought action challenging one step in pre-bankruptcy, multi-step corporate reorganization and sale of assets (aggregate transaction) — Transaction was also challenged under statutory corporate oppression provisions — There was related claim against SR for breach of her duties as director — Trustee applied for summary judgment, and defendants responded with applications to summarily dismiss or strike out claims — Case management judge struck out or summarily dismissed large parts of claim — Judge heard subsequent application by SR for enhanced costs — Judge concluded trustee should pay 85 per cent of SR's solicitor and client costs, and that trustee should be personally liable for those costs — Trustee appealed — Appeal allowed — Award of 85 per cent of solicitor and client costs was not justified — Trustee does not have to meet administrative law requirements of fairness — There is no independent duty to investigate owed to third parties — There was no litigation misconduct to justify enhanced costs — Awards of costs for dismissal application and application to set costs were to be set aside and referred back to case management judge.

Civil practice and procedure --- Costs — Persons entitled to or liable for costs — Non-party

Proceedings concerned transaction that was part of disposition of oil and gas assets owned by defendant group of companies — Defendant SR was director of related corporate entity that assigned itself into bankruptcy — Plaintiff trustee in bankruptcy brought action challenging one step in pre-bankruptcy, multi-step corporate reorganization and sale of assets (aggregate transaction) — Transaction was also challenged under statutory corporate oppression provisions — There was related claim

against SR for breach of her duties as director — Trustee applied for summary judgment, and defendants responded with applications to summarily dismiss or strike out claims — Case management judge struck out or summarily dismissed large parts of claim — Judge heard subsequent application by SR for enhanced costs — Judge concluded trustee should pay 85 per cent of SR's solicitor and client costs, and that trustee should be personally liable for those costs — Trustee appealed — Appeal allowed — Award of 85 per cent of solicitor and client costs was not justified — Case management judge overstated implications of trustee being officer of court — Trustee does not have to meet administrative law requirements of fairness — There is no independent duty to investigate owed to third parties — Awards of costs for dismissal application and application to set costs were to be set aside and referred back to case management judge.

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s. 146(7) — considered

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s. 242(1) — considered

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s. 242(3)(l) — considered

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R. 10.31 — considered

R. 13.6(2)(a) — considered

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R. 39 — considered

Tariffs considered:

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Sched. C — referred to

APPEAL by trustee in bankruptcy and CROSS-APPEAL by defendants from judgment reported at *PricewaterhouseCoopers Inc v. Perpetual Energy Inc* (2020), 2020 ABQB 6, 2020 CarswellAlta 62, 6 B.L.R. (6th) 211 (Alta. Q.B.), striking out or summarily dismissing portions of claim arising from transaction; APPEAL by trustee from judgment reported at *PricewaterhouseCoopers Inc v. Perpetual Energy Inc* (2020), 2020 ABQB 513, 2020 CarswellAlta 1732, 83 C.B.R. (6th) 206 (Alta. Q.B.), imposing costs.

***Per curiam*:**

1 These appeals involve a challenge by the Trustee in Bankruptcy, PricewaterhouseCoopers Inc., to one step in a pre-bankruptcy, multi-step corporate reorganization and sale of assets, called the Aggregate Transaction. The Trustee in Bankruptcy challenges a component of the Aggregate Transaction, called the Asset Transaction, on the basis that it was at an undervalue under s. 96 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3. The transaction is also challenged under the statutory corporate oppression provisions, as well as on public policy grounds. There is a related claim against the respondent Susan Riddell Rose for breach of her duties as a director.

2 The Trustee in Bankruptcy appeals the striking or summary dismissal of large parts of the claim: *PricewaterhouseCoopers Inc v. Perpetual Energy Inc*, 2020 ABQB 6 (Alta. Q.B.). The respondents cross-appeal with respect to portions of the claim that were not struck out or dismissed. There is also an appeal of the subsequent ruling on costs: *PricewaterhouseCoopers Inc v. Perpetual Energy Inc*, 2020 ABQB 513 (Alta. Q.B.).

Facts

3 The challenged transaction was a part of the disposition of some of the oil and gas assets owned by the Perpetual Energy group of companies. The parent of the group is a public company, Perpetual Energy Inc. (the "Perpetual Energy Parent"). The respondent Ms. Rose was the president and Chief Executive Officer of Perpetual Energy Parent.

4 The assets of the group were actually held in the Perpetual Operating Trust. In general terms, there were three categories of asset in the Trust:

> (i) The "KeepCo Assets" that were not a part of the challenged transaction, and were to be retained by the Perpetual Energy group,
>
> (ii) A subset of the KeepCo Assets called the "Retained Interests", and
>
> (iii) The Goodyear Assets, which were the subject of the challenged transaction, and which form the basis of this litigation.

The Perpetual Operating Trust held the beneficial interest in the assets, the sole beneficiary of the Trust being Perpetual Energy Parent. The legal title to the assets, and the regulatory licences to them, were held by Perpetual Energy Operating Corp. Prior to the Aggregate Transaction, Perpetual Energy Operating Corp. had no other business interests, and it only existed to be the trustee of the Perpetual Operating Trust. Ms. Rose was the sole director of Perpetual Energy Operating Corp. until the closing of the transactions. Perpetual Energy Operating Corp. changed its name to Sequoia Resources Corp. during the Aggregate Transaction, so it can conveniently be referred to as Perpetual/Sequoia. Perpetual/Sequoia subsequently assigned itself into bankruptcy, and therefore plays the central role in this litigation.

5 The assets in the Perpetual Operating Trust included the "Goodyear Assets", which were shallow natural gas assets, described as "mature legacy assets". They had been operating with a negative cash flow for some time, were subject to high fixed operating costs, and were associated with significant future Abandonment and Reclamation Obligations, being the costs relating to the anticipated expenses of reclaiming oil and gas properties at the end of their productive life: see *infra*, paras. 85-89. The Goodyear Assets were perceived as having negative net value.

6 Perpetual Energy Parent negotiated with Kailas Capital Corp. to sell the Goodyear Assets for $1. Perpetual Energy Parent announced that the transfer of these assets would improve the Perpetual group's Licensee Liability Rating with the Alberta Energy Regulator: see *infra*, para. 9. There would be a 71% reduction in forecast corporate liabilities, and a significant reduction in its Abandonment and Reclamation Obligations. Perpetual Energy Parent would be relieved of the ongoing negative cash flow associated with the Goodyear Assets. Perpetual Energy Parent expressed to public markets its opinion that the transaction would be in its best interests, because of these advantages.

7 The sale of the Goodyear Assets was accomplished in October 2016 by a multi-step transaction, described collectively as the Aggregate Transaction:

a) The Perpetual Operating Trust transferred the beneficial interest in the Goodyear Assets to its trustee Perpetual/Sequoia for $10 (plus some expense adjustments), through the "Asset Transaction". The legal and the beneficial interests in the Goodyear Assets, together with the related regulatory licences, were therefore combined in Perpetual/Sequoia. The Perpetual Operating Trust continued to hold the beneficial interest in the KeepCo Assets that were to be retained by the Perpetual Energy group.

b) Perpetual Operating Corporation was created to be the "New Trustee" for the Perpetual Operating Trust. Perpetual/Sequoia then transferred to the New Trustee the legal title to the KeepCo Assets held in the Trust, other than the Retained Interests, separating them from the Goodyear Assets.

c) In the "Share Transaction", Perpetual Energy Parent sold all of the shares of Perpetual/Sequoia for $1 to a numbered company ("198Co"), incorporated for that purpose by Kailas Capital Corp. It was at this point that Perpetual Energy Operating Corp. changed its name to Sequoia Resources Corp.

d) Ms. Rose resigned as the sole director of Perpetual/Sequoia. The parties signed a Resignation & Mutual Release.

e) New Trustee then demanded the transfer to it of the Retained Interests, which had been beneficially owned by Perpetual/Sequoia for mere minutes. The legal title and licences to all of the KeepCo Assets thereafter rested in New Trustee.

The various steps in the Aggregate Transaction were closed in sequence, separated only by minutes: reasons at para. 92.

8 The result of the Aggregate Transaction was that Kailas Capital Corp., through its subsidiary 198Co, became the new ultimate parent corporation of Perpetual/Sequoia, which owned the legal and beneficial interests in the Goodyear Assets. Perpetual Energy Parent continued to be the beneficiary of the Perpetual Operating Trust. The Trust held the beneficial interest in the KeepCo Assets that were not included in the transaction, with the legal title and regulatory licences to those assets being held by the New Trustee.

9 The Retained Interests, a 1% interest in certain producing wells, were treated separately. The Trustee in Bankruptcy alleges that they were dealt with in this way as a method of artificially increasing the Licensee Liability Rating of Perpetual/Sequoia until the transaction closed. The Licensee Liability Rating is the regulatory mechanism used by the Alberta Energy Regulator to control the transfer of oil and gas assets. The concept is described in the *Redwater* decision at paras. 18-20, 28-29 (reported as *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150 (S.C.C.)). Leaving the Retained Interests in Perpetual/Sequoia allegedly enabled the transaction to proceed without regulatory scrutiny. The Perpetual Energy defendants plead that the Retained Interests were dealt with separately to accelerate recovery of legacy Alberta Crown royalty credits. Alternatively, they argue that they were entitled to structure their affairs in order to ensure regulatory compliance.

10 A part of the Aggregate Transaction was a Gas Marketing Agreement, backed by a put/call agreement with a third party, that protected Perpetual/Sequoia against natural gas price fluctuations for 23 months.

11 The asserted advantages of the transaction to Perpetual Energy Parent were outlined, *supra*, para. 6. The Trustee in Bankruptcy alleges that as a result of the Asset Transaction Perpetual/Sequoia obtained only $5.67 million in assets, but assumed over $223 million in obligations: reasons at para. 182. The Asset Agreement acknowledged that Perpetual/Sequoia would assume the Abandonment and Reclamation Obligations:

2.06(b) under Applicable Law, the Abandonment and Reclamation Obligations and the Environmental Liabilities associated with the [Goodyear] Assets are inextricably linked with such Assets so that Purchaser will be liable for Abandonment and Reclamation Obligations and Environmental Liabilities associated with the Assets in the absence of the specific assumption of such obligations by Purchaser in this Agreement or otherwise;

The Trustee in Bankruptcy further alleges that the transaction resulted in a drop of Perpetual/Sequoia's Licensee Liability Rating with the Alberta Energy Regulator. Perpetual/Sequoia became responsible for $87 million of Abandonment and Reclamation

Obligations. Approximately 71% of the corporate liabilities related to the Goodyear Assets were transferred to Perpetual/Sequoia.

12 After the closing of the transaction, Perpetual/Sequoia operated the Goodyear Assets. It reported some initial success, but on March 23, 2018, approximately 18 months after the Aggregate Transaction, Perpetual/Sequoia assigned itself into bankruptcy. The appellant PricewaterhouseCoopers was appointed the Trustee in Bankruptcy.

13 The appellant Trustee in Bankruptcy asserts that, from the perspective of the bankrupt Perpetual/Sequoia, the Asset Transaction was at an undervalue by over $217 million. It commenced this action seeking remedies against Perpetual Energy Parent, Ms. Rose, and other branches of the Perpetual Energy group, pleading the following claims:

> a) The Asset Transaction relating to the Goodyear Assets was not at arm's-length, it was within five years the bankruptcy, and it was at an undervalue, making it void under s. 96(1)(b) of the *Bankruptcy and Insolvency Act*;
>
> b) The business of the corporation had been operated in an oppressive manner, contrary to the provisions of the Alberta *Business Corporations Act*, RSA 2000, c. B-9;
>
> c) The Aggregate Transaction was contrary to public policy, was illegal, or otherwise was in violation of equitable principles;
>
> d) The respondent Ms. Rose had breached her duties as the sole director of Perpetual/Sequoia; she denied the allegations but responded, in defence, that the Resignation & Mutual Release insulated her from liability.

The Trustee in Bankruptcy applied for summary judgment, and the defendants responded with applications to summarily dismiss or strike the claims. It was agreed that the applications to summarily dismiss and to strike would be addressed first.

The Summary Disposition Reasons of the Case Management Judge

14 The case management judge originally issued oral reasons for his decision, but later substituted extensive written decisions. The written reasons commenced by identifying the participants in the Aggregate Transaction, and by outlining the nature of that transaction. The reasons summarized the principles applicable to an application to strike out a pleading, and those applicable to an application for summary dismissal. A number of the claims were struck out as not disclosing a cause of action, or were summarily dismissed, or (in the alternative) were both struck and dismissed.

The Section 96 Claim

15 The Trustee in Bankruptcy argued that the Asset Transaction was at an undervalue, in breach of s. 96(1)(b) of the *Bankruptcy and Insolvency Act*:

> 2. In this Act, . . .
>
> > *transfer at undervalue* means a disposition of property or provision of services for which no consideration is received by the debtor or for which the consideration received by the debtor is conspicuously less than the fair market value of the consideration given by the debtor;
>
> 96(1) On application by the trustee, a court may declare that a transfer at undervalue is void as against . . . the trustee, . . . - or order that a party to the transfer or any other person who is privy to the transfer, or all of those persons, pay to the estate the difference between the value of the consideration received by the debtor and the value of the consideration given by the debtor - if . . .
>
> > (b) the party was not dealing at arm's length with the debtor and
> >
> > . . .

> (ii) the transfer occurred during the period that begins on the day that is five years before the date of the initial bankruptcy event and ends on the day before the day on which the period referred to in subparagraph (i) begins and
>
> (A) the debtor was insolvent at the time of the transfer or was rendered insolvent by it . . .
>
> (3) In this section, a person who is privy means a person who is not dealing at arm's length with a party to a transfer and, by reason of the transfer, directly or indirectly, receives a benefit or causes a benefit to be received by another person.

The respondents brought an application to summarily dismiss this claim, on the basis that the Perpetual Energy group (on the one hand) and the Kailas Capital group (on the other hand) were always dealing at arm's length. The application to dismiss proceeded solely on that issue; the other preconditions in the section were not addressed: reasons at paras. 60, 87-90, 102, 107.

16 Underlying this application were two issues. First of all, in applying s. 96, should the court look at the entire Aggregate Transaction, or should it just look at the challenged step, being the Asset Transaction? Secondly, as a matter of fact, was the relevant transaction negotiated at arm's length?

17 The case management judge noted that whether parties are dealing at arm's length is a question of fact. Guidance could be found in the income tax cases. While there was a presumption in s. 4(5) of the *Bankruptcy and Insolvency Act* that related parties did not deal at arm's length, that presumption could be rebutted by "evidence to the contrary".

18 The Perpetual group argued that they could rebut the presumption that they were not dealing at arm's length, because the Trustee in Bankruptcy conceded that the Kailas Capital group exercised "influence" with respect to the Asset Purchase Agreement, and had an "interest" in knowing what assets were in Perpetual/Sequoia: reasons at paras. 59, 93. The case management judge concluded that this claim could not be summarily dismissed, because he was "not comfortable that the quality of the evidence allows me to conclusively adjudicate the action summarily", and that the issue would turn on the credibility of witnesses: reasons at paras. 97-98. It was not possible to determine if the "degree of influence" shown demonstrated sufficient control to rebut the presumption the Perpetual Energy group was not dealing at arm's length: reasons at paras. 98-101.

19 Since this claim, as pleaded, disclosed a recognized cause of action, it could not be struck under R. 3.68: reasons at paras. 105-106.

The Alternative Section 96 Claim

20 The Trustee in Bankruptcy pleaded a related claim, which the parties described as the "alternative *BIA* claim". That claim was based on the provision that a "person privy to the transaction" could be liable in damages for an undervalue transaction, if, as set out in s. 96(3), the privy was not dealing at arm's-length, and "receives a benefit or causes a benefit to be received by another person". Paragraph 22.2.5 of the statement of claim reads:

> 22.2.5 PEI [Perpetual Energy Parent], POC [New Trustee] and Rose benefited from and were privy to the Asset Transaction within the meaning of s. 96 of the *BIA*.

There are no pleaded particulars of the benefit alleged to have been received by each of the defendants, or the role that any of them might have played in conferring a benefit on another. The case management judge did not dispose of this issue in the summary disposition reasons. As discussed, *infra* paras. 112-15, this claim should be regarded as still being outstanding and unresolved.

Corporate Oppression

21 The Trustee in Bankruptcy pleaded that the affairs of Perpetual/Sequoia had been conducted in a way that was oppressive or unfairly prejudicial to the interests of the creditors of Perpetual/Sequoia, contrary to s. 242 of the *Business Corporations Act*: reasons at paras. 117-18. The particular oppressive act pleaded was the entry into the Aggregate Transaction, although it was

conceded in argument that it was the Asset Transaction which was alleged to have disregarded the interests of the creditors of Perpetual/Sequoia: reasons at paras. 119, 180.

22 The *Business Corporations Act* allows a "complainant" to seek an oppression remedy. The first issue was whether the Trustee in Bankruptcy qualified as a complainant. Section 239(b) recognizes that a creditor could be a complainant if, in the court's discretion, the creditor was found to be a "proper person" to make an oppression application. The case management judge considered the status of the Trustee in Bankruptcy as a complainant, concurrently with the merits of the oppression claim as pleaded: reasons at para. 241. Considered together, he concluded this claim should be struck out under R. 3.68 as not disclosing a reasonable claim: reasons at paras. 232, 241.

23 While the reasoning overlaps, the threshold issue of the Trustee in Bankruptcy's standing as a "complainant" was resolved against the Trustee. Relying in particular on *Royal Trust Corp. of Canada v. Hordo* (1993), 10 B.L.R. (2d) 86 (Ont. Gen. Div. [Commercial List])), the case management judge concluded that the Trustee in Bankruptcy was not a "proper person" to be a complainant, for a number of reasons:

> (a) The statement of claim did not contain the particulars necessary to tell if the Trustee in Bankruptcy could meet the *Hordo* factors: reasons at paras. 202-203, 237:
>
> (i) Debt actions should not be turned into oppression actions: reasons at para. 190.
>
> (ii) To be a complainant, a creditor should be in a situation analogous to that of a minority shareholder. The creditor should have an interest in how the company is being managed, without having any control: reasons at para. 191.
>
> (iii) The creditor should not be "too remote to the affairs of the corporation", in the sense that the debt owed to the creditor should be related to the oppression: reasons at para. 192.
>
> (b) The claim was focused too narrowly, because it only focused on two classes of creditors, not all creditors: reasons at para. 238.
>
> (c) The effect of the *Redwater* decision was to "nullify the Oppression Claim", making recognition of a complainant pointless: reasons at para. 239.
>
> (d) The Trustee in Bankruptcy's prospect of success was "extremely low": reasons at para. 240.

The case management judge struck out the application for complainant status, but he also would not have exercised his discretion to grant the Trustee in Bankruptcy that status: reasons at paras. 237-39.

24 The case management judge also concluded that the oppression claim was not sustainable on its merits, and should be struck for that reason as well:

> (a) The oppressive conduct was said to disregard the interests of "creditors", but as stated in the *Redwater* decision there was no "creditor" associated with the Abandonment and Reclamation Obligations, which dominated the obligations of Perpetual/Sequoia: reasons at paras. 138, 143, 170, 225.
>
> (b) Abandonment and Reclamation Obligations were "inchoate", and because of their contingent nature they were too remote or speculative to be included in the insolvency process: reasons at paras. 147-50, 218, 223-224, 228. They were actually a component of the value of the asset, not a "liability": reasons at paras. 166, 171-72. The case management judge concluded "on the authority of *Redwater*, I find that the [Abandonment and Reclamation Obligation] is not a liability" and "*Redwater* has nullified the Oppression Claim": reasons at paras. 224-226. The oppression claim could not succeed to the extent that it was based on the Abandonment and Reclamation Obligations, because "the [Abandonment and Reclamation Obligation] is more properly characterized as an allegation that is based on assumptions and speculations, rather than fact": reasons at para. 232.

(c) The oppression remedy should not be turned into a means by which commercial agreements, legislative regimes or regulatory frameworks are effectively rewritten by a court to accord with what is perceived as being "just and equitable": reasons at para. 188.

(d) While the Trustee in Bankruptcy framed the claim as being on behalf of all creditors, there was only specific reference to (a) unpaid municipal taxes and (b) the Abandonment and Reclamation Obligations: reasons at para. 206. Bankruptcy must be "a collective pursuit, and not a selective pursuit": reasons at paras. 207, 210-211.

Even though Perpetual/Sequoia had some obligations other than the Abandonment and Reclamation Obligations, for a combination of these reasons the oppression claim was struck out.

25 Since the case management judge concluded the oppression claim should be struck out, it was not necessary to consider whether it should also be summarily dismissed: reasons at para. 233. Although the case management judge had initially concluded in his oral reasons that there were material facts in dispute that precluded summary dismissal, on reflection he concluded that the "*Redwater* decision nullifies the Oppression Claim" making summary dismissal possible: reasons at paras. 234-35.

The Public Policy Claim

26 One paragraph of the statement of claim alleged that the Transactions were void for public policy reasons:

Public Policy, Statutory Illegality and Equitable Rescission

24. The Transactions are void:

24.1. on grounds of public policy, for being contrary to the public policy reflected in Alberta's oil and gas regulatory regime, including the *Oil and Gas Conservation Act*, RSA 2000, ch. 0-6, the *Oil and Gas Conservation Rules*, AR 151/71 and the AER's Directive 001, Directive 006, Directive 011 (the "**Regulatory Regime**");

24.2. on the basis of statutory illegality, as they were expressly or impliedly prohibited by the Regulatory Regime; and

24.3. on equitable grounds, for the reasons and in the circumstances set out in this Statement of Claim.

