COURT FILE NUMBER	25-2332583 25-2332610 25-2335351
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PROCEEDINGS	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 INC. IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF CORINTHIAN OIL CORP.
RESPONDENT	RIVERSIDE FUELS LTD.
APPLICANT	**ALVAREZ & MARSAL CANADA INC.**, in its capacity as the Court-appointed receiver and manager of **MANITOK ENERGY INC.**
DOCUMENT	**BRIEF OF THE RESPONDENT**
ADDRESS FOR SERVICE AND CONTACT INFORMATION FOR THE PARTY FILING THIS DOCUMENT	Hamilton Baldwin Law 5039 50th Street, Rocky Mtn. House, Alberta T4T 1C1 Attn: Garrett SE Hamilton Tel: 403.845.7301 Fax: 403.845.8063 Email: garrett@hamiltonbaldwin.com File No.: 1008

Clerk's Stamp

BRIEF OF ARGUMENT OF THE APPLICANT, RIVERSIDE FUELS LTD.

HEARING DATE
FRIDAY, OCTOBER 16, 2020

Submitted by:
Garrett SE Hamilton
HAMILTON BALDWIN LAW
5039 50th Street
Rocky Mtn. House, AB T4T 1C1
Tel: 403.845.7301
Fax: 403.845.8063
File No. 1008

COUNSEL FOR THE RESPONDENT, RIVERSIDE FUELS LTD.

And Submitted to:
Howard A. Gorman Q.C and D. Aaron Stephenson
NORTON ROSE FULBRIGHT CANADA LLP
400 3rd Avenue SW, Suite 3700
Calgary, Alberta T2P 4H2
Tel: 403.267.8144
Fax: 403.264.5973
File No. 1001023920

COUNSEL FOR THE APPLICANT, ALVAREZ & MARSAL CANADA INC.

TABLE OF CONTENTS

I. INTRODUCTION

1. This is the Brief of the Respondent, Riverside Fuels Ltd. ("**Riverside**") submitted in response to the Application of Alvarez & Marsal Canada Inc. in its capacity as receiver and manager (the "**Receiver**") of Manitok Energy Inc. ("**Manitok**").

2. Riverside submits that the funds retained by the Receiver in respect of Riverside's lien claims (the "**Lien Claims**") against certain of Manitok's oil and gas assets (the "**Liened Assets**") should be used to satisfy the debt to Riverside on the basis of equity and the unjust enrichment doctrine. The grounds for this claim lie in the fact that Riverside furnished materials and performed services on the Liened Assets (the "**Riverside Work**") which enhanced the particular assets and entitled Riverside to a proprietary interest in the Liened Assets.

3. These Liened Assets are unrelated to the environmental claims and end of life obligations associated with the abandonment and reclamation of the oil and gas assets ("**End of Life Obligations**") for Manitok's remaining claims. To require satisfaction of these environmental liabilities from unrelated assets as a result of Manitok's entry into bankruptcy or otherwise leads to an inequitable result that removes any benefit Riverside is entitled to as a result of improving the land and does not accord with the environmental polluter-pay principle.

II. FACTS

A. Riverside Builders' Liens

4. Prior to 2013, Riverside and Manitok entered into a verbal agreement whereby Riverside Fuels agreed to furnish and deliver fuel and lubricants (the "**Materials**") to Manitok on a periodic basis, for use at specific oil and gas production and operation sites. The Materials were used in facilities located on the Liened Assets to support the extraction of minerals under Manitok's oil and gas licenses.[1]

5. Riverside provided Materials to Manitok periodically from 2013 up to the date of the

[1] Affidavit of Donald A Hamilton dated October 8, 2020, filed ("Hamilton Affidavit") at para 3.

receivership, February 20, 2018, after which Riverside continued to periodically provide Materials to the Liened Assets at the request of the Receiver.[2]

6. On January 12, 2018, Riverside registered builders' liens against the Liened Assets in the total amount of $105,636.06 plus interest and costs. Riverside subsequently filed a Statement of Claim and CLPs against Manitok on July 9, 2018.[3] On February 17, 2019, Riverside revised the amount of its claim downward to $85,563.31 plus interest and costs.[4]

B. Holdbacks and Persist SAVO

7. The Liened Assets were sold along with additional valuable oil and gas assets to Persist Oil and Gas Inc. ("**Persist**") pursuant to a Sale Approval and Vesting Order pronounced by the Honourable Justice Romaine on January 18, 2019, subsequently amended by order April 12, 2019, permitting the sale to close on April 15, 2019 (the "**Persist SAVO**").[5]

8. The amendment to the Persist SAVO resulted from additional negotiations of the parties, included the Alberta Energy Regulator (the "**AER**") after the Redwater decision[6] was handed down on January 31, 2019.