In this pleading the "Transactions" refers to the Asset Transaction, the Share Transaction, and the Retained Interests Transaction.

27 The case management judge concluded that "public policy" is not a cause of action, although it could be a basis to refuse relief: reasons at paras. 249, 267, 281. The courts should be cautious about extending public policy beyond established categories, as that infringes on the realm of the legislature: reasons at para. 253. An illegal contract is not enforceable by either party; it follows that illegality is not a cause of action, although it could be a defence: reasons at paras. 250-51, 267, 281. Equitable rescission is a remedy, not a cause of action, and it was only mentioned in one heading in the statement of claim, not in the text of the pleading: reasons at paras. 243, 254, 273-75, 281. Further, at this stage it would be impossible to rescind the agreements and return the parties to their original positions: reasons at paras. 256, 277-78.

28 The case management judge concluded that the ultimate remedy sought by the Trustee in Bankruptcy was a declaration that the Asset Agreement was "void": reasons at paras. 258, 261. In addition to the issues under s. 96 of the *Bankruptcy and Insolvency Act*, the Trustee's overall argument was that the agreements had been structured in such a way as to allow the Asset Transaction to proceed without regulatory scrutiny by the Alberta Energy Regulator: reasons at para. 261. The Trustee in Bankruptcy, however, had not provided any particulars as to how the Asset Transaction was in violation of any statute or public policy; " . . . the Trustee is fishing but it has neither a hook nor a net": reasons at paras. 263-65. Alternatively, "the decision in *Redwater* extinguishes the public policy claim because the [Abandonment and Reclamation Obligation] is not a liability, and the [Alberta Energy Regulator] is not a creditor of [Perpetual/Sequoia]": reasons at para. 281.

29 The case management judge concluded that the Trustee in Bankruptcy could still argue that the Asset Transaction was void under the *Bankruptcy and Insolvency Act*, but the public policy and illegality claims should be struck: reasons at paras. 281-82. Absent a specific legislative framework, the courts should not search for "some overarching and unarticulated policy" and use it to set aside the Asset Transaction: reasons at paras. 283-84.

The Director's Duties Claim

30 The Trustee in Bankruptcy made specific allegations against the defendant Ms. Rose. Ms. Rose was the sole director of Perpetual/Sequoia at the time of the Asset Transaction, and the Trustee in Bankruptcy pleaded that Ms. Rose breached her duties as a director in approving that transaction.

31 The essence of the Trustee in Bankruptcy's claim was that the consideration received by Perpetual/Sequoia in the Asset Transaction was significantly lower than the obligations it assumed. The most significant obligation was alleged to be the Abandonment and Reclamation Obligations. The Trustee in Bankruptcy estimated the deficiency in the consideration as being over $217 million: reasons at paras. 332-336. The case management judge concluded, as a threshold matter, that "*Redwater* extinguishes any suggestion that Ms. Rose breached her duties": reasons at para. 285. The case management judge, however, went on to further analyse the alleged breach of duty.

32 The case management judge concluded that because "*Redwater* held that the [Abandonment and Reclamation Obligation] is not a liability", that nullified any suggestion of breach of fiduciary duty or duty of care. The claim against Ms. Rose for breach of director's duty should accordingly be struck out as not disclosing a cause of action: reasons at para. 341. In addition, and in the alternative, the Director's duty claim against Ms. Rose should be summarily dismissed.

33 The case management judge concluded that the record was sufficient to summarily dismiss the director's liability claim: reasons at paras. 343, 355, 364, 371. The Trustee in Bankruptcy's Claim rested on the allegation that in the Asset Transaction Perpetual/Sequoia received only $5.6 million of assets, yet incurred obligations of over $223 million. However, *Redwater* confirmed that the Abandonment and Reclamation Obligations were not a liability, and they should accordingly be valued at "nil" for the purposes of the analysis. On that basis, there was no shortfall in consideration: reasons at paras. 350-51, 357, 363, 368-69. The defendant Ms. Rose had established on a balance of probabilities that there was no merit to the claim against her, and the Trustee in Bankruptcy had failed to demonstrate an issue that genuinely required a trial: reasons at paras. 365-67, 370.

The Resignation & Mutual Release

34 The defendant Ms. Rose argued that the Resignation & Mutual Release was an answer to any alleged breach of her director's duty. The case management judge concluded, that "*Redwater* nullifies the Trustee's assertions concerning the Release": reasons at para. 285. The case management judge, however, went on to further analyze the effect of the Resignation & Mutual Release.

35 The case management judge noted that execution of the Resignation & Mutual Release was one of the closing conditions of the Share Transaction, which was negotiated at arm's length by Perpetual Energy Parent on the one hand, and Kailas Capital on the other: reasons at paras. 287, 289-90, 314, 324. The Resignation & Mutual Release was accordingly signed by the new directors of Perpetual/Sequoia, after the Asset Transaction had closed, and after Ms. Rose had resigned as a director of Perpetual/Sequoia: reasons at paras. 292, 324. The Resignation & Mutual Release recited that the parties had had an opportunity to consider the consequences of the release; the purpose of a release was to "wipe the slate clean". A valid and enforceable release is a complete defence: reasons at paras. 298, 302.

36 The case management judge concluded that releasing outgoing directors after a change of control was standard industry practice: reasons at paras. 308, 319. Perpetual/Sequoia was a "special purpose corporation", and a wholly owned subsidiary of Perpetual Energy Parent, and Ms. Rose acted as its director at the request of Perpetual Energy Parent. It was Perpetual Energy Parent that negotiated for the Resignation & Mutual Release, and there was no evidence that Ms. Rose had any control over that decision: reasons at paras. 309-13.

37 The case management judge concluded that the Resignation & Mutual Release was not contrary to s. 122(3) of the *Business Corporations Act*, which precludes contracts relieving a director of her duties during her tenure. That provision was designed to prevent persons becoming directors under an agreement that they would not be subject to the responsibilities of a director during their tenure. It did not preclude releases of past potential liability on a change of control, as that was needed to create finality: reasons at paras. 316-23.

38 In summary, the case management judge found that the Resignation & Mutual Release provided Ms. Rose with a complete defence to the Trustee in Bankruptcy's claims: reasons at paras. 327, 330.

Summary of the Summary Dismissal Reasons

39 In summary:

(a) The claim under s. 96 of the *Bankruptcy and Insolvency Act* could neither be struck nor summarily dismissed.

(b) The oppression claim was struck for failure to disclose a cause of action, because the Trustee in Bankruptcy was not a "proper person" to be a complainant, or alternatively because the oppression claim lacked merit.

(c) The pleading respecting the public policy claim was struck for failure to disclose a cause of action.

(d) The claim against the director Ms. Rose was struck for failure to disclose a cause of action, and it was also summarily dismissed on the merits, and, in any event, because the Resignation & Mutual Release was a complete defence.

The Costs Reasons of the Case Management Judge

40 The case management judge heard a subsequent application by the respondent Ms. Rose for enhanced costs. He concluded that the Trustee in Bankruptcy should pay 85% of Ms. Rose's solicitor and client costs, and that the Trustee should be personally liable for those costs: *PricewaterhouseCoopers Inc v. Perpetual Energy Inc*, 2020 ABQB 513 (Alta. Q.B.) [1] .

41 The case management judge summarized the transactions that had been the subject of the summary disposition application. The specific allegations against Ms. Rose were that (a) she benefitted personally from the Asset Transaction; (b) that the Asset Transaction was clearly not in the best interests of Perpetual/Sequoia, thus amounting to oppression or prejudice; and (c) that Ms. Rose caused 198Co to agree to the Resignation and Mutual Release: costs reasons at para. 13.

42 The case management judge noted that, under the Alberta *Rules of Court*, Ms. Rose was presumptively entitled to costs as the successful party. The judge has a wide discretion over costs, and can award solicitor and client costs, or costs assessed based on Schedule C to the *Rules*. Solicitor and client costs are only awarded in cases of blameworthy conduct during the litigation: costs reasons at paras. 25, 31. The Trustee in Bankruptcy conceded that Ms. Rose was entitled to costs calculated with reference to Schedule C, which concession "sets the floor amount": costs reasons at para. 34.

43 The Court also has the ability to award costs against a non-party, when that party is the "real promoter of the litigation". That principle applies to insolvency litigation: costs reasons at paras. 35-38. PricewaterhouseCoopers was acting in a representative capacity as Perpetual/Sequoia's trustee, but that did not preclude the possibility of it being personally liable for costs: costs reasons at para. 42. A trustee in bankruptcy will be personally liable for costs if the estate of the bankrupt does not have sufficient assets to indemnify the trustee: costs reasons at paras. 43-44. With respect to bankruptcy proceedings, that possibility is confirmed by s. 197(3) of the *Bankruptcy and Insolvency Act*: costs reasons at paras. 46-47. This litigation, however, was ordinary civil litigation covered by the *Rules of Court*, which provide no special protection for trustees in bankruptcy: costs reasons at paras. 50-51.

44 A trustee in bankruptcy may only commence litigation with the permission of the inspectors: costs reasons at paras. 55-63. In this case " . . . despite being asked for evidence that the inspectors had approved the Action, the Trustee never produced any evidence of inspector approval of the lawsuit against Ms. Rose": costs reasons at para. 64.

45 A trustee should only engage in litigation that relates to all the creditors, not just selected creditors: costs reasons at para. 65. A trustee should make proper investigations before suing, and must otherwise act responsibly when litigating: costs reasons at para. 66. A trustee in bankruptcy may be held personally responsible for costs in cases of misconduct, and in appropriate cases costs in bankruptcy proceedings can be awarded on an escalated scale: costs reasons at paras. 67-69. As officers of the court, trustees in bankruptcy are held to higher standards, including when they litigate: costs reasons at paras. 70-75.

46 Trustees should be careful in presenting the facts to the court, and should not include opinions, arguments, or conclusions of law in affidavits: costs reasons at paras. 76-77. In this case, the trustee in bankruptcy inappropriately:

> (a) asserted that "the Asset Transaction was not in the best interests of [Perpetual/Sequoia]"; that was a determination to be made by the Court: costs reasons at para. 78;
>
> (b) provided an opinion that Ms. Rose had "personally benefited" from the transactions, which was also something to be determined by the Court: costs reasons at paras. 79-81.

47 When investigating the conduct of a director, or suing the director of a public corporation, a trustee in bankruptcy has an obligation to act fairly, which includes conducting "an appropriate investigation", which includes "appropriate participation" of the director: costs reasons at paras. 83-86. When conducting an investigation, the trustee "has an obligation to follow a procedure that is in compliance with the principles of procedural fairness": costs reasons at paras. 89, 93, 113, 114. Disclosure should be made, and the director should be given an opportunity to respond: costs reasons at paras. 90-91. A trustee in bankruptcy who proposes to sue a director must conduct "an appropriate investigation", which includes seeking out relevant and material evidence: costs reasons at paras. 97, 99-100.

48 The case management judge concluded that duties imposed by the courts of equity on trustees in general (that is, not trustees in bankruptcy) were applicable: costs reasons at paras. 103-110. He also concluded that "I have an ongoing responsibility to expand the common law, where appropriate". If there was no precedent for requiring a trustee in bankruptcy to carry out an appropriate investigation, then one needed to be set: costs reasons at para. 112.

49 The case management judge then applied these principles to the conduct of the Trustee in Bankruptcy with respect to this particular litigation. Between June 2018 and August 2018 (when the statement of claim was issued) there was a dialogue between the Trustee in Bankruptcy, and the Perpetual group and Ms. Rose. On June 26, 2018 the Trustee in Bankruptcy invited Ms. Rose to provide further comments, and she responded that her reply would come in as timely a fashion as possible and it would "likely be next week". Ms. Rose did not meet her expected deadline, but confirmed on July 6 that she was "working diligently to pull together the additional information": costs reasons at paras. 126-27. The Trustee in Bankruptcy never followed up, and never imposed a deadline for Ms. Rose to reply; the statement of claim was issued on August 2, 2018, causing the case management judge to conclude:

> [132] Based on my review of the June 26, 2018 Trustee Letter, I find that the Trustee: (i) invited further material, but did not specify or request anything particular; (ii) did not set any deadline by which the Perpetual Group was to respond; and (iii) made no reference to a claim against Ms. Rose.

The case management judge criticized the trustee in bankruptcy for failing to wait for further information, failing to follow up, and failing to set a deadline: costs reasons at paras. 167-174, 194-99, 231-32.

50 The Trustee in Bankruptcy alleged in the statement of claim that Ms. Rose "would benefit personally from the Asset Transaction". (This is the "alternative *BIA* claim", see *supra*, para. 20.) The case management judge concluded that this allegation was made without asking "Ms. Rose a single question concerning the alleged benefit": costs reasons at paras. 134-39. In addition, the allegations about corporate oppression were made without asking Ms. Rose any questions about the exercise of her business judgment. Further, the Trustee in Bankruptcy did not ask the Kailas Capital principals any questions about the transactions: costs reasons at paras. 141-45. Further, no questions were asked about the circumstances leading up to the Resignation & Mutual Release: costs reasons at paras. 146-52.

51 Based on these considerations, the case management judge found that the Trustee in Bankruptcy failed to undertake the type of investigation required of him, and as a result proceeded on certain erroneous assumptions: costs reasons at paras. 154-57. Overall, the Trustee in Bankruptcy suffered from "tunnel vision", which was a "single-minded and overly narrow focus" of an investigation: costs reasons at paras. 158-164. This was exacerbated by the failure of the Trustee in Bankruptcy to follow up respecting the further information Ms. Rose said was forthcoming, and the failure to make inquiries of the Kailas Capital principals: costs reasons at paras. 167-181.

52 The failure to ask Ms. Rose any questions about the alleged "benefit" was an "important flaw in the conduct of the Trustee": costs reasons at para. 183. This was another manifestation of "tunnel vision". On the merits, the case management judge was not satisfied that the dealings with the Abandonment and Reclamation Obligations accrued to the benefit of Perpetual Energy Parent, precluding any benefit to Ms. Rose as a shareholder: costs reasons at paras. 188-90. Notice should have been given to Ms. Rose before public allegations of breach of duty were made against her, and she should have been provided an opportunity to respond: costs reasons at paras. 194-200.

53 The case management judge summarized his conclusions:

> 201 Given the nature of the allegations made by the Trustee (which included: (i) alleged failure to exercise business judgment; (ii) alleged oppression; (iii) an allegation of being unfairly prejudicial; and (iv) an allegation of unfairly disregarding the interests of the creditors of the corporation), and the magnitude of the claim against Ms. Rose (which was in the range of $220 million), I find the conduct of the Trustee was egregious. The fact that this tactic was pursued by an officer of the Court is even more concerning.

The allegations about the Resignation & Mutual Release were also made without adequate investigation: costs reasons at paras. 203-210. Specifically, there was "no basis whatsoever to justify the allegation that Ms. Rose caused PEI to cause 198Co to agree to the Release": Costs reasons at para. 215.

54 The case management judge concluded that the record showed that the Trustee in Bankruptcy "exercised very poor judgment that equates to positive misconduct": costs reasons at para. 228. That conduct was a) a failure to conduct a neutral and thorough investigation, b) a failure to provide Ms. Rose with advance notice of the claim, c) a failure to provide Ms. Rose with a further opportunity to submit information and d) a failure to give Ms. Rose sufficient time to address the issues: costs reasons at paras. 229-32. He concluded that Ms. Rose was entitled to an award of solicitor and client costs, as this was "a circumstance where justice can only be done by a substantial indemnification for costs": costs reasons at paras. 221, 238. The ultimate award was 85% of the bill of costs presented by Ms. Rose: costs reasons at para. 228.

55 The case management judge also concluded that the Trustee in Bankruptcy was the true "promoter" of the litigation. Since the estate of Perpetual/Sequoia would be unable to pay the costs, the Trustee in Bankruptcy should be directly liable for costs: costs reasons at paras. 234-37.

Issues on Appeal

56 Three appeals were commenced, and argued together:

(a) Appeal 1901-0255AC, commenced by the Trustee in Bankruptcy, challenging those portions of the decision that struck out or summarily dismissed various parts of the claim.

(b) Appeal 1901-0262AC, in effect a cross-appeal, commenced by the Perpetual Energy group, seeking summary dismissal of the claim under s. 196 of the *Bankruptcy and Insolvency Act*.

(c) Appeal 2001-0174AC, commenced by the Trustee in Bankruptcy, challenging the costs award made in favour of the respondent Ms. Rose.

57 Interventions were permitted by the Orphan Well Association and jointly by three prominent oil and gas companies: Canadian Natural Resources Limited, Cenovus Energy Inc. and Torxen Energy Ltd: *PricewaterhouseCoopers Inc v. Perpetual Energy Inc*, 2020 ABCA 417 (Alta. C.A.). The nature and mandate of the Orphan Well Association is described in the *Redwater* decision at paras. 22-23. The industry intervenors could provide an industry perspective on the nature and consequences of abandoned wells, and the way that abandonment and reclamation obligations are dealt with by the industry.

58 There are three general issues that have an impact on the specific issues raised in the three appeals:

(a) The Reasons for Decision: *infra* paras. 60-67.

(b) The principles governing the summary disposition of claims: *infra* paras. 68-81.

(c) The legal nature of abandonment and reclamation obligations and the *Redwater* decision: *infra* paras. 82-97.

59 The specific issues that require analysis are:

(a) The summary disposition of the s. 196 claim, including whether the proper analysis is at the level of the Aggregate Transaction, or at the level of the Asset Transaction: *infra* paras. 98-111.

(b) The alternative section 96 claim: *infra* paras. 112-115.

(c) The oppression claim, including a) the "complainant" status of the Trustee in Bankruptcy, and b) the merits of the oppression claim: *infra* paras. 116-44.

(d) the public policy claim: *infra* paras. 145-52.

(e) the scope of director's duties: *infra* paras. 153-59.

(f) the legal effect and interpretation of the Resignation & Mutual Release: *infra* paras. 160-75.

(g) the costs decision, including:

(i) Costs in bankruptcy proceedings: *infra* paras. 183-93.

(ii) Approval of the inspectors: *infra* paras. 194-98.

(iii) Trustees as officers of the court: *infra* paras. 199-206.

(iv) The failure to investigate: *infra* paras. 207-219.

(v) Allegations against the respondent Ms. Rose: *infra* paras. 220-25.

The Reasons for Decision

60 The case management judge gave oral reasons for his decision on the summary disposition application on August 15, 2019. He retained the right to "to review the transcript, and to add in case names and citations", and stated:

> Notwithstanding this is Oral Judgment, I do intend to issue written reasons. I do have a lengthy judgment. I just need to do some refinement and, most importantly, I have certain things like citations checked.

Since the appeal period runs from the pronouncement of the decision, the Trustee in Bankruptcy commenced appeal 1901-0255AC on August 23, 2019, and the Perpetual Energy group appellants commenced appeal 1901-0262AC on August 26, 2019. The case management judge had indicated that the written reasons would be available "in a couple of weeks", but

they were not issued until January 13, 2020; they are reported as 2020 ABQB 6. The written reasons are almost twice as long as the oral reasons. They state that in the case of discrepancies "this written decision takes precedence": reasons at para. 1.

61 A trial judge who pronounces a decision orally undoubtedly has the right to edit any subsequent written version of the decision. That right to edit exists whether or not the right is "reserved" in the oral decision, but there are limits to it: *Wilde v. Archean Energy Ltd.*, 2007 ABCA 385 (Alta. C.A.) at para. 24, (2007), 82 Alta. L.R. (4th) 203, 422 A.R. 41 (Alta. C.A.). In this case the written reasons involved a substantial rewriting and expansion of the analysis, and extended far beyond "editing".

62 To give one specific example, in the oral reasons the case management judge concluded that the state of the record did not permit summary dismissal of the oppression claim. In the written reasons, he indicated that he had reconsidered the issue, and he had concluded that the dispute on the material facts he identified did not exist: reasons at paras. 233-35. Reversing a decision made in the oral reasons goes far beyond editing.

63 Further, given that appeal periods are deliberately kept short to promote finality, if a judge proposes to issue written reasons, that must be done promptly, preferably well before the appeal period expires. The reversal of any line of analysis in the oral reasons, or the addition of whole new lines of analysis, are highly undesirable. If the judge's thinking has developed to the point that he or she is able to give oral reasons, it should not be necessary to embellish those reasons when they are reduced to writing.

64 There are cases where the matter is urgent, and the parties need a decision immediately. In those cases, trial judges will sometimes pronounce the result, in cursory fashion, and issue written reasons at the earliest opportunity: *Law Society of Alberta v. Beaver*, 2016 ABCA 290 (Alta. C.A.) at para. 11, (2016), 44 Alta. L.R. (6th) 16 (Alta. C.A.); *Liu v. Huang*, 2020 ONCA 450 (Ont. C.A.) at para. 10. That, however, was not the situation here. The transactions challenged in this litigation occurred in October 2016. Perpetual/Sequoia assigned itself into bankruptcy in March 2018. There was no urgency, and the effect of the decision was to finally terminate significant portions of the claim. Likewise, there was no urgency in pronouncing the costs consequences of the merits application.

65 When reasons are issued long after the result is pronounced, there can be a perception of result-driven analysis: *R. v. Teskey*, 2007 SCC 25 (S.C.C.) at para. 18, [2007] 2 S.C.R. 267 (S.C.C.). While the problem is more acute in criminal cases, and in cases that are heavily dependent on the trial evidence, it also applies to civil matters like the ones at issue in these appeals. As the court noted in *Jacobs Catalytic Ltd. v. I.B.E.W., Local 353*, 2009 ONCA 749 (Ont. C.A.) at para. 52, (2009), 255 O.A.C. 201 (Ont. C.A.):

> 52. While *Teskey* is a criminal case, the rationale applies here. When an adjudicator purports to issue the final reasons for a decision and later issues supplementary reasons, without explaining why the supplementary reasons did not form part of the initial reasons, a reasonable person may apprehend that the adjudicator engaged in results-based reasoning in order to shore up the decision. If the adjudicator had relied on the content of the supplementary reasons in arriving at the decision, those reasons should have formed part of the first set of reasons.

Where the analysis in the written reasons differs from that given in the oral reasons, an appellate court is entitled to review the decision based on the original rationale: *Nova Scotia (Minister of Community Services) v. Z. (C.K.)*, 2016 NSCA 61 (N.S. C.A.) at paras. 61-63, (2016), 376 N.S.R. (2d) 113 (N.S. C.A.).

66 In this case, it would have been preferable if the case management judge had simply reserved his decision on the dismissal application, and issued only one set of reasons. On appeal, this Court is entitled to refer to both sets of reasons, and the differences between them, or disregard the later written reasons.

67 A similar problem arose with the costs reasons, which were first rendered orally on August 26, 2020. Written reasons followed on September 24, 2020: 2020 ABQB 513 (Alta. Q.B.). The written reasons were not, however, just an edited version of the oral reasons. For example, they included a new section on the case management judge's "responsibility to expand the common law": see the costs reasons at paras. 103-114.

The Principles Governing the Summary Disposition of Claims

68 Claims can be struck out under R. 3.68 if they disclose "no reasonable claim", or if they are otherwise improper. Claims can also be summarily dismissed under R. 7.3 if there is "no merit" to the claim. While these rules set out distinct procedures, they are both methods of dealing with claims before trial in a proportionate, but fair manner, by weeding out unmeritorious claims at an early stage: *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) at paras. 27-28, 36, [2014] 1 S.C.R. 87 (S.C.C.).

69 Summary dismissal applications are generally brought after pleadings are closed, and are based on affidavit evidence demonstrating that there is no merit to the claim. Summary dismissal is appropriate where the record is sufficiently certain to resolve the dispute on a summary basis, or, in other words, there is no genuine issue requiring a trial. The moving party must establish on a balance of probabilities that there is "no merit" to the claim; the resisting party must put its best foot forward and demonstrate a genuine issue requiring a trial. In the end, the presiding judge must be left with sufficient confidence that the state of the record permits a fair summary disposition: *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49 (Alta. C.A.) at para. 47, (2019), 86 Alta. L.R. (6th) 240 (Alta. C.A.).

70 On the other hand, an application to strike out a pleading under R. 3.68(2)(b) for failure to disclose a cause of action is dealt with based on the pleadings. The facts as pled are assumed to be true, and no evidence is permitted on the motion. A claim will be read "generously", and will only be struck if it is plain and obvious that the pleading discloses no reasonable cause of action, assuming the facts pled are true: *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (S.C.C.) at para. 21, [2011] 3 S.C.R. 45 (S.C.C.). In order to avoid overly restraining the evolution of the common law, a claim will not be struck out merely because it is novel, but a claim will not be allowed to proceed just because it is novel: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 (S.C.C.) at para. 19.

71 As this summary reveals, there are significant differences between an application to strike pleadings, and an application for summary dismissal, even though they both serve the same broader purpose of weeding out unmeritorious claims at an early stage. The analysis underlying the two remedies, in particular, is significantly different; summary dismissal depends on the evidence, whereas striking out precludes the use of evidence. It is for this reason that a "blended" striking/dismissal analysis is unhelpful. The reasons under appeal concluded that some of the claims could be both struck out and summarily dismissed. While the ultimate conclusion may be correct, attempting to analyze the two branches together tends to allow the evidence to colour the assessment of the pleadings, which is to be done without reference to the evidence.

72 While there are some narrow exceptions to the assumption in an application to strike that the facts as pled are true, that exception should not be allowed to overtake the rule. For example, in *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.) the pleadings alleged that allowing the testing of cruise missiles in Canada would increase the likelihood of nuclear war. The Supreme Court observed that that was an allegation incapable of proof, and it need not be accepted as true. In *Young v. Borzoni*, 2007 BCCA 16 (B.C. C.A.) at paras. 30-32, (2007), 64 B.C.L.R. (4th) 157 (B.C. C.A.) unparticularized allegations of misconduct that could "only be viewed as wild speculation" were not accepted at face value. These cases, however, do not contemplate a generalized merit-based assessment of the allegations on an application to strike out a pleading. Contrary to what is implied at paras. 32-36 of the reasons under appeal, there are no wide exceptions to the "no evidence" rule. The "no evidence" rule cannot accommodate assessing permissible evidence on a case-by-case basis.

73 Some of the cases relied on in the reasons under appeal are on allowing "novel claims" to proceed, a related but different issue: *HOOPP Realty Inc. v. Guarantee Co. of North America*, 2015 ABCA 336 (Alta. C.A.) at para. 19, (2015), 607 A.R. 377 (Alta. C.A.); and *NEP Canada ULC v. MEC OP LLC*, 2014 ABCA 140 (Alta. C.A.) at para. 16, (2014), 95 Alta. L.R. (5th) 264, 572 A.R. 354 (Alta. C.A.) [hereinafter O'Connor Associates]. Deciding whether a claim should be allowed to proceed, even though novel, must still be based on the claim as pleaded, not on evidence. This is a collateral issue that only arises if the pleading does *not* assert a known claim. However, assessing whether a novel claim should be allowed to proceed depends in part on whether it has a "reasonable prospect" of succeeding. *HOOPP Realty* and *O'Connor Associates* discuss how to assess "reasonable prospect", and do not create a general exception to the "no evidence" rule on an application to strike pleadings.

74 There are two subsidiary principles in play on an application to strike pleadings. Firstly, as noted, the pleadings are read generously: *Fullowka v. Royal Oak Mines Inc.* (1996), [1997] N.W.T.R. 1, 147 D.L.R. (4th) 531 (N.W.T. C.A.) at pp. 537-38.

If, on an initial reading, the pleading is capable of several interpretations, it should be given the interpretation that will support the pleading. Courts should not artificially read pleadings in a way that leads to a fatal deficiency. Further, a poorly drafted pleading should be amended, not struck out: *S. (C.H.) v. Alberta (Director of Child Welfare)*, 2010 ABCA 15 (Alta. C.A.) at paras. 44-6, (2010), 21 Alta. L.R. (5th) 7, 469 A.R. 359 (Alta. C.A.); *United Petroleum Distributors (Calgary) Ltd. v. 548311 Alberta Ltd.*, 1998 ABCA 121 (Alta. C.A.) at para. 5, 19, (1998), 65 Alta. L.R. (3d) 346, 216 A.R. 116 (Alta. C.A.).

75 Secondly, pleadings are to allege facts, but not the evidence to be relied on: R. 13.6(2)(a). If a pleading is deficient because it lacks particulars, the remedy is to order production of particulars, not to strike the claim: R. 3.68(1)(b); *Hughes Estate v. Hughes*, 2007 ABCA 277 (Alta. C.A.) at para. 41, (2007), 78 Alta. L.R. (4th) 203, 417 A.R. 52 (Alta. C.A.); *Elbow River Marketing Ltd. Partnership v. Canada Clean Fuels Inc.*, 2011 ABCA 258 (Alta. C.A.) at paras. 2-3, (2011), 513 A.R. 315, 56 Alta. L.R. (5th) 222 (Alta. C.A.).

76 To illustrate the first principle, the case management judge criticized the pleadings because the Trustee in Bankruptcy had pleaded that it was a "proper person" to be a complainant, that it was entitled to equitable rescission, and that there had been "oppressive conduct". The case management judge noted that these were ultimately questions for the trial judge. It was, however, unreasonable to read the pleadings as suggesting they were not. For example, it was unreasonable to read these pleadings as a suggestion by the Trustee in Bankruptcy that it was entitled to "self-appoint" as a complainant in the oppression action. One purpose of pleadings is to avoid taking the other party by surprise, and it is expected that the plaintiff will provide particulars of the allegations and the relief requested: R. 13.6(3). There was nothing inappropriate about this form of pleading that could not have been cured by amendment.

77 Similarly, there was no basis for criticizing the pleading that the "Asset Transaction was not in the best interests of [Perpetual/Sequoia]": reasons at para. 78. This is a legitimate allegation, forming part of the cause of action, and not any attempt to usurp the role of the court. It is no different from Ms. Rose's allegation that she exercised sound business judgment in her decisions as a director of Perpetual/Sequoia.

78 Another example related to the Trustee in Bankruptcy's allegation that Ms. Rose had "caused" Perpetual Energy Parent or Kailas Capital to enter into the Resignation & Mutual Release. It was unreasonable to read this pleading as a suggestion that Ms. Rose had "forced" any of the parties to do anything, or execute documents "against their will": compare costs reasons at paras. 203, 214, 216. Ms. Rose obviously could not force anybody to do anything, and that was never suggested. This allegation clearly meant that Ms. Rose had included the provision of a release among the items to be discussed during the negotiations. On any reasonable reading, these pleadings do not allege any form of duress.

79 The Perpetual Energy group, in fact, used the same type of wording when they argued that Kailas Capital had influenced the structure of the Asset Transaction and the transfer of the Goodyear Assets. This meant no more than that this was another issue that had to be resolved during the negotiations. Similarly, Ms. Rose pleaded that she acted "in full satisfaction of her fiduciary duties and duty of care" in approving the transaction. Ms. Rose also pleaded that the Trustee in Bankruptcy was *not* entitled to complainant status for the purpose of pursuing the oppression claim. The pleadings by the Trustee in Bankruptcy as well as by the defendants served one of the main purposes of the pleadings: they identified the issues that had to be resolved. It was unreasonable to read any of these pleadings as usurping the court's authority.

80 As noted, the second and related principle is that if a pleading lacks particulars, the remedy is to direct the provision of particulars, not to strike out the pleading. In several instances the case management judge relied in part on the absence of particulars to strike out the claim, for example: (a) an absence of particulars to support the claim for complainant status: reasons at paras. 202-203, 206, 237; and (b) an absence of particulars respecting the public policy claim: reasons at paras. 242, 244, 255, 263, 270, 284. If and to the extent that particulars were actually necessary and missing, it was an error of principle to strike out the claim without giving the Trustee in Bankruptcy an opportunity to amend.

81 In summary, when considering whether any of the pleadings in this litigation should have been struck, consideration should have been given to whether any perceived flaws in the pleadings could be cured by amendment or by the provision of particulars.

The Legal Nature of Abandonment and Reclamation Obligations and the Redwater Decision

82 The summary disposition decision under appeal was heavily influenced by the case management judge's interpretation and application of the *Redwater* decision. The case management judge held that *Redwater* decided that Abandonment and Reclamation Obligations are "neither a liability nor any amount referable to an existing obligation'"; they are "not sufficient to constitute a liability that needs to be considered"; and are "too remote or speculative to be characterized as a liability"; they are merely "a future burden that has not crystallized into a liability"; they are "an obligation that will arise at a future date, thereby implicitly acknowledging that the ARO is not a current debt or liability": reasons at paras. 170, 171, 172, 224, 239, 357, 366.

83 The case management judge concluded that the effect of *Redwater* was that Abandonment and Reclamation Obligations were "not a liability for purposes of the Oppression Claim"; and since the Alberta Energy Regulator was not a creditor with respect to them, Perpetual/Sequoia "could not have assumed liability in respect of the ARO in conjunction with the Asset Transaction"; and accordingly, *Redwater* "nullified the Oppression Claim"; it also "nullifies the Trustee's assertions concerning the Release"; it "extinguished any suggestion" that Ms. Rose breached her duties as a director; it "nullifies the Trustee's arguments concerning fiduciary duty and duty of care"; and justified summary dismissal of the director's liability claim: reasons at paras. 224, 225, 239, 285, 366-69. Because of *Redwater*, Abandonment and Reclamation Obligations were "more properly characterized as an allegation that is based on assumptions and speculations", and therefore they were not a "true fact for the purposes of R. 3.68(2)(b)"; on an application to strike, they need not be assumed to be true: reasons at para. 232. The overall effect of *Redwater* was to "extinguish" any assertion that the Asset Transaction resulted in a net deficit to Perpetual/Sequoia, because the Abandonment and Reclamation Obligations should be valued at "nil": reasons at paras. 365-66.

84 This part of the reasoning reflects, at best, a significant overreading of the effect of the *Redwater* decision. It is therefore necessary to analyze in detail that decision, and the nature of Abandonment and Reclamation Obligations.

Abandonment and Reclamation Obligations

85 When oil and gas wells are producing, they are valuable assets. However, after they cease to be productive they can quickly turn into significant liabilities. The Alberta Energy Regulator has specific "end-of-life" rules on how a spent well must be rendered environmentally safe by being shut-in and "abandoned". In general terms, the end-of-life obligations of the owner of the well are to cement-in various formations deep underground, to "cap" the well, and to restore the surface to its original condition: Alberta Energy Regulator Directive 020: *Well Abandonment*; *Redwater* at para. 16. Compliance with those Abandonment and Reclamation Obligations can be expensive.

86 Abandonment and Reclamation Obligations (or "end-of-life", or "asset retirement" obligations) are inherent in any oil well, from the moment it is drilled and comes into production. At that point in time the Abandonment and Reclamation Obligations can be said to be "contingent", but only in the sense that the moment when the well will cease production is unknown. However, they are not "contingent" in the sense that they will only come into existence if, and only if, a condition precedent comes to pass: *Redwater* at para. 36; *McLarty v. R.*, 2008 SCC 26 (S.C.C.) at paras. 14-18, [2008] 2 S.C.R. 79 (S.C.C.). The only issue is *when* they will come into existence. A well may produce for decades. However, while the Abandonment and Reclamation Obligations may not crystallize for some time, they are inevitable; no well produces forever.

87 The time at which the Abandonment and Reclamation Obligations with respect to any particular well must be performed is variable:

> (a) With respect to a newly drilled well the Abandonment and Reclamation Obligations may only manifest themselves decades in the future.
>
> (b) Once the production of a well has peaked, and its most productive years are behind it, it may be possible to predict with some degree of certainty when the Abandonment and Reclamation Obligations will have to be performed. The closer one gets to the end of production, the more precise the date of reclamation will become.

> (c) But once a well has been exhausted, production has stopped, and the well has been shut-in, the Abandonment and Reclamation Obligations have crystallized. The Abandonment and Reclamation Obligations may be unperformed, but they are no longer "contingent" in either sense. The owner of the well is under a public duty to shut in the well and reclaim the surface.

The further reclamation is in the future, the more difficult it will be to quantify the Abandonment and Reclamation Obligations. Even if Abandonment and Reclamation Obligations can be said to be "contingent" liabilities, that is sufficient in law for some purposes: *Tannis Trading Inc. v. Coldmatic Refrigeration of Canada Ltd.*, 2010 ONSC 5747 (Ont. Div. Ct.) at paras. 24-25, (2010), 85 B.L.R. (4th) 77 (Ont. Div. Ct.); *Manufacturers Life Insurance Co. v. AFG Industries Ltd.*, 2008 CanLII 873 at para. 30, (2008), 44 B.L.R. (4th) 277 (Ont. S.C.J.). Further, the present value of the Abandonment and Reclamation Obligations will directly depend on how far into the future they will arise. Abandonment and Reclamation Obligations are unliquidated, some of them may be more immediate than others, and their quantum is uncertain, but they are still inevitable. They exist whether or not abandonment notices have been issued by the Alberta Energy Regulator. Abandonment and Reclamation Obligations may not be entirely a current liability or obligation, but they are a real liability or obligation. They are routinely reported on the balance sheets of oil and gas companies, including those of Perpetual Energy Parent.

88 The evidence on this record is that prior to the Aggregate Transaction, the Perpetual Operating Trust held oil and gas properties in all these categories. The KeepCo Assets and the Retained Interests were still producing; they did not carry immediate Abandonment and Reclamation Obligations. The Goodyear Assets, on the other hand, were all "mature", and their Abandonment and Reclamation Obligations were more immediate. Further, by the time of the Asset Transaction, the record suggests the Goodyear Assets included 910 shut in wells and 727 abandoned wells, meaning that some portion of the obligation to reclaim was due to be performed or was imminent. The exact cost of reclamation may have been unknown and unquantified, but the obligation was no longer "contingent"; the obligation was merely unperformed.

89 The extent of the Abandonment and Reclamation Obligations associated with the Goodyear Assets is not clear at this stage of the proceedings. When Perpetual Energy Parent publicly announced the pending Aggregate Transaction, it advised the market that it expected to relieve itself of $87 million of Abandonment and Reclamation Obligations. Perpetual/Sequoia reported them on its balance sheet at $131 million, and after the transaction closed, Perpetual Energy Parent announced it had shed $131 million of Abandonment and Reclamation Obligations. The Trustee in Bankruptcy estimates that the Abandonment and Reclamation Obligations were actually $218.9 million, comprising $98.8 million of abandonment costs, $93.2 million in reclamation costs, and $26.8 million related to other facilities: reasons at para. 368. For the purposes of these appeals the exact quantum is not material; it is sufficient to note that the amount involved is potentially substantial.

The Effect of the Redwater Decision

90 Redwater Energy Corporation was a bankrupt oil and gas company. It had about 20 producing wells that were of value, but it had over 100 other wells that were either depleted or shut in, and had no value. In fact, there was a significant liability associated with the depleted wells, because they had to be reclaimed. In effect, these wells had "negative value": *Redwater* at para. 2.

91 Redwater Energy's trustee in bankruptcy proposed to sell off the valuable wells, and use the proceeds to pay the secured creditor. That would leave the bankrupt shell of Redwater Energy with the depleted wells, and no funds to pay for reclamation. The trustee in bankruptcy needed permission from the Alberta Energy Regulator to transfer the licences for the valuable wells to the third party purchaser. The Alberta Energy Regulator refused to approve the transfers, unless the proceeds were used to reclaim the abandoned wells; those proceeds could not be paid to the secured creditor. The trustee in bankruptcy responded that it did not intend to comply with the environmental remediation orders that had been issued, and that the obligation to reclaim the wells was a "claim provable in bankruptcy": *Redwater* at paras. 50-52. As such, the reclamation obligations had to be dealt with within the bankruptcy process, and they would be treated like the claims of all other unsecured creditors. The reclamation obligations would effectively be extinguished by operation of the bankruptcy: *Redwater* at paras. 114, 117.

92 *Redwater* held that there was no constitutional conflict between the applicable federal and provincial legislation. The non-constitutional issue in *Redwater* was focused: were the reclamation obligations a "claim provable in bankruptcy" under s. 121 of the *Bankruptcy and Insolvency Act*? If they were, those obligations would be extinguished in the bankruptcy. If not, what was the trustee in bankruptcy's obligation with respect to them?

93 *Redwater* at para.119 confirmed the test for determining whether an environmental liability is a "claim provable in bankruptcy", previously set in *AbitibiBowater Inc., Re*, 2012 SCC 67, [2012] 3 S.C.R. 443 (S.C.C.). First, there must be an obligation owed to a "creditor". Second, the obligation must be incurred before the bankruptcy. Third, it must be possible to attach a monetary value to the obligation. The end-of-life obligations did not fit the test, because there was no "creditor". Neither the Alberta Energy Regulator nor the Orphan Well Association was owed any debt; the environmental obligation was owed to the public: *Redwater* at paras. 122, 134-35. Further, there was insufficient certainty in the quantum of the Abandonment and Reclamation Obligations to make them a "claim provable in bankruptcy", because there was no certainty that the Alberta Energy Regulator would perform the remediation work: *Redwater* at paras. 145, 149, 154.

94 *Redwater* does not stand for the proposition that Abandonment and Reclamation Obligations are not a liability or obligation of the bankrupt corporation. The *Bankruptcy and Insolvency Act* provides that in some circumstances the trustee in bankruptcy is "not personally liable" for environmental obligations. The Supreme Court ruled that these provisions protect the trustee, "while the ongoing liability of the bankrupt estate is unaffected": *Redwater* at paras. 74-75. A trustee who "disclaims" assets is protected from personal liability, but "the liability of the bankrupt estate is unaffected": *Redwater* at paras. 93, 98. Claims that are "not provable in bankruptcy" remained an obligation that the bankrupt had to discharge to the extent it has assets: *Redwater* at para. 118. Having received the benefit of the oil wells, the bankrupt corporation "cannot now avoid the associated liabilities": *Redwater* at para. 157. Trustees in bankruptcy must comply with non-monetary obligations that cannot be reduced to "provable claims": *Redwater* at para. 160. Accordingly, an order was given that the proceeds of the sale of Redwater's assets could not be paid to its secured creditor, but had to be used to address its "end-of-life" obligations: *Redwater* at para. 163.

95 The case management judge focused on the fact that *Redwater* confirmed that the Alberta Energy Regulator is not a "creditor" with respect to the Abandonment and Reclamation Obligations, and accordingly the Abandonment and Reclamation Obligations cannot be a "claim provable in bankruptcy". That much is an accurate reading of *Redwater*, but it does not mean that Abandonment and Reclamation Obligations are "assumptions and speculations" that do not exist, that they are not an obligation or liability of Perpetual/Sequoia, or that they should be valued at "nil". The Abandonment and Reclamation Obligations are an obligation of Perpetual/Sequoia, owed "to the public" and the surface landowners, but which are nevertheless obligations which the trustee of a bankrupt corporation cannot ignore. Not only did *Redwater* confirm that Abandonment and Reclamation Obligations are a continuing obligation of a bankrupt corporation, that decision confirms that those obligations had to be discharged even in priority to paying secured creditors.