9. The subsequent amendment to the Persist SAVO did not impact the order in respect of the Receiver holding $119,093.08 from net sale proceeds of the Liened Assets in trust pending determination of the Lien Claims (the "**Holdback**").[7]

III. ANALYSIS

A. Lien Claims and Redwater

10. Riverside agreed to the limited scope of the current Application in order to allow the parties to focus their arguments on the stated issue. Given the recent decision in

---

[2] Hamilton Affidavit, at para 5.
[3] Fifteenth Report of the Receiver, dated September 18, 2020 at App B.
[4] *Ibid*, at para 21.
[5] Persist SAVO granted and filed January 18, 2019 and amended by order granted and filed April 12, 2019.
[6] Orphan Well Association v. Grant Thornton Ltd., 2019 SCC [2019] ("Redwater").
[7] *Ibid*, at paras 11 and 12.

Redwater and the uncertain effect it will have on oil and gas priority claims, Riverside felt it prudent to limit focus to allow for a more comprehensive examination of the matter. Despite the Receiver's concerns, as the parties agreed to proceed on the assumption that the lien claims were valid, Riverside will not make any unnecessary address in respect of same, except to note that it is confident in the Lien Claims.

11. With the introduction of the Redwater decision into Canadian jurisprudence, there has been a significant shift in how contingent environmental oil and gas claims interact with a bankrupt's estate. Given that there have been relatively few available decisions expanding on Redwater prior to date of this Application, it is clear that the effect of the Redwater decision has not been fully weighed and considered by the courts. It leaves this priority question for competing claims of specific security resulting from improvements to assets of the debtor and unrelated general environmental claims against the debtor's estate as a somewhat novel issue.

B. Equitable Result

12. Following Redwater, it is settled that a bankrupt's estate is obligated to satisfy non-monetary obligations that are binding upon it, including unrelated environmental claims and end of life obligations associated with the abandonment and reclamation of the bankrupt's oil and gas assets ("**End of Life Obligations**").[8] However, more relevant to Riverside's submissions is that assets that fall outside the bankrupt's estate are not subject to these same obligations.

13. Riverside submits that the Applicant's proposal of turning the entirety of the bankrupt's estate, including the Holdback, over to the AER to deal with End of Life Obligations will not lead to an equitable resolution of these matters. Through the Judicature Act[9] and section 183(1)(d) of the BIA, the Court is vested with the jurisdiction to consider principles of equity and fairness when dealing with matters put before it. Riverside submits that it is necessary to rely on those principles in order to avoid an inequitable result whereby assets unrelated to remaining environmental liabilities are used to satisfy those

[8] Redwater, at para 160.
[9] Judicature Act, RSA 2000, c J-2, s. 8 and Bankruptcy and Insolvency Act, RSC 1985, c B-3 ("BIA").

remaining liabilities and the benefit from work on the Liened Assets does not flow to the party that performed the work.

i. Builders' Lien and the Prejudicial Effect of Bankruptcy in Light of the Redwater Decision

14. Through the Riverside Work, Riverside supported continued mineral production from the Liened Assets during the period for which it remains unpaid. This work directly enhanced Manitok's estate through the production and sale of extracted minerals as well as supporting the value of the Liened Assets through continued mineral production. Pursuant to the Builders' Lien Act, upon prompt registration, Riverside was entitled to the Lien Claims in the Liened Assets.[10]

15. Outside of bankruptcy, the Lien Claims provide a proprietary interest in the assets that Riverside improved as a result of its efforts. This would allow Riverside to appoint: (i) a receiver of rents and profits in respect of the profits gained from the production of the Liened Assets, or (ii) a trustee with the power to sell, mortgage or lease the Liened Assets, thereby allowing recovery on the outstanding debt.[11]

16. Upon Manitok's entry into bankruptcy, the Lien Claims provided Riverside an enhanced priority as a secured creditor,[12] however, on sale of the Liened Assets, pursuant to the Persist SAVO, Riverside's *in rem* rights were removed. As a result of the decision in Redwater, prior to sale of the Liened Assets in bankruptcy, the outstanding environmental claims of Manitok's other oil and gas assets take priority over the entire estate regardless of proprietary rights or connections between the assets and the outstanding liability.