96 The case management judge held that Perpetual/Sequoia "could not have assumed liability" for the Abandonment and Reclamation Obligations, even though the Asset Transaction specifically confirmed that it had: *supra*, para 11. The Perpetual defendants admitted in their defence that Abandonment and Reclamation Obligations were liabilities of Perpetual/Sequoia:

> 44 (c) PEOC/Sequoia's liabilities at the time of the Transaction were comprised of the estimated future costs to be incurred over time by Sequoia in an efficient abandonment and reclamation program at a discount rate commensurate with the discount rate for the other producing assets, and were considered in the value of the Goodyear Assets;

This pleading is consistent with the statement in ***Redwater*** at para. 157, that Abandonment and Reclamation Obligations serve "to depress the tenure's value at the time of sale". The case management judge overlooked this admission, and instead relied on concessions that had been made by the Trustee's counsel in court before the ***Redwater*** decision was released.

97 Section 96 of the *Bankruptcy and Insolvency Act* addresses "transfers at an undervalue". The extent to which the assumption of obligations, specifically environmental obligations, can "depress the tenure's value", resulting in an "undervalue" as defined in s. 2, is something that can be explored at trial. Abandonment and Reclamation Obligations may not be a conventional "debt", but

rather operate by depressing the value of the assets; whichever side of the equation they be on, they could impact whether there is "undervalue" in a transaction. Likewise, the extent to which a director owes a duty to ensure that the corporation discharges environmental obligations owed to the public is unclear. However, none of the claims pleaded in this action can be struck out or dismissed for "failing to disclose a cause of action", or because they "lacked merit" on the basis that *Redwater* "nullifies" or "extinguishes" Abandonment and Reclamation Obligations.

The Section 96 Claim

98 The case management judge concluded that the claim under s. 96 of the *Bankruptcy and Insolvency Act* could neither be struck nor summarily dismissed. This is the claim that the Asset Transaction was void because it was at an undervalue, and not at arm's length. In appeal 1901-0262AC, the Perpetual Energy group challenges this portion of the decision in two steps. First of all, they argue that the proper focus of the analysis should be on the Aggregate Transaction, not on the Asset Transaction. At that level, they argue that the Aggregate Transaction was at arm's-length. Secondly, they argue that there were no issues of fact or credibility that raised a genuine issue for trial, and the case management judge erred in concluding that the record did not permit summary disposition.

99 It was not disputed that the Perpetual Energy group and their officers and directors (on the one hand), and the Kailas Capital group, 198Co and their officers and directors (on the other hand) were dealing at arm's length: reasons at para. 57. The Aggregate Transaction, which related to the disposition of the Goodyear Assets by the sale of the shares of Perpetual/Sequoia, was at arm's length. The issue was that the Asset Transaction concerned only Perpetual Energy Operating Corp. (later Sequoia), the Perpetual Operating Trust and Perpetual Energy Parent. Those parties were all related, and were presumed not to deal at arm's length under s. 4(5) of the *Bankruptcy and Insolvency Act*.

100 The Perpetual Energy group argues, however, that whether persons are dealing at arm's length is a question of fact, and that the presumption that related parties do not deal at arm's length only prevails "in the absence of evidence to the contrary": s. 4(4) and (5). They rely on the acknowledgement by the Trustee in Bankruptcy that the Kailas Capital group had an "interest" in knowing what assets were in Perpetual/Sequoia, and that they had "influence" over the Asset Transaction: reasons at paras. 59, 93. Neither factor, however, is sufficient to rebut the presumption that the Perpetual Energy parties were not dealing with each other at arm's length.

101 The Kailas Capital group undoubtedly had an "interest" in the assets, in the sense that they were buying the Goodyear Assets, and they needed to know what was included in the sale. This was a commercial interest, not a legal interest: reasons at para. 84. They also needed to know that the legal and beneficial interests in the Goodyear Assets were in fact located in the corporate vehicle they were purchasing: Perpetual/Sequoia. Exactly how the Perpetual Energy group rearranged its affairs to move the Goodyear Assets into Perpetual/Sequoia, and specifically the consideration to be paid under that transaction, was not a matter over in which they had any legal interest, or over which they had any legal control. There is no indication on this record that the acceptability of the overall Aggregate Transaction to the Kailas Capital group depended on the mechanism by, or consideration for which the Goodyear Assets were moved into Perpetual/Sequoia.

102 The fact that, in the abstract, the Kailas Capital group had some "influence" over the overall structure of the Aggregate Transaction is also not legally significant. The Kailas Capital group had no legal ability to dictate the consideration in the Asset Transaction. Any party that enters into a transaction that is in breach of s. 96 will have some motivation for doing so. The motivation of the party, however, is not a defence to a claim by a trustee in bankruptcy under that section.

103 Take as an example a corporation that is having difficulty with its banking relationship. The bank says "we are not happy" and "you need to improve your balance sheet", and we look forward to you "doing something". If the corporation then enters into a transaction that is in violation of section 96, is no defence that they were "influenced" to do so by the bank, or that the bank was "interested" in the outcome.

104 On this record, there is no legally relevant evidence to rebut the presumption that the related members of the Perpetual Energy group who were engaged in the Asset Transaction were not operating at arm's length. The evidence on the present record

is that the structure and pricing of the Asset Agreement were under the control of the directors and officers of the Perpetual Energy group. That transaction was not shown to be negotiated at arm's length. Ms. Rose's conclusory statements to the contrary are inconsistent with the documentary evidence and corporate law.

105 It is also not relevant that the overall Aggregate Transaction was undoubtedly and admittedly negotiated at arm's length. If a transaction is entered into in violation of s. 96, it is no defence that it was connected to a number of other transactions that did not engage s. 96 at all. It follows that when determining whether the transaction was at arm's-length for the purposes of s. 96, the proper focus is on the Asset Transaction, not the Aggregate Transaction. The problem of transfers at undervalue that is addressed by s. 96 persists no matter how the challenged transaction is structured, and each component of a multi-step transaction must meet the statutory requirements. Section 96 is directed at a "transfer at undervalue", and as held in *Urbancorp Toronto Management Inc. (Re)*, 2019 ONCA 757 (Ont. C.A.) at para. 46, " . . . the focus in determining whether the dealing was non-arm's length is on the relationship between the parties to the particular transfer". The argument that non-arm's length, undervalue steps in a multi-step transaction can be disregarded is not consistent with the policy behind s. 96.

106 It has been held that income tax cases can be helpful in determining what, *as a matter of fact*, amounts to "arm's-length" dealing, but there is no such factual dispute here: see *supra*, para. 99. In any event, it does not follow that cases about the tax consequences of the structure of multi-step transactions apply to transactions which are challenged under s. 96. It has long been accepted that a taxpayer can structure its affairs to reduce its tax liability; that concept does not apply to s. 96 of the *Bankruptcy and Insolvency Act*.

107 For example, in *McLarty v. R.* the Minister taxed a transaction as if it was not at arm's-length, because initially it was between Compton, in its own right as seller, and Compton, as an agent/purchaser for the beneficial purchasers. The Supreme Court concluded that the trial judge was entitled to conclude that Compton was dealing at arm's length with the beneficial purchasers/taxpayers, such as McLarty. McLarty was the one being taxed, and he was not involved in the original transaction. In these appeals the Asset Transaction occurred entirely within the Perpetual Energy group, and there was no external party with a beneficial interest in it analogous to the one held by McLarty.

108 The decision in *Teleglobe Canada Inc. v. R.*, 2002 FCA 408, [2003] 1 C.T.C. 255 (Fed. C.A.) is also distinguishable. In that case the Government of Canada privatized and sold Teleglobe to Memotec Data. When the tax consequences of the transaction were considered, an issue arose as to whether the relevant transaction was that between "Old Teleglobe" and "New Teleglobe", or the overall one between Canada and Memotec Data. The former transaction was not at arm's-length, but it was driven by policy considerations, specifically the need to maintain a debt to equity ratio that would generate consumer telecommunication rates consistent with those charged by other carriers. The court decided that the Canada/Memotec transaction was the appropriate transaction to consider, because the consideration at that level was negotiated at arm's length. It was Canada/Memotec's "agreement which fixed the values in question": *Teleglobe* at para. 30. There was no evidence on this record of any equivalent arms-length negotiation of the *consideration* that was set in the Asset Transaction for the transfer of the Goodyear Assets; that consideration was apparently set in-house, not at arm's-length. The consideration set in the Aggregate Transaction was disconnected from the consideration set in the Asset Transaction. Further, there were no policy considerations underlying the Aggregate Transaction that are remotely analogous to those in *Teleglobe*.

109 The Perpetual Energy defendants accurately pleaded that the Asset Transaction was "a technical step" required before the Share Transaction could close. Ms. Rose fairly deposed that the Kailas Capital group had an interest in "which assets would comprise the Goodyear Assets". The Trustee in Bankruptcy acknowledged that the Asset Transaction was a preliminary step to the Share Transaction, and that the Kailas Capital group needed to have assurances that "the beneficial interest in the Goodyear Assets" had been transferred to Perpetual/Sequoia. None of that, however, displaces the critical fact that, on this record, the consideration paid in the Asset Transaction was apparently set not-at-arm's-length within the Perpetual Energy group.

110 Finally, the respondents argue that Perpetual/Sequoia failed due to a fall in natural gas prices, not as a result of any transaction at an undervalue. That is not necessarily relevant, because s. 96 can be engaged if, at the time of transfer, the transferor is insolvent: s. 96(1)(b)(ii)(A). Section 96 assumes that the transferor might already have failed by the time of the transfer, or will fail as a result of it.

111 It follows that appeal 1901-0262AC, seeking the summary dismissal or striking of the s. 96 claim, is dismissed. That claim will have to be resolved at trial.

The Alternative Section 96 Claim

112 The case management judge did not deal with the related claim, described as the "alternative *BIA* claim", against Perpetual Energy Parent, New Trustee and Ms. Rose. It was alleged that these defendants were "privies" under s. 96(3), and "by reason of the [Asset Transaction], directly or indirectly, received a benefit or caused a benefit to be received by another person": see *supra*, paras. 15, 20. This portion of the claim may have effectively been dismissed as against the defendant Ms. Rose, because the case management judge concluded that the Resignation & Mutual Release was a complete defence for her.

113 A "privy" need not actually be a party to the challenged transaction, so long as the privy is not dealing at arm's-length with one of the contracting parties. There can be little doubt in these circumstances that the sole director of a corporation does not deal at arm's length with that corporation. This is not a case like *Piikani Nation v. Piikani Energy Corp.*, 2013 ABCA 293, 556 A.R. 200, 86 Alta. L.R. (5th) 203 (Alta. C.A.) where the director was dealing on his own account, with respect to his contract of employment. The decisive issue here is therefore whether there was a "benefit" conferred on any of the named defendants.

114 The Trustee in Bankruptcy did not plead any direct benefit that was received from the Asset Transaction. The argument presented orally was that the Asset Transaction accrued generally to the benefit of Perpetual Energy Parent, which would cause its shares to rise in value, and that Ms. Rose, as a shareholder of Perpetual Energy Parent would derive an indirect benefit. The record suggests that the shares of Perpetual Energy Parent actually decreased in value after the Aggregate Transaction. Ms. Rose held approximately 1-2% of the publicly traded shares of Perpetual Energy Parent, which may not constitute a sufficiently proximate "benefit" to engage s. 96(3).

115 On the present record, it is not possible to identify what benefit may have been received by which defendant, and which defendant might have "caused that benefit" to have been conferred. The case management judge did not deal with the issue, and oral argument in this Court did not properly canvass it. Whether the Resignation & Mutual Release can encompass this claim is also an open issue: see *infra*, para. 166. These reasons accordingly do not deal with the alternative *BIA* claim, which remains before the trial court.

The Oppression Claim

116 The Trustee in Bankruptcy pleaded that the business of Perpetual/Sequoia and its affiliates had been conducted in a way that was oppressive or unfairly prejudicial to its creditors, within s. 242(2) of the *Business Corporations Act*:

> (2) If, on an application under subsection (1), the Court is satisfied that in respect of a corporation or any of its affiliates
>
> (a) any act or omission of the corporation or any of its affiliates effects a result,
>
> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

One potential remedy under s. 242(3)(l) is an order compensating an aggrieved person.

117 The statement of claim alleges:

> 19. Through the acts and omissions set out in this Statement of Claim, including causing PEOC, PEI, POT to enter into and carry out the [Aggregate Transaction]:

19.1 Ms. Rose exercised her powers as a director of PEOC and its affiliates in a manner; and

19.2 PEI and POC carried on or conducted their business or affairs in a manner that was:

oppressive, unfairly prejudicial to or unfairly disregarded the interests of the creditors of PEOC, including its contingent creditors.

Under s. 242, the "corporation" in question was "PEOC", that is Perpetual/Sequoia. Perpetual Energy Parent ("PEI") and the New Trustee ("POC") were "affiliates". Perpetual Operating Trust, not being a corporation, did not fit the definition of "affiliate".

118 Section 242(1) provides that only a "complainant" can apply for an oppression remedy, so a threshold issue was whether the Trustee in Bankruptcy could qualify as a complainant.

119 The case management judge found that the claim of complainant status by the Trustee in Bankruptcy should be struck. Alternatively, the case management judge would not have exercised his discretion to grant complainant status. Further, even if the Trustee in Bankruptcy was given complainant status, the oppression claim should be struck or summarily dismissed on the basis that the "*Redwater* decision nullifies the Oppression Claim".

Complainant Status of the Trustee in Bankruptcy

120 The *Business Corporations Act* defines the "complainants" entitled to seek an oppression remedy:

239 In this Part,

(b) "complainant" means

(i) a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

(ii) a director or an officer or a former director or officer of a corporation or of any of its affiliates,

(iii) a creditor . . .

(B) in respect of an application under section 242, if the Court exercises its discretion under subclause (iv),

or

(iv) any other person who, in the discretion of the Court, is a proper person to make an application under this Part.

In short, a creditor has no automatic status as a complainant in an oppression action, but can qualify as a complainant if the court exercises its discretion to recognize it as a "proper person" to seek an oppression remedy.

121 Although "any other person", even if not a creditor, could theoretically prove it was "a proper person", the oppression action itself must still be directed at the interests of the four groups identified in s. 242(2): a security holder, creditor, director or officer. Neither "the environment" nor "the public" is listed.

122 The case management judge considered the threshold issue of complainant status concurrently with the merits of the oppression claim, and appears to have "struck out" the claim for complainant status. This was partly because of an absence of particulars to support the claim for complainant status: reasons at paras. 202-203, 206, 237. As previously noted, if the problem was an absence of particulars, the remedy was to call for the provision of particulars, not to strike out the claim.

123 Complainant status is a form of standing granted by the court, which is not properly regarded as a pleading that can be "struck out for failing to disclose a cause of action". Being a "complainant" is a recognized legal concept. In this case the Trustee in Bankruptcy pleaded that it was the trustee of Perpetual/Sequoia, and that as such it was a "proper person" to advance

an oppression claim on behalf of the creditors. This was not an allegation of either fact or law, rather it was merely a statement of one component of the remedy that the Trustee in Bankruptcy sought: appointment as a complainant in the discretion of the court. Complainant status was not a "fact" that could be presumed to be "true" under R. 3.68(2)(b), as suggested in the reasons at para. 200. As noted, this pleading also did not amount to an assertion by the Trustee in Bankruptcy that it could self-appoint as a complainant.

124 Seeking recognition as a "complainant" is a question of evidence, not a matter of pleading that is susceptible to being struck out under R. 3.68. The court may or may not exercise its discretion to recognize the proposed complainant, but making a claim for standing is not a matter of "striking out" a pleading for failure to disclose a cause of action. Complainant status is determined based on affidavit evidence presented by the potential plaintiff/complainant, outlining the nature of the alleged oppression, and the proponent's suitability to seek a remedy for that oppression. It was an error of principle to suggest that no evidence supporting the claim for complainant status could be considered on the application: reasons at para. 203. The statement of claim should undoubtedly plead sufficient facts to make out the oppression claim, but there is no requirement that all of the particulars supporting the appointment of the proponent as a complainant must be pleaded. Pleadings are not to contain evidence: R. 13.6(2)(a).

125 The issue actually before the case management judge was whether the Trustee in Bankruptcy should be afforded complainant status. The case management judge indicated he would not exercise his discretion to do so for a number of reasons: (a) the oppression claim was "selective", rather than "collective", because it only reflected the interests of two classes of creditors: reasons at para. 238; (b) *Redwater* "nullified the oppression claim" because Abandonment and Reclamation Obligations are not a liability: reasons at para. 239; (c) the Trustee in Bankruptcy's prospect of success was "very low": reasons at para. 240; (d) the municipality creditors were not shown to be in a position analogous to a minority shareholder, nor was it shown that they had any legitimate interest in the management of the corporation: reasons at para. 202.

126 Requiring a creditor to apply for complainant status reflects a policy that oppression claims are not to be used as a method of debt collection. The mere fact that a corporation does not or cannot pay its debts as they come due does not amount to oppression. In this litigation, however, the Trustee in Bankruptcy is not merely asserting the failure to pay a debt. The allegation here is that the corporation has been re-organized in such a way that it has been rendered unable to pay its debts. For example, the Asset Transaction, which resulted in the separation of the Goodyear Assets from the KeepCo assets, was alleged to be unfairly prejudicial to the creditors.

127 In declining to grant the Trustee in Bankruptcy status as a complainant under the *Business Corporations Act* the case management judge failed to appreciate the collective nature of the role of a trustee in bankruptcy, namely that the oppression action was being brought by the Trustee in Bankruptcy on behalf of the estate of Perpetual/Sequoia, not on behalf of individual creditors. This was largely occasioned by the argument of the Trustee in Bankruptcy, which focused on two liabilities of particular concern, the Abandonment and Reclamation Obligations and the municipal taxes owed. He viewed the oppression claim as articulated by the Trustee in Bankruptcy as directly engaging the issue of whether the Abandonment and Reclamation Obligations were associated with creditors in the sense used both in *Redwater* and in the *Business Corporations Act*. He concluded that because *Redwater* made clear that there was no creditor associated with the Abandonment and Reclamation Obligations, the oppression action was doomed to fail.

128 Section 242 contemplates that conduct can be oppressive respecting "any" security holder, creditor, director or officer. In circumstances like this, one creditor could apply for complainant status, effectively on behalf of all creditors, or only on its own behalf. It follows that there is nothing inherently unreasonable about a trustee in bankruptcy applying for complainant status. That could be a legitimate part of the trustee's duties to maximize the value of the bankrupt estate for the benefit of all of the creditors.

129 The respondents rely on the *Hordo* case, which identified four criteria for determining if a creditor (and by analogy a trustee in bankruptcy) qualified as a complainant. The allegations in *Hordo* were very unusual, and indeed implausible. While that decision outlines some relevant considerations, it does not set out any binding preconditions to complainant status for a creditor. In order to qualify as a complainant, it is undoubtedly true that a creditor must demonstrate more than that it is owed

a debt. However, the creditors of a corporation do have a legitimate interest in preventing management from conducting the business of the corporation a way that prevents it from satisfying its obligations. The creditors may not have any assurance that their debts will be paid, but they do have a reasonable expectation that the corporation's business and assets will not be unfairly re-structured in such a way that payment of those debts becomes impossible: *Tannis Trading* at paras. 25-26; *Manufacturers Life* at para. 31; *J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd.*, 2008 ONCA 183 (Ont. C.A.) at para. 66, (2008), 41 B.L.R. (4th) 51 (Ont. C.A.); *Gestion Trans-Tek Inc. v. Shipment Systems Strategies Ltd.*, [2001] O.T.C. 860 (Ont. S.C.J.) at paras. 30-36, (2001), 20 B.L.R. (3d) 156 (Ont. S.C.J.).

130 There is no hard rule that the creditor must be in a position analogous to that of a minority shareholder to qualify as a complainant, if only because s. 242 identifies "creditor" as a distinct category of complainant. Further, that requirement is somewhat circular, because if the business of the corporation is conducted in a way that unfairly disregards the interests of the creditors, one could argue that the creditors are in a position analogous to that of an oppressed minority shareholder.

131 The case management judge concluded that an oppression claim by a creditor should be "collective" in the sense that it should be for the benefit of all of the creditors. A single creditor should not use the oppression remedy to collect its own debt. That, however, would not generally be a barrier to a trustee in bankruptcy seeking complainant status, because trustees in bankruptcy, by definition, represent all of the creditors of the bankrupt. The aggregate claims in a bankruptcy always consist of a number of individual claims. The case management judge's objection was that the Trustee in Bankruptcy focused his arguments on the two main obligations of Perpetual/Sequoia: the Abandonment and Reclamation Obligations and unpaid municipal taxes. As set out in the next section of these reasons, the Abandonment and Reclamation Obligations cannot support "creditor" status for the purposes of an oppression action, but they are still relevant to whether a claim of oppression exists and is properly brought by creditors of the estate through its representative the Trustee in Bankruptcy: see *infra*, paras. 140-41. That narrows, but does not necessarily eliminate, the Trustee in Bankruptcy's claim to complainant status.

132 The Trustee in Bankruptcy did not provide particulars of the debts of Perpetual/Sequoia existing at the time of the Asset Transaction that remained unpaid on the date of bankruptcy. As a matter of pleading, that level of detail would not be necessary. Further, if the detail was of concern, the answer was to seek particulars, or to cross-examine the Trustee in Bankruptcy on his affidavit, not to strike the pleading.

133 It is admittedly not clear from the record to what extent Perpetual/Sequoia assumed responsibility for any debts in the Asset Transaction, other than the Abandonment and Reclamation Obligations and municipal taxes. Nevertheless, the collective pursuit of all of those outstanding taxes in an oppression action would be "collective" not "selective". There is no rule that a creditor oppression action can only be launched if there are diverse debts owing to diverse creditors.

134 If the judge concludes that there is no possible merit to the oppression claim, it would be pointless to grant complainant status to a creditor. That, however, is not the same thing as saying that the proposed complainant is unsuitable. That is one factor to consider, but is not a conclusive consideration in determining his complainant status.

135 In summary, it was unhelpful to blend the analysis of the "complainant" status of the Trustee in Bankruptcy, with the substance of the oppression claim. The former is not a matter of "striking a pleading". On this record, it was unreasonable to conclude that the Trustee in Bankruptcy was not a "proper person".

The Merits of the Oppression Claim

136 The case management judge concluded that the oppression claim could be struck out because it failed to disclose a cause of action. In his oral reasons he concluded that the oppression claim could not be summarily dismissed, but in the subsequent written reasons he concluded that summary disposition would have been possible as an alternative: reasons at paras. 233-35.

137 The case management judge concluded that the *Redwater* decision was a complete answer to the oppression claim for two reasons. First of all, *Redwater* "nullified" the claim because it held that Abandonment and Reclamation Obligations were not a true obligation or liability, but merely "an allegation that is based on assumptions and speculations". Secondly *Redwater* concluded that Abandonment and Reclamation Obligations were owed to the public, and not to any "creditor"; neither

the Alberta Energy Regulator nor the Orphan Well Association were creditors for that purpose. As previously noted, the first conclusion arises from a misreading of *Redwater*. However, *Redwater* did conclude that there was no "creditor" with respect to Abandonment and Reclamation Obligations, and to that extent *Redwater* is relevant to these appeals.

138 For the reasons previously given, Abandonment and Reclamation Obligations are a real obligation and liability of an oil and gas company: *supra*, paras. 85-89. The outcome of *Redwater* was that the proceeds from the sale of Redwater Energy's valuable assets had to be used to discharge those obligations, and could not be paid to the secured creditor. That in itself demonstrates the reality of these obligations. *Redwater* did not "nullify" Abandonment and Reclamation Obligations.

139 What *Redwater* did decide, however, was that there was no "creditor" associated with Abandonment and Reclamation Obligations. As a result, Abandonment and Reclamation Obligations could not be "claims provable in bankruptcy". These appeals are concerned with the *Business Corporations Act*, not the *Bankruptcy and Insolvency Act*, but there is no principled basis to distinguish *Redwater* on this point, and find that there is a "creditor" associated with Abandonment and Reclamation Obligations for the purposes of s. 242. The definition of "creditor" for oppression purposes may be wider than it is in other contexts, for example by including contingent claims: *Tannis Trading* at paras. 24-25; *Manufacturers Life* at para. 30. However, given the finding in *Redwater* that Abandonment and Reclamation Obligations are not associated with a creditor, they cannot *directly* be used to support complainant status in an oppression claim brought by "creditors".

140 The conclusion that there is no creditor associated with Abandonment and Reclamation Obligations is not fatal to the oppression claim. The oppression claim can still be advanced by the Trustee in Bankruptcy on behalf of all other creditors who were owed money at the time of the alleged oppressive conduct, and remained unpaid on the date of bankruptcy. As previously noted, the quantum of debts of that nature owed to the recognized creditors of Perpetual/Sequoia is unclear on this record. The respondents argue that, with respect to municipal taxes, there are only three municipalities still owed taxes from before 2017, and they have all entered into deferred payment plans.

141 Further, even though the Abandonment and Reclamation Obligations may not be associated with a "creditor", that does not mean that they are irrelevant to an oppression claim brought on behalf of creditors. As *Redwater* confirms, Abandonment and Reclamation Obligations are real liabilities or obligations of oil and gas companies. It is possible that the directors and officers of a corporation might manage those Abandonment and Reclamation Obligations in a manner that is unfairly prejudicial to the interests of creditors.

142 The case management judge also concluded that the proposed oppression claim was contrary to the policies of the Alberta Energy Regulator: reasons at paras. 120-25. He concluded "the Trustee asks the Court to frame a legal regime that has been rejected by the legislature": reasons at para. 125. The Trustee in Bankruptcy points to two threshold problems with this analysis: no evidence is permitted in an application under R. 3.68(2)(b), and in any event the evidence relied on by the case management judge was not placed on the record by the parties. It was an error for the case management judge to attempt to resolve this complex issue without a proper evidentiary record, and proper submissions from the parties.

143 The extent to which the Asset Transaction is consistent with public policy may well be a central issue at trial. Further, the public policy of the Alberta Energy Regulator is not as clear as the case management judge suggested. In *Redwater*, the Alberta Energy Regulator stated that its policy was to require that all the assets of the corporation be used for reclamation, but that the Regulator would not go outside the corporation to impose liability on others: *Redwater* at paras. 104, 107-108. If that policy were applied here, it could mean that the Regulator's policy was that recourse could be had to the KeepCo Assets, but it not would not extend beyond that. It is not obvious that the Trustee in Bankruptcy's claim is inconsistent with any policy.

Summary of the Oppression Claim

144 In summary, the case management judge erred in his analysis for several reasons including conflating the determination of whether to grant complainant status with the merits of the claim. There was no principled basis to deny the Trustee in Bankruptcy complainant status to launch an oppression action. It was unreasonable to conclude that the Trustee in Bankruptcy was not a "proper person". Further, while the oppression claim may be narrower than the Trustee in Bankruptcy anticipated, the pleadings

do disclose a cause of action. The claim cannot be struck out on this record. Further, the state of the record and the complexity of the issues does not permit a fair disposition of this claim on a summary basis.

Public Policy and Illegality

145 The statement of claim pleaded that "the Transactions are void" on grounds of public policy, on the basis of statutory illegality, and on equitable grounds: see *supra*, para. 26. The case management judge concluded that neither "public policy" nor "illegality" were causes of action, although they might be defences. Equitable rescission was a remedy, not a cause of action, and in any event, rescission would be impossible at this stage of the transactions. The Trustee in Bankruptcy's argument was that the structure of the Asset Transaction was inconsistent with the policy of the Alberta Energy Regulator, but no particulars were provided. Further, the case management judge held that *Redwater* extinguished the public policy claim because the Abandonment and Reclamation Obligations are not a liability: *supra*, paras. 27-29.

146 The case management judge correctly held that neither "public policy" nor "illegality" were causes of action that would support a claim for damages. The Trustee in Bankruptcy, however, never suggested otherwise; the pleading was simply that the challenged transactions were "void", meaning that they could not be relied on by the defendants to justify their actions. This portion of the statement of claim, when read generously, does not advance a cause of action, but was a response to an anticipated defence. This pleading might have been placed in a Reply to the statements of defence, but it was not inappropriate for the Trustee in Bankruptcy to include it in the statement of claim. If further clarification of this pleading is required, the remedy is to amend, not to strike.

147 A central issue underlying this litigation is whether an oil and gas company can arrange its affairs so as to avoid regulatory scrutiny, in a manner that is analogous to income tax law. For example, does the Alberta Energy Regulator's policy enable a technique such as leaving the Retained 1% Interests in Perpetual/Sequoia for a few minutes in the middle of this transaction in order to bypass regulatory scrutiny? The public policy pleading alleges that this type of strategy is not permissible, and that avoiding regulatory scrutiny is not necessarily equivalent to regulatory compliance. The statement of defence filed by the Perpetual Energy group asserts that the transactions are "fully compliant" with "public policy reflected in the Regulatory Regime and the law". It further pleads that the transactions were not structured "to be completed without regulatory intervention". As noted, it cannot be determined from this record whether the policies of the Alberta Energy Regulator have been violated: *supra*, paras. 142-43.

148 *Redwater* does not provide an answer to this portion of the pleadings. *Redwater* does not hold that Abandonment and Reclamation Obligations are not a liability: *supra*, paras. 90-97. The ultimate effect of *Redwater* was actually that the attempt, in that case, to separate Redwater Energy's valuable assets from its abandoned wells was ineffective. *Redwater* held that the public is the beneficiary of the environmental obligations inherent in the Abandonment and Reclamation Obligations: reasons at para. 221, *Redwater* at para. 122. It is in this sense that "public policy" is engaged by this litigation. The exact scope and enforceability of the public interest is uncertain, but that is no reason to strike out pleadings at this stage. These are the type of novel issues that must be tested at trial.

149 The case management judge concluded that the Trustee in Bankruptcy was attempting to impose liability for environmental claims on directors, contrary to the intentions of the Legislature. That, however, is not the thrust of this litigation. The Trustee does not seek to make directors liable for environmental damage, but rather to hold them to account for allegedly having structured the affairs of the corporation (Perpetual/Sequoia) in such a way that made it impossible for that corporation to discharge its public obligations. This may be a novel position, but it is not one that should be resolved summarily.

150 The respondent Ms. Rose argues that the assumption by Perpetual/Sequoia of the Abandonment and Reclamation Obligations in the Asset Transaction had no negative effect on it. She argues that, as the holder of the regulatory licences, Perpetual/Sequoia was exposed to the Abandonment and Reclamation Obligations both before and after the Asset Transaction. Exactly where the burden of these obligations lies will have to be resolved at trial. The Trustee's argument, however, is that whatever burdens Perpetual/Sequoia had before the Asset Transaction were set off by the positive value of the KeepCo Assets. It was partly the separation of the Goodyear Assets from the KeepCo Assets that allegedly tainted the transaction.

151 The case management judge correctly held that rescission is likely unavailable as a remedy, because the parties could not be restored to their original positions. However, where an equitable remedy is blocked, the court might grant an alternative remedy in damages. Directors owe their corporation fiduciary duties, which are equitable in nature. In any event, "equitable rescission" is only mentioned in one of the headings in the statement of claim, and is not asserted as a cause of action.

152 In summary, the "public policy" pleadings (set out *supra*, para. 26) should not have been struck out. To the extent necessary, they could have been clarified by amendment, or enhanced with particulars. On the whole they set out and engage an important underlying issue in this litigation that can only be resolved at trial.

Breach of Director's Duties

153 The statement of claim alleges that Ms. Rose, as the sole director of Perpetual/Sequoia at the time the Asset Transaction was approved, was in breach of her duties to Perpetual/Sequoia.

154 Under the *Business Corporations Act* the management of the affairs of a corporation is placed in the hands of the directors:

> 101(1) Subject to any unanimous shareholder agreement, the directors shall manage or supervise the management of the business and affairs of a corporation.

Some of the duties of a director are set out in the statute:

> 122(1) Every director and officer of a corporation in exercising the director's or officer's powers and discharging the director's or officer's duties shall
>
> (a) act honestly and in good faith with a view to the best interests of the corporation, and
>
> (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

The power to manage, and these director's duties, are universal to all corporations. There is no exception for a "special-purpose corporation that was a wholly owned subsidiary", or because "this was Perpetual Energy doing this transaction through a subsidiary", as suggested in the reasons at paras. 312-13.

155 A fundamental principle of corporate law is that each corporation is a separate legal person. It owns its own assets, and controls its own affairs. The shareholders may be the ultimate owners, and they may have the power to elect and replace directors, but in the absence of a unanimous shareholders agreement it is the directors who manage the corporation. The statutory duties of directors fall on their shoulders. It was an error of law to conclude that Ms. Rose did not control, and was not the "directing mind" of Perpetual/Sequoia as held in the oral reasons for decision. The director's resolution approving the Asset Transaction, which recited that the director believed it was in the best interest of the corporation, was in fact signed by Ms. Rose; no one else was authorized to do so.

156 Ms. Rose had an obligation to ensure that the Asset Transaction was in the best interests of Perpetual/Sequoia: *Business Corporations Act*, s. 122(1)(a); *BCE Inc., Re*, 2008 SCC 69 (S.C.C.) at para. 66, [2008] 3 S.C.R. 560 (S.C.C.). Ms. Rose argues that she had no alternative but to do the bidding of Perpetual Energy Parent. However, if Ms. Rose did not agree that the instructions she was getting were in the best interests of Perpetual/Sequoia, her obligation was to resign; her replacement would then have been responsible for any decisions made. If Perpetual Energy Parent had executed a unanimous shareholder declaration, it would have been responsible for all management decisions: *Business Corporations Act*, s. 146(7). As matters stood, however, Ms. Rose was responsible for ensuring that the Asset Transaction was in Perpetual/Sequoia's best interests. Ms. Rose's argument that she was only following the orders of Perpetual Energy Parent is merely an admission by Ms. Rose that she had abdicated her responsibility as a director.

157 Notwithstanding her assertion that she did not control Perpetual/Sequoia's business, and was merely following orders, Ms. Rose inconsistently alleged that she "took her responsibilities as a director and officer of [Perpetual/Sequoia] seriously,

considered the best interests of [Perpetual/Sequoia], its stakeholders, and then exercised her business judgment to the best of her ability": reasons at para 323. The "business judgment rule" provides that the courts will defer to the judgment of the directors on difficult business decisions. It does not support the abdication of a director's decision making responsibility. Further, Ms. Rose deposed that the decision to enter into the Asset Transaction was not governed solely by the interests of Perpetual/Sequoia, but also by the interests of Perpetual Energy Parent and the Kailas Capital group.

158 Finally, for the reasons previously given, *Redwater* did not "nullify" the claim for breach of director's duty, as suggested in the reasons at paras. 285, 341.

159 In summary, it was not, on the face of it, appropriate to either strike out or summarily dismiss the claim alleging breach of director's duties. That conclusion is subject to analyzing the effect of the Resignation & Mutual Release, discussed next.

The Resignation & Mutual Release

160 One component of the Aggregate Transaction was that after the change of control Ms. Rose would resign as the sole director of Perpetual/Sequoia, and release the corporation from any claims she might have against it. The new directors of Perpetual/Sequoia, effectively elected by the Kailas Capital group, would grant her a corresponding release of any claims that might arise from her decisions as a director, other than claims relating to fraud, criminal conduct or deceit. Ms. Rose asserts that the resulting Resignation & Mutual Release is a complete defence to the claim that she breached her duties as a director.

161 The Trustee in Bankruptcy argues that the Resignation & Mutual Release is not legally enforceable against it. Alternatively, the Trustee in Bankruptcy argues that the Resignation & Mutual Release, by its terms, does not cover the claims being made against Ms. Rose.

Legal Effectiveness of the Resignation & Mutual Release

162 In the abstract, a widely worded release could cover the claims made against Ms. Rose in the statement of claim. The Trustee in Bankruptcy, however, argues that the Resignation & Mutual Release is legally ineffective, referring particularly to s. 122(3) of the *Business Corporations Act*:

> (3) Subject to section 146(7), no provision in a contract, the articles, the bylaws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves the director or officer from liability for a breach of that duty.

On a proper reading of the statute, this provision does not necessarily render ineffective the type of release at issue in this litigation.

163 There are a number of different scenarios under which a director might be released from liability:

> a. A person might agree to act as a director, but only if the corporation entered into a contract relieving that director of liability for any breaches of duty while in office. Such a release would clearly be an attempt to release the director from "the duty to act in accordance with this Act", and would be ineffective under s. 122(3).
>
> b. At the other end of the spectrum, if a director was sued for breach of duty, the director and the corporation might ultimately enter into a settlement agreement. That settlement might involve the director paying damages, and would likely also include a release. Such a release was not intended to be caught by s. 122(3): see Institute of Law Research and Reform, Report No. 36, Proposals for a New Alberta Business Corporations Act, August, 1980, p. 67.
>
> c. A third common scenario arises where there is a change of control of the corporation, and as a condition of closing the existing directors and officers are released from liability for any past breaches and transgressions. This kind of release is very common, and is not within the contemplation of s. 122(3). Since the outgoing directors have resigned, they will not thereafter be under any "duty to act in accordance with this Act". Releasing a director from liability for past breaches of duty is not the same as relieving the director of the obligation to perform those duties. If the purchaser otherwise "gets what

it paid for", it knowingly gives up the opportunity to make claims for earlier breaches only discovered after closing. This prevents a windfall to the purchasers such as the one that arose in the seminal case of *Regal (Hastings) Ltd. v. Gulliver*, [1942] 1 All E.R. 378, [1967] 2 A.C. 134 (U.K. H.L.). The interpretation of this type of provision suggested in *McKay-Cocker Construction Ltd. v. McMurdo*, [2001] O.T.C. 791 (Ont. S.C.J.) at para. 16 is too narrow.

d. A fourth scenario is where the director is involved in negotiating or approving a contract, and in the course thereof is in breach of his or her duties. For example, if a director negotiated a contract where part of the consideration was diverted from the corporation to the director, that would be a breach of fiduciary duty. If the director arranged to have a release included in the contractual documents, that release might not be enforceable, either at common law, or because of s. 122(3). Enforceability of the release might depend on whether the other directors or the shareholders were aware of the inappropriate aspect of the transaction, and the wording of the release: see *Bailey v. Temple*, 2020 NLCA 3 (N.L. C.A.) at para. 33, (2020), 443 D.L.R. (4th) 633 (N.L. C.A.), discussing *London & South Western Railway v. Blackmore* (1870), L.R. 4 H.L. 610 (U.K. H.L.) and other cases.

e. The final scenario involves a combination of the third and fourth scenarios. The tainted transaction and the change of control happen at the same time. The allegation is that the director breached his or her duty during the change of control transaction, and a release was given at that time relieving the former director of liability. However, in this scenario the release of the director is given by the new owners, after the change of control.

The final situation is the one faced by the respondent Ms. Rose. It is alleged that Ms. Rose breached her duties during the adoption of the Asset Transaction. The Resignation & Mutual Release and the Asset Transaction were both part of the Aggregate Transaction. The release, however, was granted by 198Co and Kailas Capital, after the change of control.

164 Given the particular facts on this record, s. 122(3) should not be interpreted as invalidating the Resignation & Mutual Release, in so far as it releases the claims for breach of director's duties and oppression. Kailas Capital and 198Co purchased Perpetual/Sequoia based on the representation that it contained the beneficial interest in the Goodyear Assets, which had inherent in them some Abandonment and Reclamation Obligations. Kailas Capital and 198Co knew all of the details behind the Asset Transaction and the Share Transaction, and knew of Ms. Rose's involvement. They agreed to purchase the Goodyear Assets; in the Resignation & Mutual Release they disclaimed any future ability to seek damages of any kind from Ms. Rose based on breaches of director's duties or oppression that occurred before they purchased Perpetual/Sequoia. The Trustee in Bankruptcy cannot be in any better position. Subject to the issues discussed in the next section of these reasons surrounding the "claims" covered by the release, and considering the context of the transactions and the wording of the various agreements selected by the parties, there is no basis to completely invalidate the Resignation & Mutual Release: *London and South Western Railway* at p. 623.

165 While the issue may not directly arise in this litigation, a proviso should be added that a generalized release of a director may not cover every duty owed. One example is the potential, but presently ill-defined, obligation of a director of a corporation to ensure that the corporation complies with its environmental and regulatory responsibilities: see J. Sarra, *Fiduciary Obligations in Business and Investment: Implications of Climate Change*, Commonwealth Climate and Law Initiative, Working Paper Series, October 14, 2017. As noted in *Redwater*, such obligations would potentially be owed to the public, not necessarily to the corporation exclusively. It may not, therefore, be open to a private party such as 198Co to release a director like Ms. Rose from those obligations. The extent to which there are such duties, and whether or how they can be enforced against Ms. Rose is a matter that cannot, and need not be resolved on this record.

166 One issue that does arise directly on this record is whether a corporation can a) enter into a transaction in violation of s. 96, b) confer a benefit on a "privy" under that transaction in violation of s. 96(3), and c) immediately grant a release to the privy for any liability. A trustee in bankruptcy who subsequently challenges the transaction has a compelling argument that such a release is legally ineffective. This issue is directly relevant to the alternative *BIA* claim, which, as noted *supra* para. 115, is as yet unresolved. The impact of the Resignation & Mutual Release on the alternative *BIA* claim should also be referred back to the trial court for adjudication.

Interpretation of the Resignation & Mutual Release

167 The next question is the proper interpretation of the Resignation & Mutual Release. The Trustee in Bankruptcy argues that even if it is legally effective, it does not cover the claims now made. The answer is not obvious because of references to inconsistent definitions of "Claims" in the various documents.

168 The shares of Perpetual/Sequoia were transferred to 198Co under the Share Purchase Agreement (called the "Share Transaction" by the parties), which was part of the Aggregate Transaction. It defines "Claim":

> 1.1 *Definitions*. In this Agreement . . .
>
> (m) "Claim" means any claim, demand, lawsuit, proceeding, arbitration or governmental investigation, in each case, whether asserted, threatened, pending or existing; (EKE A87)

Article 8 of the Share Purchase Agreement, entitled "Closing and Deliveries", includes:

> 8.1 Deliveries of the Vendor.
>
> (a) At Closing . . . the Vendor shall deliver . . .
>
> (xviii) resignations of all directors and officers of the Corporation and a release from such directors and officers pursuant to which they release all Claims against the Corporation
>
> 8.2 Deliveries of the Purchaser.
>
> (a) At Closing . . . the Purchaser shall deliver . . .
>
> (xiii) releases signed by the new signing authorities of the Corporation as appointed by the Purchaser releasing the directors and officers of the Corporation from any Claims related to such directors and officers acting as a director or officer of the corporation. (EKE A122-23)

The "Deliveries" contemplated by these clauses were implemented through the execution and exchange of the Resignation & Mutual Release.

169 In the Resignation & Mutual Release, Ms. Rose resigned as the director of Perpetual/Sequoia, and released Perpetual/Sequoia and its agents from "any and all Claims (as defined in the *Share Purchase Agreement*)". It then continued:

> 3. PEI [Perpetual Energy Parent] and PEOC [Perpetual/Sequoia] do hereby remise, release and forever discharge Susan Riddell Rose from all Claims (as defined in the Purchase and Sale Agreement) which PEI and PEOC now have or can have or can hereafter have against Susan Riddell Rose by reason of, existing out of or connected with Susan Riddell Rose having acted, at the request of PEI, as a director and officer of PEOC, but which shall exclude any claim based on the fraud, criminal conduct, or deceitful conduct of Susan Riddell Rose. (EKE A160)

Clause 4.01 of the Purchase and Sale Agreement (called the "Asset Transaction" by the parties), recited that the "Vendor makes the following representations and warranties", including:

> (l) Claims. As it pertains to the Assets only, no suit, action or other proceeding before any court or governmental agency has been commenced against Vendor, or to the knowledge of Vendor, has been threatened against Vendor or any Third Party, which might result in impairment or loss of the interest of Vendor in and to any of the Assets or which might otherwise adversely affect the Assets other than has been previously disclosed; (EKE A67)

The Trustee in Bankruptcy argues that the narrower definition of "Claims" found in clause 4.01(l) of the Purchase and Sale Agreement does not cover the claims against Ms. Rose asserted in the statement of claim.

170 To summarize, on the face of it there is a disconnection between the various documents:

(a) Section 8.2(a)(xiii) of the Share Purchase Agreement, which is the "blanket" document, envisions a wide release relating to Ms. Rose's conduct as a director: "any Claims related to such directors and officers acting as a director or officer of the corporation".

(b) Likewise, clause 3 of the Resignation & Mutual Release envisions a wide release relating to Ms. Rose's conduct as a director: "Rose having acted, at the request of PEI, as a director and officer of PEOC".

(c) The covenants in the Share Purchase Agreement refer to the wider definition of "Claims" found in that document: "any claim, demand, lawsuit . . . ".

(d) The Resignation & Mutual Release contains inconsistent references. Ms. Rose releases Perpetual/Sequoia from all claims, using the wider definition in the Share Purchase Agreement. However, in clause 3 Perpetual/Sequoia purportedly only releases Ms. Rose with respect to the narrower definition of claims in the Purchase and Sale Agreement, relating to "impairment of the Assets".

(e) The reference to "Claims" in clause 3 of the Resignation & Mutual Release limits the released claims to those relating to "impairment of the Assets" only, which creates a disconnect with (i) the later reference in that very clause to "Rose having acted, at the request of PEI, as a director and officer of PEOC", and (ii) section 8.2(a)(xiii) of the Share Purchase Agreement, which refers to claims arising from "acting as director", not with respect to the "impairment of the Assets".

On his reading of the Resignation & Mutual Release, the Trustee in Bankruptcy argues that none of the claims against Ms. Rose relate to the "impairment of the Assets".

171 The respondent Ms. Rose notes that this issue was not raised before the case management judge. If the issue had been identified, she argues she would have introduced further evidence about the intention of the parties at the time the transactional documents were drafted. Given these potential gaps in the record, and given that this Court does not have the benefit of the analysis of the issue by the case management judge, it is not appropriate to attempt to resolve it at the appellate level. A release must not be interpreted in a vacuum, but rather according to the context in which it was drafted, having regard to the intention of the parties: *Hill v. Nova Scotia (Attorney General)*, [1997] 1 S.C.R. 69 (S.C.C.) at paras. 20-21. This issue is referred back to the trial court.

Other Issues

172 The respondent Ms. Rose argues that the Trustee in Bankruptcy did not adequately plead his position with respect to the Resignation & Mutual Release. For example, the Trustee did not plead that the Resignation & Mutual Release should be "set aside". The pleadings with respect to this issue adequately advised the respondent that the effectiveness of the Resignation & Mutual Release was being challenged. The Trustee in Bankruptcy was entitled to argue that the Resignation & Mutual Release was legally ineffective against it without seeking to have it "set aside" or declared "void". All concerned are well aware of the issues, and in any event, any shortcomings in the pleadings could easily be cured by amendment.

173 The Trustee in Bankruptcy argues that the wording of the Resignation & Mutual Release is not wide enough to cover unknown claims, or "future claims". The intent, however, is clear; the new owners of Perpetual/Sequoia were to take the company they were purchasing "as is". The intention was obviously to relieve Ms. Rose of any claims that arose before the closing of the Aggregate Transaction, whether they were known or unknown, excepting claims based on fraud, criminal conduct, or deceitful conduct. The commercial efficacy of the Resignation & Mutual Release required that it cover unknown claims.

174 Further, there is no issue here as to whether the Resignation & Mutual Release is wide enough to cover "future claims"; there are no such claims. The Trustee in Bankruptcy asserts only claims that relate to the conduct of Ms. Rose *before* the closing of the Aggregate Transaction, and before she resigned as the director of Perpetual/Sequoia. The Trustee in Bankruptcy obviously did not assert these claims until after the Resignation & Mutual Release was signed, but that does not mean they are "future

claims" as that term is applied to releases. There is a distinction between claims that relate to conduct that post-dates the signing of the release, and claims advanced after the signing of the release but relating to conduct before the signing: *Biancaniello v. DMCT LLP*, 2017 ONCA 386 (Ont. C.A.) at para. 52, 2017 D.T.C. 5061 (Ont. C.A.). Further, as previously noted (*supra*, para. 163(a)) while it is questionable whether a release respecting future performance of director's duties can be effective, no such issues are engaged here.

Summary

175 In summary, while there was facial merit to the claims of breach of director's duties, most of Ms. Rose's potential liability to Perpetual/Sequioa was released by the Resignation & Mutual Release. While some portions of the claim as against the respondent Ms. Rose were properly summarily dismissed, there was no basis on which the claim could be struck for failing to disclose a cause of action. It was not, however, possible to dispose of the alternative *BIA* claim against Ms. Rose on this record, and that and related issues must be referred back to the trial court as previously indicated in these reasons.

The Costs Appeal

176 In appeal 2001-0174AC the Trustee in Bankruptcy challenges the award to the respondent Ms. Rose of 85% of her solicitor and client costs. The Trustee in Bankruptcy argues that costs should, at most, have been awarded on Schedule C.

177 The costs award was made on the assumption that Ms. Rose had been completely successful in defending the action against her. As previously noted in these reasons, there are some aspects of the claim that are as yet unresolved. For that reason alone, the costs award must be set aside, and the costs of the summary judgment and striking application must be returned to the case management judge. Strictly speaking, it is not necessary to discuss the costs award further. The issues, however, were fully argued, and there are a number of important issues that cannot be left unresolved.

178 A trial judge has a wide discretion in awarding costs, although costs are generally awarded based on Schedule C: R. 10.31. Costs awards are designed to partially indemnify the successful party for the legal expenses incurred during the litigation. Party and party costs awards are deliberately set so that they do not fully indemnify the successful party. This discourages unwarranted litigation, it promotes proportionality in litigation that is commenced, and it creates an incentive on all litigants to litigate economically.

179 The mere fact that a claim is unsuccessful is not sufficient to justify solicitor and client costs: *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.) at p. 134; *Goldstick Estates (Re)*, 2019 ABCA 508 (Alta. C.A.) at paras. 24, 27, (2019), 55 E.T.R. (4th) 1 (Alta. C.A.). There are some recognized situations when solicitor and client costs can be awarded, generally when there has been reprehensible, scandalous or outrageous conduct by a party: *Young* at p. 134. The misconduct alleged must arise from the conduct of the litigation; a distaste for the unsuccessful litigant, its pre-litigation conduct, or its cause of action is not sufficient: *Luft v. Taylor, Zinkhofer & Conway*, 2017 ABCA 228 (Alta. C.A.) at paras. 72-73, (2017), 53 Alta. L.R. (6th) 44 (Alta. C.A.); *Pillar Resource Services Inc. v. PrimeWest Energy Inc.*, 2017 ABCA 19 (Alta. C.A.) at paras. 8-9, 153, (2017), 46 Alta. L.R. (6th) 224 (Alta. C.A.). Further, there is no exception that "justice can only be done by the complete indemnification of costs": *Luft v. Taylor, Zinkhofer & Conway* at para. 74. Any such exception invoking "justice" in the abstract (inappropriately relied on in the costs reasons at paras. 220, 237(b)) is conclusory and would overtake the rule.

180 The costs reasons are summarized *supra*, paras. 40-55. The case management judge concluded that, in appropriate cases, a trustee in bankruptcy could be personally liable for costs. In this litigation the Trustee in Bankruptcy was the "real promoter" of the litigation, and for that and other reasons he should be personally liable for costs. The Trustee in Bankruptcy had not proven that the litigation was authorized by the inspectors. Trustees were officers of the court, and owed duties to potential defendants. The Trustee in Bankruptcy had commenced this action without a proper investigation, and without giving the defendants an opportunity to respond. The serious allegations against Ms. Rose were particularly egregious. Overall, the Trustee in Bankruptcy "exercised very poor judgment that equates to positive misconduct": costs reasons at para. 227.

181 Costs awards are discretionary and should not be interfered with unless they reflect an error of principle or the award is plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 (S.C.C.) at paras. 24-7, (2003), [2004] 1 S.C.R. 303

(S.C.C.); *M. (N.) v. W. (F.)*, 2004 ABCA 151 (Alta. C.A.) at paras. 6-7, (2004), 33 Alta. L.R. (4th) 17, 348 A.R. 143 (Alta. C.A.); *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)*, 2007 SCC 2 (S.C.C.) at para. 49, [2007] 1 S.C.R. 38 (S.C.C.); *Walker v. Ritchie*, 2006 SCC 45 (S.C.C.) at para. 17, [2006] 2 S.C.R. 428 (S.C.C.). The costs award under appeal contains such reviewable errors.

182 The costs appeal raises the following specific issues:

(a) Costs in bankruptcy proceedings

(b) Approval of the inspectors

(c) Trustees as officers of the court

(d) The duty to investigate

(e) Allegations against the respondent Ms. Rose

Costs in bankruptcy proceedings

183 The costs reasons discuss the question of costs awards in bankruptcy proceedings generally, and in particular the personal liability of trustees in bankruptcy for costs.

184 First of all, it is helpful to note that there is no "Bankruptcy Court" in Alberta, contrary to common parlance and what is suggested in the reasons: costs reasons at paras. 45, 67, 71. There are only three courts in Alberta: the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta, and the Provincial Court of Alberta. Section 183(1)(d) of the *Bankruptcy and Insolvency Act* provides that bankruptcy jurisdiction in Alberta is vested in the Court of Queen's Bench, but as pointed out in Holden, Morawetz & Sarra, *The 2019 Annotated Bankruptcy and Insolvency Act*, (Toronto: Thomson Reuters, 2019) para. B-13: "Although commonly referred to as the bankruptcy court, this reference is done for convenience only; there is in fact no such tribunal". See also *Eagle River International Ltd., Re*, 2001 SCC 92 (S.C.C.) at para. 20, [2001] 3 S.C.R. 978 (S.C.C.); *Westam Development Ltd., Re* (1967), 61 D.L.R. (2d) 421 (B.C. C.A.) at pp. 423-24, (1967), 59 W.W.R. 65 (B.C. C.A.). The correct reference is to the "superior court exercising bankruptcy jurisdiction".

185 It is true that the Court of Queen's Bench maintains a special "commercial" hearing list that deals with most bankruptcy matters. There is a group of judges that is routinely assigned to hear that list, but that does not constitute them a "bankruptcy court", any more than the existence of special family law lists creates a "family court". Further, the existence of the commercial list does not in any way diminish the mandate of any other judge of the Court of Queen's Bench to deal with bankruptcy matters.

186 The appropriate distinction, therefore, is not between proceedings in the "bankruptcy court" and proceedings in the "Court of Queen's Bench". For costs purposes, the proper distinction is based on the type of work being done. Matters related to what may loosely be called the mechanics of the bankruptcy process, and issues that arise within that process, are dealt with under the *Bankruptcy and Insolvency General Rules*, CRC, c. 368, including its tariff of costs. Section 197(1) of the *Bankruptcy and Insolvency Act* provides:

> 197(1) Subject to this Act and to the General Rules, the costs of and incidental to any proceedings in court under this Act are in the discretion of the court.

This provision, by its specific wording, only applies to proceedings "under this Act", that is proceedings related to the mechanics of the bankruptcy.

187 On the other hand, civil litigation conducted in the Court of Queen's Bench, even by a trustee in bankruptcy, is governed by the Alberta *Rules of Court*, and costs are dealt with under Part 10 and Schedule C of the Alberta *Rules*. While this litigation raises, in part, rights that are created under the *Bankruptcy and Insolvency Act* (specifically, under s. 96), it is primarily an

action by the bankrupt estate against third parties. This litigation and its costs consequences are accordingly governed by the Alberta *Rules of Court*.

188 When a corporation is assigned into bankruptcy, its assets and businesses are taken over by the trustee in bankruptcy. Corporations, including bankrupt corporations, are inanimate legal persons and can only act through human representatives. The trustee in bankruptcy is the personification of the bankrupt corporation. When the trustee commences litigation on behalf of a bankrupt corporation, there is no meaningful distinction to be drawn between the trustee, the estate in bankruptcy, and the bankrupt corporation. It is artificial to suggest that the trustee is the "real promoter" of such litigation, as held in the costs reasons at paras. 35-38. By this standard, the trustee would always be the "real promoter" of estate litigation. The trustee is the person that makes the decision to commence litigation, with the approval of the inspectors, but bankrupt estate litigation is conducted by and on behalf of the bankrupt corporation. In any event, this artificial distinction does not affect the liability of a trustee in bankruptcy for costs.

189 When a trustee in bankruptcy commences litigation on behalf of a bankrupt, the trustee is always initially liable for costs awards payable to third parties: *Sigurdson v. Fidelity Insurance Co. of Canada* (1980), 110 D.L.R. (3d) 491 (B.C. C.A.) at pp. 495-96, (1980), 20 B.C.L.R. 345 (B.C. C.A.); *Pythe Navis Adjusters Corp. v. Columbus Hotel Co. (1991) Ltd.*, 2014 BCCA 262 (B.C. C.A.) at paras. 34-36, (2014), 61 B.C.L.R. (5th) 346 (B.C. C.A.); *Akagi v. Synergy Group (2000) Inc.*, 2015 ONCA 771 (Ont. C.A.) at paras. 22-23, (2015), 128 O.R. 64 (Ont. C.A.); *Vancouver Trade Mart Inc. (Trustee of) v. Creative Prosperity Capital Corp.* (1998), 7 C.B.R. (4th) 3 (B.C. S.C.) at para. 30. The seminal case is *Arthur Williams & Co., Re*, [1913] 2 K.B. 88 (Eng. C.A.) at pp. 94-95:

> The question in this appeal is one that is so familiar and so well settled with reference to other jurisdictions that I confess I was surprised to learn that it was thought capable of being argued in bankruptcy. If trustees of a settlement, or executors, or administrators of a deceased person, or a receiver, or a liquidator, raise a contest with another person and bring him into court to defend himself in respect of some claim which is set up against him, and the claim fails, the trustees, or executors, or receiver, or official liquidator, are personally liable to pay the costs. It is immaterial that in making the claim they acted *bona fide* in the belief that they were doing that which was for the benefit of the estate which they represented. They are personally liable as between them and the defendant; they are entitled to an indemnity out of the estate which they are representing unless they have been guilty of misconduct. The question of misconduct is not relevant at all in these circumstances as between the plaintiffs and the defendant whom they have brought into Court; it does not matter whether they have acted *bona fide* or not; they brought an action and failed, and they are personally liable to pay costs, but in a proper case they are, as I have said, entitled to an indemnity. (emphasis added)

The issue of "personal liability" for costs of a trustee in bankruptcy properly relates only to the ability of the trustee to be indemnified for its legal expenses by the bankrupt estate, not to the entitlement of third parties to recover their costs.

190 Section 197(3) of the *Bankruptcy and Insolvency Act* provides:

> 197(3) Where an action or proceeding is brought by or against the trustee, or where a trustee is made a party to any action or proceeding on his application or on the application of any other party thereto, he is not personally liable for costs unless the court otherwise directs.

Three things should be noted: (a) this provision only relates to costs arising from "bankruptcy work" not general civil litigation: ***Sigurdson*** at pp. 493-94, (b) the trustee is presumptively entitled to be indemnified from the estate for its expenses relating to "bankruptcy work", in accordance with the priority scheme in s. 196(6), and (c) in the absence of some misconduct the court will not direct that the trustee personally bear the burden of those expenses.

191 These general rules respecting the personal liability of trustees in bankruptcy in ordinary litigation are summarized in Holden, Morawetz & Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed (Toronto: Thomson Reuters, online) at para. I§84:

> Section 197(3) only applies to proceedings in the bankruptcy court. If a trustee in bankruptcy takes proceedings or has proceedings taken against it in the ordinary civil courts, s. 197(3) has no application, and if the trustee is unsuccessful in such proceedings, it will be personally liable for costs. The trustee is, however, entitled to indemnity out of the bankrupt estate unless it has been guilty of some misconduct in bringing the proceedings or has taken them without the permission of the inspectors.

The distinction between the trustee's liability to pay costs, and its entitlement to be reimbursed by the bankrupt estate is not always recognized in the cases.

192 Thus, when a trustee is said to be "personally liable" for costs in ordinary civil litigation, that can, at best, mean that the trustee is not entitled to be indemnified for those expenses from the estate. This, however, is primarily a matter for the creditors and inspectors. A third party litigant, who has been awarded costs but is a stranger to the bankruptcy itself, is generally not interested in whether the trustee is entitled to indemnity from the estate. That is a concern of the trustee, particularly if the estate lacks resources to indemnify the trustee.

193 It follows that much of the discussion in the costs reasons respecting whether the Trustee in Bankruptcy should be personally liable for costs was moot. Ms. Rose, as the putatively successful litigant, was entitled to recover her costs from the Trustee in Bankruptcy. Absent any objection from the inspectors, there was no reason for the case management judge to rule on whether the Trustee in Bankruptcy was entitled to indemnity from the Perpetual/Sequoia estate: see the costs reasons at para. 43.

Approval of the inspectors

194 Section 30(1)(d) of the *Bankruptcy and Insolvency Act* provides that litigation in the name of the estate must be authorized by the inspectors. The case management judge questioned the authority of counsel to commence the action. In response to the inquiry from the case management judge, "Have inspectors given permission for PWC to bring these legal proceedings?", the Trustee in Bankruptcy responded in writing "Yes". Counsel confirmed, in open court, that the proper authorization had been obtained, and offered further evidence "if that's required". In a later proceeding, counsel provided a redacted copy of minutes of a meeting of the inspectors which stated "Proceed as described in Special Counsel's memos". From time to time, some of the inspectors of the Perpetual/Sequoia bankruptcy were present in court.

195 Despite these assurances, the case management judge held in the Costs Reasons:

> 64. In this case, despite being asked for evidence that the inspectors had approved the Action, the Trustee never produced any evidence of inspector approval of the lawsuit against Ms. Rose.

In the absence of any indication at all that the action had not properly been authorized, the case management judge's insistence on further "evidence" was unreasonable. There was no air of reality to the suggestion that litigation of this magnitude and notoriety had been advanced as far as it had without the inspectors being aware of it.

196 It is trite law that the submissions of counsel are not evidence, but that does not mean that they can never be relied on. Representations by counsel relating to the conduct of the litigation can be "accepted by the court in the solemn fashion they are provided": *Peddle v. Alberta Treasury Branches*, 2004 ABQB 608 (Alta. Q.B.) at para. 43. If counsel, as an officer of the court, states in open court that he or she has authority to pursue the litigation on behalf of the client, that representation can be relied on in the absence of actual evidence to the contrary: *R. v. Harrison* (1976), [1977] 1 S.C.R. 238 (S.C.C.) at p. 246; *Selangor United Rubber Estates Ltd. v. Cradock (No. 4)*, [1969] 1 W.L.R. 1773 (Eng. Ch. Div.) at pp. 1781-82, [1969] 3 All E.R. 965 (Eng. Ch. Div.) at p. 975.

197 The appellant Ms. Rose argued that from the heavily redacted material eventually provided it was not possible to tell if the action commenced was the one actually authorized, and if the authorization included suing Ms. Rose. Whether counsel for the Trustee in Bankruptcy is acting beyond his authority is primarily a concern of the inspectors. The defendants have no legitimate interest in inquiring into the decision making process behind the litigation, or the details of advice received from

special counsel. Solicitor and client privilege precludes the defendants or the court from dissecting the trustee's litigation strategy and instructions to counsel. If a defendant has some actual evidence of a want of authority, that is one thing, but a defendant is not entitled to speculate or go on a fishing expedition.

198 In summary, it reflected an error of principle for the case management judge to place any weight on the alleged deficiency in formal proof that the litigation had been properly authorized.

Trustees in bankruptcy as officers of the court

199 One foundation of the costs award was inferences that the case management judge drew from the Trustee in Bankruptcy's status as an "officer of the court". Partly as a result of this status, the case management judge criticized the Trustee in Bankruptcy on a number of fronts, such as the very commencement of what the case management judge though was doomed litigation, the failure to properly investigate the claim, the failure to give notice to the defendants before suing, and the content of the pleadings and affidavits. The case management judge recognized that the duties he expounded had not previously been recognized, but reasoned "I have an ongoing obligation to expand the common law, where appropriate": costs reasons at para. 112. The Trustee in Bankruptcy points to the unfairness of identifying new standards of conduct, *ex post facto* and without allowing submissions from counsel, and then criticizing him for not having met them.

200 It is true that trustees in bankruptcy are officers of the court, and are held to a high standard. In some instances, a trustee in bankruptcy may not even be able to rely on strict legal rights. For example, in *James, Ex parte* (1874), L.R. 9 Ch. 609 (Eng. & Wales C.A. (Civil)) a trustee in bankruptcy was directed to repay money that had been paid under a mistake of law, even though the trustee had an undoubted legal right to retain the money. In *Lehman Brothers Australia Ltd. v. MacNamara*, [2020] EWCA Civ 321 (Eng. & Wales C.A. (Civil)) at para. 95, [2020] 3 W.L.R. 147 (Eng. & Wales C.A. (Civil)) the administrators were directed to correct an admitted mutual error in the amount of a claim, even though the claims were supposed to be final, and there was no legal obligation to amend.

201 Some of the expectations of trustees in bankruptcy are set out in the *Code of Ethics for Trustees*, found in sec. 34-52 of the *Bankruptcy and Insolvency General Rules*:

> 34 Every trustee shall maintain the high standards of ethics that are central to the maintenance of public trust and confidence in the administration of the Act . . .
>
> 36 Trustees shall perform their duties in a timely manner and carry out their functions with competence, honesty, integrity and due care . . .
>
> 39 Trustees shall be honest and impartial and shall provide to interested parties full and accurate information as required by the Act . . .

This *Code of Ethics* sets a high standard, but the case management judge's interpretation of the scope of these duties, and whether in fact they were violated here, reflect reviewable error.

202 Trustees in bankruptcy, as officers of the court, obviously owe some duties to the court and the legal system. The trustee's primary duty, however, is to the creditors of the estate, through the inspectors. The obligation of a trustee in bankruptcy to be "honest and impartial" does not displace this primary duty, or imply some duty to potential defendants in estate litigation. The trustee would be placed in a conflict of interest if it was also under legal duties to third parties, particularly those that are adverse in interest to the bankrupt estate. Lawyers, for example, are also "officers of the court" who are held to high standards, yet they have no duty to third parties to investigate, consult, give notice, etc., of the type suggested by the case management judge.

203 Further, the obligation of a trustee in bankruptcy to act "impartially" does not mean that a trustee cannot take a proper adversarial role in litigation. As noted in *Doyle Salewski Inc. v. Scott*, 2019 ONSC 5108 (Ont. S.C.J.) [hereinafter Golden Oaks] at para. 48:

> 48 The defendants' argument implies that a trustee in bankruptcy must refrain from any advocacy for the position it is taking in litigation. In my view, this is unrealistic and even antithetical to the role of the trustee. A trustee must approach an investigation without any unfounded bias and keep an open mind about what it will find. Having investigated, however, a trustee abdicates its responsibilities under the *BIA* if it fails to apply its expertise and experience to assess the information received and act on that assessment. Once a trustee has reasonably concluded that there are assets belonging to the estate in third party hands and that there are grounds to recover them, and it obtains instructions to begin legal proceedings from inspectors, its role necessarily involves some advocacy.

In this case the Trustee in Bankruptcy had investigated the circumstances, and had concluded that Perpetual/Sequoia had claims against various defendants. The Trustee in Bankruptcy was not only entitled, but was obliged to pursue those claims. This is not inconsistent with the role of a trustee in bankruptcy as an officer of the court.

204 Specifically, a trustee in bankruptcy is not an administrative tribunal: *Asian Concepts Franchising Corp., Re*, 2016 BCSC 1581 (B.C. S.C.) at paras. 69-70, (2016), 40 C.B.R. (6th) 73 (B.C. S.C.); *Drummie, Re*, 2004 NBQB 35 (N.B. Q.B.) at para. 19, (2004), 49 C.B.R. (4th) 90 (N.B. Q.B.). The duty of good faith imposed on officers of the court precludes taking advantage of the mistakes of others, but it does not come anywhere near to requiring that trustees in bankruptcy conduct investigations in a manner consistent with "the principles of procedural fairness". Those principles of administrative law are not transferable to civil commercial matters; there is no free standing right to procedural fairness: *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 (S.C.C.) at para. 25, [2018] 1 S.C.R. 750 (S.C.C.). The decision in *Cormie v. Principal Group Ltd. (Trustee of)* (1989), 66 Alta. L.R. (2d) 340, 99 A.R. 1 (Alta. Q.B.) turns on its particular facts, and disclaims any "broader or more wide-ranging duty of fairness". The generic statement in *Kaiser, Re*, 2011 ONSC 4877 (Ont. S.C.J. [Commercial List]) at para. 20, (2011), 84 C.B.R. (5th) 29 (Ont. S.C.J. [Commercial List]) that a trustee in bankruptcy is an officer of the court and "must act fairly" is merely conclusory and, in its context, unobjectionable.

205 A trustee's duty to provide "full and accurate information as *required by the Act*" obviously relates to information about the bankruptcy process. This duty cannot extend to information in the hands of third parties that the trustee does not have. Here, in any event, the core information about the Asset Transaction and the Aggregate Transaction was known to all. A trustee is under no obligation to reveal his litigation strategy, potential defendants, or the privileged advice he has received from counsel.

206 Particular criticisms of the Trustee in Bankruptcy call for a separate analysis: the alleged failure to properly investigate, and the nature of the allegations made against the respondent Ms. Rose.

The failure to investigate

207 The case management judge criticized the Trustee in Bankruptcy for failing to conduct a proper investigation before issuing the statement of claim. As just discussed, there is no general basis for placing such a free standing obligation on trustees in bankruptcy, and it is not usually a proper consideration when awarding costs.

208 As a threshold consideration, it should be noted that the decision to sue was not that of the Trustee in Bankruptcy alone. The action was approved by the inspectors, based on the advice in "Special Counsel's memos". The Trustee in Bankruptcy was not the only one who thought litigation was warranted, based on the investigation actually done. Neither the case management judge nor the respondents were privy to the nature of counsel's privileged advice, or the discussions by the inspectors.

209 The general rule is that the unsuccessful litigant pays costs to the successful litigant. As long as the unsuccessful litigant acted in good faith it does not particularly matter why it lost. Perhaps it failed to investigate, or its witnesses were unreliable, or it could not meet the burden of proof, or it misjudged the law or its legal rights. Whatever the reason, losing should not be double counted. Because the unsuccessful litigant must pay costs, any "failure to properly investigate" has already been taken into account.

210 On this record, there is also no basis to criticize the Trustee in Bankruptcy's investigation, or to accuse him of having "tunnel vision".

211 Following his preliminary investigations, the Trustee in Bankruptcy concluded that the Asset Transaction might be void for being at an undervalue. On May 28, 2018 he wrote to Perpetual Energy Parent and Ms. Rose, indicating that some of the transactions "may be void", and that the Perpetual group might be indebted to Perpetual/Sequoia as a result. He demanded the production of the relevant records, but also suggested a "without prejudice meeting with you at the earliest mutually convenient opportunity to discuss the Transfers". On June 26, 2018 the Trustee in Bankruptcy wrote again, indicating that a further review of the documents since provided confirmed his initial view that the Asset Transaction was void.

212 It is unclear why this course of conduct should be criticized for involving "tunnel vision", or otherwise. The Trustee in Bankruptcy was entitled to form an opinion from his investigations that the transactions were in breach of s. 96 of the *Bankruptcy and Insolvency Act*; the summary disposition reasons accepted that this is a viable claim. Having identified a possible undervalue transaction, there was nothing objectionable about the Trustee in Bankruptcy pursuing it: *Option Industries Inc (Re)*, 2020 ABQB 535 (Alta. Q.B.) at para. 45; *Golden Oaks* at para. 48. In the absence of any evidence to contradict his conclusion, the Trustee in Bankruptcy had no reason to change his opinion. The corporate oppression and director's duty claims were derivative of that conclusion. Absent any other obvious explanation, the Trustee in Bankruptcy had no reason to go looking down any other tunnels.

213 There is no rule that a trustee must conduct any, or any particular type of investigation before suing. The trustee in bankruptcy might obviously seek information from the former directors of the corporation, but that is not invariably necessary. There may be ample information available in the corporate records, or from other sources.

214 With respect to many issues in this appeal, the Trustee in Bankruptcy was entitled to rely on the documentary record. As one example, the case management judge was particularly critical of the Trustee in Bankruptcy's failure to make more inquiries about the Resignation & Mutual Release: costs reasons at paras. 203-216. This, however, was an issue that could be analyzed from the documentary evidence. It was known that the Perpetual Energy group and Kailas Capital were dealing at arm's length. The Resignation & Mutual Release was negotiated as part of the Aggregate Transaction. The terms of the Resignation & Mutual Release were known. The timing of the execution of the Resignation & Mutual Release was known, as was the identity of the signatories of that document. The tenure of Ms. Rose as a director of Perpetual/Sequoia was also known, and the alleged effect of the Resignation & Mutual Release on her duties as a director was also known. The Trustee in Bankruptcy's allegation was that, in law, the Resignation & Mutual Release was ineffective and could not be relied on by Ms. Rose. The need for further investigation is not obvious.

215 The case management judge nevertheless criticized the Trustee in Bankruptcy for not questioning the principals of Kailas Capital about the Resignation & Mutual Release, but it is unclear what relevant information they could have provided. Certainly, the Trustee in Bankruptcy was not required to act on their personal legal opinions about the legal effect of the Resignation & Mutual Release; the Trustee in Bankruptcy had his own counsel for that purpose. The case management judge suggested that the Trustee in Bankruptcy should have asked the principals of Kailas Capital: "Did Ms. Rose cause PEI to require you, the 198Co Principals, to execute the Release against your will?": costs reasons at para. 212. As previously noted (*supra*, para. 78), this is a contrived interpretation of the pleadings. No one suggested that Ms. Rose had forced anybody to do anything against their will, and it would have been absurd for the Trustee in Bankruptcy to pose the suggested question to the principals of Kailas Capital.

216 As another example, the case management judge held that, with respect to the proper characterization of Abandonment and Reclamation Obligations, the Trustee in Bankruptcy "drew a legal conclusion without asking Ms. Rose for her position on the matter": reasons at para. 136. The characterization of the Abandonment and Reclamation Obligations was an issue of law, depending heavily on the interpretation of the yet-to-be released *Redwater* decision. The Trustee in Bankruptcy was entitled to take his legal advice from his own counsel, and Ms. Rose's legal opinion on the matter was irrelevant. As the CEO of a public oil and gas company, if asked she likely would have indicated that Perpetual Energy Parent, and the industry generally, regarded them as being real obligations.

217 Likewise, there was no point in asking Ms. Rose her opinion about the legal effectiveness of the Resignation & Mutual Release. There was no point in asking Ms. Rose or the principals of Kailas Capital if the Perpetual Group and Kailas Capital/198Co were at arm's-length; they obviously were, and no one suggested otherwise.

218 The case management judge also criticized the Trustee in Bankruptcy for issuing the statement of claim without waiting for further input from Perpetual Energy Parent and Ms. Rose: see *supra*, paras. 49, 211. To summarize, the Trustee in Bankruptcy had demanded and received certain documents, and on June 26, 2018 he wrote to Ms. Rose, advising of his preliminary conclusion that the Asset Transaction was in breach of s. 96 and contrary to the interests of Perpetual/Sequoia. He asked Ms. Rose "if there was anything specific you want the Trustee to consider" or "any other aspect you consider relevant". Ms. Rose responded that her reply would come in as timely a fashion as possible and it would "likely be next week". Ms. Rose did not meet her expected deadline, but confirmed on July 6 that she was "working diligently to pull together the additional information": costs reasons at paras. 126-27.

219 The Trustee in Bankruptcy never followed up, and never imposed a deadline for Ms. Rose to reply. The statement of claim, which had been approved over two months earlier by the inspectors, was issued on August 2, 2018, causing the case management judge to conclude:

> [132] Based on my review of the June 26, 2018 Trustee Letter, I find that the Trustee: (i) invited further material, but did not specify or request anything particular; (ii) did not set any deadline by which the Perpetual Group was to respond; and (iii) made no reference to a claim against Ms. Rose.

This criticism was unwarranted:

> (i) The Trustee in Bankruptcy did not "request anything particular" because he had what he needed. The invitation of June 26, 2018 was an open-ended one, enabling Ms. Rose to provide anything she thought relevant that had not previously been produced. This letter was the opportunity the Trustee in Bankruptcy was criticized for not providing: an opportunity for Perpetual Energy Parent and Ms. Rose to provide whatever further input they wished.
>
> (ii) The Trustee in Bankruptcy was not obliged to set any deadline on his open invitation, if only because Ms. Rose had set her own deadline. It is curious that the Trustee in Bankruptcy was criticized for not setting a deadline, but no criticism was directed at Ms. Rose for not meeting the one she imposed herself. The one month that passed before the statement of claim was issued was reasonable.
>
> (iii) There was also no obligation to specifically mention a claim against Ms. Rose. The Trustee's letter indicated that the transaction did not appear to be in the best interests of Perpetual/Sequoia. Ms. Rose was the sole director, and she undoubtedly had access to her own advisers on the legal implications. As noted, there was no general duty on the Trustee in Bankruptcy to give advance notice to potential defendants.

In summary, there was no principled basis on which to award enhanced costs because of any perceived failure to investigate prior to issuing the statement of claim. This pre-litigation conduct cannot support an award of enhanced costs.

Allegations against the respondent Ms. Rose

220 The case management judge was particularly critical of the claim against the respondent Ms. Rose. This was partly because of the perception that *Redwater* "nullified" much of the claim, the perceived "failure to investigate", and the failure to follow up discussed in the previous section of these reasons. As noted, the process followed by the Trustee in Bankruptcy did not justify enhanced costs.

221 The case management judge specifically concluded that notice must be given before allegations of breach of duty are made against a director of a public corporation. This was because "serious allegations of wrongful conduct, eventually became publicly available". Given the "magnitude and potentially harmful impact on Ms. Rose's reputation" she should have been given advance notice of the allegations and an opportunity to respond: costs reasons at paras. 195-96. He concluded:

> 201 Given the nature of the allegations made by the Trustee (which included: (i) alleged failure to exercise business judgment; (ii) alleged oppression; (iii) an allegation of being unfairly prejudicial; and (iv) an allegation of unfairly disregarding the interests of the creditors of the corporation), and the magnitude of the claim against Ms. Rose (which was in the range of $220 million), I find the conduct of the Trustee was egregious. The fact that this tactic was pursued by an officer of the Court is even more concerning.

On this record, there was nothing "egregious" about the Trustee's conduct, and it was inaccurate to suggest it was a "tactic". As previously discussed, while it may be prudent to do so, there was no "duty of fairness" to investigate, nor a duty to give advance notice that would justify these criticisms.

222 The allegations against Ms. Rose were facially justified. As outlined previously in these reasons (*supra*, paras. 153-59), the Trustee in Bankruptcy had good reason to plead that Ms. Rose was in breach of her duties as a director. Ms. Rose essentially admitted she had abdicated her responsibility as the sole director of Perpetual/Sequoia, then inconsistently argued that she had exercised her "business judgment". *Redwater* did not "nullify" this claim. The size of the claim was what it was; this was not a "tactic".

223 The case management judge criticized the wording of the pleadings: "unfairly prejudicial", "disregarding the interests", etc. The Trustee in Bankruptcy cannot be faulted for alleging breach of director's duties, and consequential oppression, using the very terminology provided in the *Business Corporations Act*. Any other form of pleading might well be criticized. Pleadings are supposed to outline the case, to avoid surprise. Further, it is doubtful that these pleadings carry the sense of moral opprobrium attributed to them by the case management judge. Directors of publicly traded companies realize that they owe duties to the corporation, and they realize what those duties are. Others involved with pubic companies would understand the nature of the allegations.

224 It is worth noting that these pleadings were no more hard-hitting than the allegations in the statement of defence that the claim was "abusive", and was "frivolous, irrelevant, and improper":

> 63. This action is an abusive attempt by Sequoia's trustee to indirectly pursue the agenda of the AER and energy companies that make significant contributions to the orphan well fund, by suing the Perpetual Defendants in relation to a Transaction that fully complied with the Regulatory Regime and the law. That agenda should not be pursued through an abusive lawsuit.

All of the pleadings in this litigation, while sometimes blunt, fairly engaged the underlying issues. Some of the factums filed in these appeals also included extravagant language.

225 In addition, the case management judge returned repeatedly to his interpretation of the pleadings as alleging that Ms. Rose had "forced" the principals of Kailas Capital to enter into parts of the transaction against their will: costs reasons at paras. 203, 214, 216. Again, the pleadings could not reasonably be read as alleging duress in any form. That implausible reading of the pleadings did not justify enhanced costs.

Summary of the Costs Appeal

226 As noted, costs awards are discretionary and should not be interfered with unless they reflect an error of principle or the award is plainly wrong. On this record, the award to 85% of solicitor and client costs was not justified. The claim against Ms. Rose was arguable: *Redwater* did not "nullify" this claim. The case management judge overstated the implications of a trustee being an officer of the court. A trustee does not have to meet administrative law requirements of fairness. There is no independent duty to investigate owed to third parties. There was no litigation misconduct that would justify enhanced costs.

Conclusion

227 In conclusion, appeal 1901-0255AC is allowed. The corporate oppression and public policy pleadings are restored. The Trustee in Bankruptcy is granted complainant status to pursue the corporate oppression claim if it so elects. The alternative *BIA* claim, and the interpretation, scope and legal effect of the Resignation & Mutual Release are returned to the trial court. The

Trustee in Bankruptcy is granted leave to amend any portions of the statement of claim that would benefit from clarification, with any dispute about amendments to be resolved by the case management judge.

228 Appeal 1901-0262AC is dismissed.

229 Appeal 2001-0174AC is allowed. The awards of costs for the dismissal application and the application to set costs are set aside and referred back to the case management judge. The words "in its personal capacity" in paragraph 3 of the costs order were inappropriate.

Appeals allowed; cross-appeal dismissed.

Footnotes

1 References to paragraph numbers in the costs reasons are to the Canlii version.

TAB 14

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
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 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.

Bank Act, R.S.C. 1985, c. B-1.

Bankruptcy Act, R.S.C. 1985, c. B-3 —

s. 2 "creditor"

s. 121(1)

Business Corporations Act, S.A. 1981, c. B-15 —

s. 92

s. 93

s. 94

s. 95

Energy Resources Conservation Act, R.S.A. 1980, c. E-1 —

s. 2

Limitation of Civil Rights Act, R.S.S. 1978, c. L-16.

Oil and Gas Conservation Act, R.S.A. 1980, c. O-5 —

s. 4(b) [am. 1983, c. O-5.5, s. 30]

s. 4(f) [am. 1983, c. O-5.5, s. 30]

s. 7

s. 9

ss. 11-20

s. 11(1)(b)

s. 92(1)

s. 92(2) [re-en. 1988, c. 37, s. 12]

s. 95

Workers' Compensation Act, The, S.A. 1973, c. 87.

Regulations considered:

Oil and Gas Conservation Act, R.S.A. 1980, c. O-5 —

Oil and Gas Regulations,

Alta. Reg. 151/71,

s. 3.030(3)

Words and phrases considered:

ABANDONMENT

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

CREDITOR

. . . a public officer ordering a citizen to obey the general law [does not thereby become] a creditor [as meant in s. 2 of the *Bankruptcy Act*, R.S.C. 1985, c. B-3] for any amount the citizen may ultimately be required to spend in complying.

Appeal from decision of MacPherson J., (1989), 80 C.B.R. (N.S.) 84, 75 Alta. L.R. (2d) 185 (Q.B.), additional reasons at (April 27, 1990), Doc. Calgary 8701-08925 (Alta. Q.B.), ordering receiver-manager not to comply with order of Energy Resources Conservation Board.

The judgment of the court was delivered by *Laycraft C.J.A.*:

1 The issue on this appeal [from 80 C.B.R. (N.S.) 84, 75 Alta. L.R. (2d) 185 additional reasons at (April 27, 1990), Doc. Calgary 8701-08925 (Alta. Q.B.)] is whether the *Bankruptcy Act*, R.S.C. 1985, c. B-3, prevents the court-appointed receiver-manager of an insolvent and bankrupt oil company from complying with an order of the Energy Resources Conservation Board of the province of Alberta. The order required the receiver-manager, in the interests of environmental safety, to carry out proper abandonment procedures on seven suspended oil wells. In Court of Queen's Bench, Mr. Justice MacPherson held [at p. 191 Alta. L.R.] that the order requiring "the abandonment and the securing of potentially dangerous well sites is at the expense of the secured creditors' entitlement" under the *Bankruptcy Act* and is "beyond the province's constitutional powers." He directed the receiver-manager not to comply with the order. For the reasons which follow, I respectfully disagree with that conclusion and would allow the appeal by the board.

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

I Facts

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

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

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

5 On August 7, 1987, a receiving order, effective retroactively to July 7, 1987, placed Northern Badger in bankruptcy. Collins Barrow Limited was appointed trustee in bankruptcy.

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

> requiring an undertaking that the wells will continue to be operated in adherence with the regulations and conditions of the well licences. Also it is essential that the licensee be capable of responding to any problems which may occur and properly abandoning the well once production is complete.

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

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

[Emphasis added.]

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

9 During the interval between these two letters, the receiver had attempted to sell the Northern Badger properties to various prospective purchasers, including Senex Corporation. On November 13 Senex made an offer to purchase the remaining Northern Badger assets held by the receiver for $1,850,000 plus a carried interest of 17.5 per cent on certain undeveloped properties held by Northern Badger. Under this offer Senex would become the licensee of the remaining wells. However, the agreement had a clause which provided:

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

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

11 Prior to the closing, by an agreement dated on the same day, Senex exercised its rights under the "back out" clause and passed seven wells back to the receiver. This amending agreement did not vary the purchase price of the remaining assets. All the wells passed back must now be abandoned; two of them require minor expenditures, but the other five will require expenditures in the range of $40,000 each.

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

13 On January 27, 1988, the receiver advised the board that:

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

[Emphasis added.]

14 After a six-day trial in May 1988 Panamericana obtained judgment against Northern Badger for $1,304,112, and also obtained a declaration that it had priority over all other creditors of Northern Badger for the payment of sums due under the

debenture. Thereupon, on May 29, 1988, the receiver applied to Court of Queen's Bench for an order approving its administration of the receiving order and for a discharge from its responsibilities. The affidavit filed in support detailed the payment or settlement of all claims for which provision had been made by the five funds established in December 1987. It disclosed that, after all assets were distributed to Panamericana, there would still be a substantial deficiency in the payment of the debenture debt.

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

> The Receiver has determined that certain assets of Northern Badger were not marketable and were excluded by Senex Corporation in its purchase of the assets of Northern Badger, which assets shall remain with the estate of Northern Badger, subject to any further direction of this Honourable Court.

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

17 The board's reaction to this information was, apparently, immediate. On June 1, 1989, an order in council of the Lieutenant Governor in Council purporting to be issued under s. 7 of the *Oil and Gas Conservation Act*, R.S.A. 1980, c. O-5, approved the issuance by the board of an order respecting the abandonment of those five wells and the two others.

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

19 While the board's motion was pending an effort was made to obtain contribution toward the cost of abandonment from other working interest owners. Upon the application of the board, on November 23, 1989, Mr. Justice MacPherson directed the receiver to take steps to collect from other working interest owners of the seven wells their proportionate share of abandonment costs totalling $202,500. The proportion of these costs attributable to the percentage interest of Northern Badger in the wells was estimated at $17,330. Nothing in the record before the court discloses whether, or the extent to which, this effort succeeded.

20 On this appeal, the respondents objected that a portion of the evidence presented on behalf of the board was inadmissible. They strongly urged that there was, in the result, no evidence that failure to abandon the wells presented any danger. The evidence in question was the affidavit of Mr. G.J. DeSorcy, Chairman of the Energy Resources Conservation Board. In that affidavit Mr. DeSorcy stated that he is a professional engineer and chairman of the board. He testified, on information and belief, as to a considerable amount of technical information about the five wells, the formations encountered, and the present condition of them. He expressed opinions as to the danger of cross-flows of liquids and gases, and as to hazards to the environment and to "public health and safety." The information was, apparently, derived from the records of the wells filed with the board; the expressions of opinion were his own.

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

II The reasons for judgment

22 The learned chambers judge delivered extensive reasons for judgment. He held that the board order sanctioned by the order in council was within the board's jurisdiction under the general powers contained in ss. 4(*b*), 4(*f*) and 7 of the *Oil and Gas Conservation Act*. He held [at p. 189 Alta. L.R.], however, that the board:

> is a creditor seeking to have its claim to have the seven wells abandoned preferred to the claim of the secured creditor, and to the scheme of distribution set forth in s. 136 of the Bankruptcy Act.

He cited *Quebec (Deputy Minister of Revenue) v. Rainville*, [1980] 1 S.C.R. 35, *(*sub nom. *Re Bourgault; Deputy Minister of Revenue of Quebec v. Rainville)* 33 C.B.R. (N.S.) 301, 105 D.L.R. (3d) 270, *(*sub nom. *Bourgault's Estate v. Deputy Minister of Revenue of Quebec)* 30 N.R. 24, and *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, 38 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, and said [at pp. 190-192 Alta. L.R.]:

> The E.R.C.B. orders in council in form relate to a constitutionally valid objective, that is, abandonment of gas wells. The genuine purpose is to do something beyond the province's constitutional powers. It is to take money directed, by the Bankruptcy Act, to be paid to a secured creditor, and apply it to another purpose.
>
> . . . . .
>
> Subject to the rights of secured creditors, everything in the nature of property of the bankrupt vests in the trustee in bankruptcy. The E.R.C.B. has the powers under the Oil and Gas Conservation Act to abandon the wells and collect the costs from the appropriate parties.
>
> This claim, whether done directly or ordered to be done, is a claim provable in bankruptcy.
>
> Section 121 of the Bankruptcy Act: 'All debts and liabilities, present or future, to which the bankrupt is subject', is surely wide enough to cover this liability.
>
> The proper approach to solving problems such as are raised in the case at bar is prescribed by the Supreme Court of Canada in *F.B.D.B. v. Que. (Comm. de la santé & de la sécurité du travail)*, [1988] 1 S.C.R. 1061, 68 C.B.R. (N.S.) 209 at 217 and following, 50 D.L.R. (4th) 577, 14 Q.A.C. 140, 84 N.R. 308, a similar case of contest between preserving the secured creditors' rights as opposed to saving the public purse.
>
> The Bankruptcy Act has not been amended to deal with modern social problems of abandonment of contaminated property. Here the abandonment and the securing of potentially dangerous well sites is at the expense of the secured creditors' entitlement if the E.R.C.B. were to succeed.
>
> While I am aware that the Supreme Court of the United States of America split five to four in deciding a similar issue in the matter of *Midlantic Nat. Bank v. New Jersey Dept. of Env. Protection; Quanta Resources Corp. v. New York (City)*, 474 U.S. 494, 88 L. Ed. 2d 859, 106 S. Ct. 755 (1986), I am of the view that the law of Canada accords with the dissenting view of the Chief Justice of the United States when he said that it was for the legislature to change the law, not the courts, when it came to impairing otherwise valid security for societal purposes. One should see also *Lloyd's Bank Can. v. Int. Warranty Co.*, a decision of the Alberta Court of Appeal (1989) [now reported 68 Alta. L.R. (2d) 356, [1990] 1 W.W.R. 749, 76 C.B.R. (N.S.) 54, 60 D.L.R. (4th) 272, 97 A.R. 113, leave to appeal to S.C.C. refused 70 Alta. L.R. (2d) liii, 102 A.R. 240, 104 N.R. 320] as to the need for clear legislative statements before destroying property rights.
>
> Accordingly, I must instruct the receiver-manager that he must not proceed to abandon the several wells directed to be abandoned by the order of the E.R.C.B. out of the moneys held for the secured creditors.

III The Regulatory Regime for Alberta Oil and Gas Wells

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

> 4 The purposes of this Act are
>
> . . . . .
>
> (*b*) to secure the observance of safe and efficient practices in the locating, spacing, drilling, equipping, completing, reworking, testing, operating and abandonment of wells and in operations for oil and gas;
>
> . . . . .
>
> (*f*) to control pollution above, at or below the surface in the drilling of wells and in operations for the production of oil and gas and in other operations over which the Board has jurisdiction.

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

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

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

> 11(1) ...
>
> (*b*) he is the licensee or is acting under the instructions of the licensee.

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

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

28 The *Energy Resources Conservation Act*, which establishes the board, has a similar statement of its purposes in s. 2. Among these purposes are:

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

29 It is evident that the regulatory regime contained in these statutes and regulations contemplates that all wells drilled for oil or gas will one day be abandoned. That is so whether the well is unsuccessful or whether it produces large quantities of

oil or gas. At some point, when further production is not possible or the cost of production of remaining quantities exceeds the revenue which could be obtained from it, the process of abandonment is required of the well licensee. In those situations where there is no solvent entity able to carry out the abandonment duties the wells become, in the descriptive vernacular of the oil industry, "orphan wells." Thus the direct issue in this litigation, in my opinion, is whether the *Bankruptcy Act* requires that the assets in the estate of 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.

321, 60 N.R. 81; and *British Columbia v. Henfrey Samson Belair Ltd.*, supra. But in all these cases some actual impost had been levied against the citizen and a sum of money was due and owing to the specific public authority involved. In *Rainville*, Quebec had registered a "privilege" for $5,474.08 for sales tax which the company had failed to remit; in *Deloitte, Haskins & Sells*, the sum in dispute was a levy of $3,646.68 made under *The Workers' Compensation Act*, S.A. 1973, c. 87; in *Henfrey Samson Belair Ltd.* the company had collected, and failed to remit sales tax of $58,763.23. Thus in each case a specific sum was due to the Crown, or a Crown agency, as a debt. None of the cases is authority for the proposition that a public officer ordering a citizen to obey the general law thereby becomes a creditor for any amount the citizen may ultimately be required to spend in complying.

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

V The Duties of the Receiver

37 Vennard Johannesen Insolvency Inc. assumed its duties as receiver in this case as an officer of the court. The nature of its duties has been determined by a long line of cases, now reinforced by the provisions of the *Business Corporations Act*, S.A. 1981, c. B-15. Sections 92 and 93 require the receiver to act in accordance with the directions of the court and of the instrument under which the appointment was made. Sections 94 and 95 provide:

> 94 A receiver or receiver-manager of a corporation appointed under an instrument shall
>
> (*a*) act honestly and in good faith, and
>
> (*b*) deal with any property of the corporation in his possession or control in a commercially reasonable manner.
>
> 95 On an application by a receiver or receiver-manager, whether appointed by the Court or under an instrument, or on an application by any interested person, the Court may make any order it thinks fit including, without limiting the generality of the foregoing, any or all of the following:
>
> (*a*) an order appointing, replacing or discharging a receiver or receiver-manager and approving his accounts;
>
> (*b*) an order determining the notice to be given to any person or dispensing with notice to any person;
>
> (*c*) an order fixing the remuneration of the receiver or receiver-manager;
>
> (*d*) an order
>
> > (i) requiring the receiver or receiver-manager, or a person by or on behalf of whom he is appointed, to make good any default in connection with the receiver's or receiver-manager's custody or management of the property and business of the corporation;
> >
> > (ii) relieving any of those persons from any default on any terms the Court thinks fit;
> >
> > (iii) confirming any act of the receiver or receiver-manager;
>
> (*d*.1) an order that the receiver or receiver-manager make available to the applicant any information from the accounts of his administration that the Court specifies;
>
> (*e*) an order giving directions on any matter relating to the duties of the receiver or receiver-manager.

38 A receiver appointed by the court must act fairly and honestly as a fiduciary on behalf of all parties with an interest in the debtor's property and undertaking. The receiver is not the agent of the debtor or the creditor or of any other party, but has the duty of care, supervision and control which a reasonable person would exercise in the circumstances. The receiver may

be liable for failure to exercise an appropriate standard of care. These points have been made in many cases starting in 1905 with *Plisson v. Duncan* (1905), 36 S.C.R. 647. The decision of Viscount Haldane in *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160, 9 D.L.R. 476 (P.C.), which has been fre quently quoted, emphasizes the independence of the receiver from those who procured the appointment.

39 It is also clear that the receiver takes full responsibility for the management, operation and care of the debtor's assets, but does not take legal title to them. That point has been made in a number of decisions including that of Lamer J. (as he then was) speaking for the court in *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. At p. 315 [N.R.] he said:

> [T]he immoveable in the case at bar is property of the bankrupt within the meaning of the *Bankruptcy Act*. Even if the trustee takes possession of the immoveable before the bankruptcy, the bankrupt remains owner of his property. The trustee who has seized an encumbered immoveable cannot claim to have a right of ownership over that property: he has only the rights of a creditor under a pledge or hypothec. This Court has ruled this way twice in *Laliberté v. Larue*, [1931] S.C.R. 7 and *Trust général du Canada v. Roland Chalifoux Ltée*, [1962] S.C.R. 456.

40 A further factor affecting the obligation of a court-appointed receiver is the receiver's status as an officer of the court; the standard required because of that status is one of meticulous correctness. In *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.), Stratton J. (as he then was) said that the receiver's obligations "reach further than merely acting honestly." He quoted with approval the statement of Wilson J. in *Fotti v. 777 Management Inc.*, [1981] 5 W.W.R. 48, 2 P.P.S.A.C. 32, 9 Man. R. (2d) 142 (Q.B.), at p. 54 [W.W.R.]:

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

41 The same concern for proper conduct by the court's appointed officer may be seen in the judgment of the Saskatchewan Court of Appeal in *Canadian Commercial Bank v. Simmons Drilling Ltd.* (1989), 76 C.B.R. (N.S.) 241, 35 C.L.R. 126, 62 D.L.R. (4th) 243, 78 Sask. R. 87. In that case the receiver undertook a lengthy review of the debtor's records, and discovered that some subcontractors, who had not registered liens in time, were unpaid. In some cases, the time for filing liens had expired after the receiver had been appointed. The court affirmed the duty of a receiver to ascertain his obligations within a reasonable time and noted that the receiver's actions in the discharge of those obligations are the actions of the court which appointed him. It held that, whether by intention or by default, an officer of the court cannot be permitted to change the relative rights of those for whom he is acting. Sherstobitoff J.A. said at p. 249 [C.B.R.]:

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

> *of the court*. The receiver's action is the action of the court and the court will not permit or approve any action on the part of its officer which has the effect of changing the rights of competing creditors, whether deliberately or by default.

[Emphasis added.]

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

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

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

VI Conclusion

45 In my opinion the board had the power, when authorized by the Lieutenant Governor in Council, to order the abandonment of the wells by some person. The order was clearly within the general regulatory scheme, and within the expressed purposes, of both of the statutes regulating the oil and gas industry. Indeed, the contrary was not argued. What was contended is that the board should have directed its order to Northern Badger or to the trustee in bankruptcy rather than to the receiver. What was further contended is that the receiver or trustee in bankruptcy is unable to obey the general law enacted by the provincial legislature to govern oil wells because to do so would subvert the scheme Parliament has devised for distribution of assets in a bankruptcy.

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

47 In *Ohio v. Kovacs*, 469 U.S. 274, 83 L. Ed. 2d 649, 105 S. Ct. 705 (1985), a state obtained an injunction ordering an individual to clean up a hazardous site, and later a receiver was appointed to seize property of the debtor and perform the duty. The individual filed for bankruptcy and the issue was whether his subsequent discharge from bankruptcy cleared the obligation. It was held in the Sixth Circuit Court of Appeals that the claim was essentially a monetary "liability on a claim" under the bankruptcy statute, and that the debtor was discharged. The United States Supreme Court affirmed.

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

49 In *Midlantic National Bank v. New Jersey Department of Environmental Protection; Quanta Resources Corp. v. New York (City)*, 474 U.S. 494, 88 L. Ed. 2d 859, 106 S. Ct. 755 (1986), a corporation filed for bankruptcy after it was discovered to have

stored oil contaminated with a carcinogen at a site in New Jersey and another in New York. The trustee proposed to abandon the sites on the ground that they were of "inconsequential value" to the estate. In New Jersey, state environmental officials ordered the site cleaned up. A majority of the United States Supreme Court held that a bankruptcy trustee may not abandon property in contravention of state law. The minority would have held that the abandonment might be barred in emergency conditions, which did not yet exist in the case.

50 A similar problem arose again after both the above cases had been decided in *United States v. Whizco Inc.*, 841 F. 2d 147 (C.A. 6th Circ., 1988). The United States sought an injunction to force obedience to a statutory obligation to abandon a worked out coal mine. The Sixth Circuit Court of Appeals held, following the *Kovacs* case, that the operator's discharge under the *Bankruptcy Act* discharged the operator's liability to the extent that it would require the expenditure of money.

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

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

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

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

53 The Court of Appeal affirmed the judgment of Cory J. ((1981), 39 C.B.R. (N.S.) 152). The endorsement on the record was as follows:

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

54 As in *Canada Trust Co. v. Bulora Corp.*, supra, it is urged in this case that Northern Badger is the licensee of the wells; the receiver has never had legal title to them and is not the licensee. Therefore, it is said, the abandonment order should be directed to Northern Badger and not to the receiver. In my opinion, that contention is not valid.

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

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

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

58 Conflict between federal and provincial legislation is, of course, a classic Canadian problem. A number of cases have considered the situation where either a federal or provincial law, validly enacted within the constitutional power reserved to the enacting body, also touches upon or affects a heading of power reserved to the other level of government. These cases have been extensively reviewed and commented upon in the recent decision of the Supreme Court of Canada in *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, [1990] 2 W.W.R. 193, 46 B.L.R. 161, 9 P.P.S.A.C. 177, 65 D.L.R. (4th) 361, 82 Sask. R. 120, 104 N.R. 110.

59 Provincial legislation has often been upheld despite incidental effects on a subject under the federal power. Where there is direct confrontation (as where one statute says "yes" and the other says "no") — as Dickson J. (as he then was) expressed it in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 18 B.L.R. 138, 138 D.L.R. (3d) 1, 44 N.R. 181, the doctrine of paramountcy may force a conclusion of invalidity of the provincial legislation.

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

61 Similarly, in *Royal Bank v. Nova Scotia (Workmen's Compensation Board)*, [1936] S.C.R. 560, [1936] 4 D.L.R. 9, the Supreme Court of Canada held valid a levy for worker's compensation which adversely affected security granted under the *Bank Act* [R.S.C. 1927, c. 12]. La Forest J., giving the judgment of the court in *Bank of Montreal v. Hall*, supra, quoted the judgment of Davis J. in the Nova Scotia case (at pp. 568-69 [S.C.R.]) as follows (at p. 148 [S.C.R.]):

> I have reached the conclusion that the goods in question, though owned by the bank subject to all the statutory rights and duties attached to the security, were property in the province of Nova Scotia
>
> > used in or in connection with or produced by the industry with respect to which the employer (was) assessed though not owned by an employer

> and became subject to the lien of the provincial statute the same as the goods of other owners ... *It is a provincial measure of general application for the benefit of workmen employed in industry in the province and is not aimed at the impairment of bank securities though its operations may incidentally in certain cases have that effect*.

[Emphasis added by La Forest J.]

62 In *Bank of Montreal v. Hall* the provincial legislation in conflict with valid federal legislation was forced to give way. The bank sought to enforce security granted to it under the *Bank Act*, R.S.C. 1985, c. B-1, and the issue was whether it was required to follow the procedures and experience delays prescribed by the Saskatchewan *Limitation of Civil Rights Act*, R.S.S. 1978, c. L-16. After a review of the case law and of the two enactments La Forest J. was "led inescapably to the conclusion" that there was an "actual conflict in operation" between them. The provincial legislation was held inoperative in respect of security taken by the bank.

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

64 I respectfully agree with the decision in *Canada Trust Co. v. Bulora Corp.*, supra. In my opinion, the receiver, the manager of the wells with operating control of them, was bound to obey the provincial law which governed them.

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

66 I would allow the appeal and direct the receiver to comply with the board order. The parties may speak to costs.

. . . . .

Memorandum of judgment (supplemental reasons on costs):

67 The issue decided in this memorandum of judgment is the question of costs between the parties, Panamericana de Bienes y Servicios, S.A. and its receiver, Vennard Johannesen Insolvency Inc., the Energy Resources Conservation Board ("E.R.C.B.") and Collins Barrow Limited, Trustee in Bankruptcy of Northern Badger Oil and Gas Limited.

68 In Court of Queen's Bench, Mr. Justice MacPherson held that the receiver was not obliged to comply with an E.R.C.B. order of June 6, 1989 respecting the abandonment of seven oil wells. Subsequently he directed the board to pay to Panamericana costs of $15,000 plus proper disbursements and to the trustee in bankruptcy costs of $1,500 plus proper disbursements. On June 12, 1991 the court issued its judgment in this case allowing the appeal of the E.R.C.B. and directing the receiver to comply with the board's order. Subsequently, the parties made written submissions as to costs.

69 The receiver took possession of the seven wells when it obtained a receiving order of the assets of Northern Badger in May 1987. It had operated the wells for a considerable time and still had control of them at the time of the board's order on June 6, 1989. The issue in this litigation was the contest between Panamericana and its receiver on the one hand, and the board on the other as to whether the receiver was bound to obey the order.

70 The trustee in bankruptcy was brought into the litigation by the direction of Mr. Justice MacPherson presumably to protect the estate in bankruptcy. There was, however, very little if any estate in the bankruptcy which was not already subject to the receiving order obtained by the receiver. Nevertheless, once it was involved in the litigation the trustee in bankruptcy actively supported the position of the receiver that it was not bound to comply with the board order.

71 These positions were essentially unchanged in the argument before this court. The principal issue continued to be the contest between Panamericana and its receiver-manager on the one hand and the board on the other. The trustee in bankruptcy continued to support the position of Panamericana and its receiver. Nevertheless, there was one significant difference. The receiver, while continuing to argue that it was not bound to comply with the board's order, in this court suggested that the obligation to abandon the wells passed to the trustee in bankruptcy. The trustee vehemently resisted this contention.

72 The receiver and Panamericana now contend that each party should bear its own costs urging that the litigation involved a novel issue of great public significance. For its part the trustee in bankruptcy argues that it should be entitled to costs throughout on a solicitor-and-client basis to be paid by the receiver from the moneys remaining under its administration in the receivership. The board seeks its costs from the opposing parties.

73 We are all of the view that the board should be entitled to one set of costs in this litigation. Those costs should be paid by Panamericana and its receiver from the assets under administration. The argument made by the trustee in bankruptcy did not, in our view, add significantly to the burden of the litigation. On the other hand the trustee in bankruptcy chose to take sides in the argument between the receiver and the Board and should not be entitled to the costs of this unsuccessful argument.

74 Accordingly we direct that the Energy Resources Conservation Board will have its costs from Panamericana and the receiver in the lump sum of $15,000 plus proper disbursements for the proceedings in Court of Queen's Bench and its party-and-party costs to be taxed under Column 5 of the *Rules of Court* for the appeal. The trustee in bankruptcy should neither pay nor receive costs of the litigation either in Court of Queen's Bench or in this court.

Appeal allowed.

Order accordingly.

Footnotes

* On November 5, 1991, the court issued an amendment to the judgment, which has been incorporated herein.

** Leave to appeal to S.C.C. refused (January 16, 1992), Doc. 22655, Lamer C.J.C., Sopinka, McLachlin JJ. (S.C.C.).

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