17. It is from this conversion and the loss of proprietary interest in Manitok's assets through bankruptcy that Riverside is prejudiced. While the loss of proprietary rights of a secured creditor as a result of bankruptcy is not considered to be inequitable when it results in a loss of priority to another secured creditor within the bankruptcy scheme, Riverside submits that it is inequitable when the mechanisms of bankruptcy defeat a proprietary claim

---

[10] Builders' Lien Act, RSA 2000, c B-7 ("**Builders' Lien Act**"), s. 6.
[11] *Ibid*, s. 54(1) and 54(2).
[12] BIA, s. 2.

in favour of an external obligation for a party that is not a creditor of the bankrupt and that is not subject to that same priority system.

18. The bankruptcy process is intended to deal with "the administration of a bankrupt's estate and the orderly and equitable distribution of property to its creditors."[13] In Manitok's case, there was no distribution or administration available to Manitok's creditors as the AER is ostensibly entitled to the entire remaining available assets to deal with Manitok's End of Life Obligations. The AER is not a creditor and it follows that the there is no reason for the bankruptcy at all in situations with significant outstanding environmental liabilities.

ii. General Security vs. Specific Security

19. Riverside was eligible for specific security from improvements made to certain of Manitok's oil and gas assets through the Riverside Work. Through the Builders' Lien Act, Riverside is only entitled to a lien over assets it improves and does not receive an interest in any other of Manitok's assets.[14] This proprietary interest from the Liened Claims cannot be extended to any of Manitok's other assets, yet, the Receiver argues that End of Life Obligations of Manitok should be satisfied by all the assets regardless of their relationship to the End of Life Obligations.

20. The Receiver's position is particularly problematic when the Receiver is able to sell the Liened Assets for a sum sufficient to establish the Holdback and with the purchaser then assuming all End of Life Obligations for the Liened Assets.

21. The Court in Redwater partially justified this inequitable conclusion on that basis that the general End of Life Obligations of the debtor would not conflict with the bankruptcy priority scheme as Parliament had already contemplated an enhanced priority in bankruptcy when dealing with environmental claims.[15] These justifications found in both the BIA and as

---

[13] Redwater, para 31.
[14] *Builders' Lien Act*, s. 6.
[15] *BIA*, s. 14.06(7).

reported in Redwater were contingent on the environmental claims being related or proximate to the prioritized asset (underline added).[16]

> "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."[17]

22. With this connection between the asset and the liability, the inchoate, uncertain environmental claims receive a super priority over all the assets of a particular debtor. If the Redwater decision is allowed to justify priority over unrelated assets, it leads to a direct conflict with the purpose of granting proprietary interests in specific assets through the Builders' Lien Act. Further, it breaches the well-recognized tenant of Canadian environmental law that the polluter pays.[18]

23. As all environmental liabilities with respect to the Liened Assets have been assumed by the purchaser of those assets, use of the proceeds of sale by the AER is only to deal with End of Life Obligations for unrelated assets.

24. On a more practical basis, the lender in Redwater, ATB, was in a position to review the debtor's assets and liabilities prior to extending credit to the debtor. As a sophisticated creditor, it would have been aware of the risks with outstanding environmental claims and would have the opportunity to negotiate with the debtor to obtain favourable security or otherwise alter the credit terms to ensure it would not be unfairly prejudiced. From this preferred position, it made the informed decision to lend to Redwater.

25. In contrast, Riverside's interest in these matters arose through the course of its provision of materials and services to the oil and gas industry. While that does not excuse them from obligation to ensure any extension of credit is on reasonable terms and to a credit worthy debtor, as a small supplier in the oil and gas industry Riverside is limited in its ability to request information from Manitok or alter the terms of credit.

---

[16] *Ibid.*
[17] Redwater, para 159.
[18] *Ibid*, para 29.

26. To force Riverside to bear the unrelated End of Life Obligations ignores the purpose of the Builders' Lien Act and places a further burden on the least sophisticated parties who have the limited ability to determined debtor actions or otherwise deal with this burden.

27. This is further evident when the limited information available to unsophisticated creditors cannot be relied upon to give an accurate reflection of a debtor's environmental liabilities. The AER uses a Liability Management Rating (the "**LMR**") to assist in assessing a licensee's ability to address its abandonment, remediation and reclamation obligations.[19] The LMR is a ratio of the aggregate value attributed to production assets to the deemed aggregate liability of the abandonment and reclamation costs of those assets. The AER generally requires licensees to maintain an LMR above 1.0, whether through completion of abandonment or remediation of existing assets, acquiring greater producing assets or posting security.[20] An LMR ratio greater than 1.0 indicates that a licensee's assets and posted security should be able to satisfy any End of Life Obligations of the licensee.

28. Until approximately January 2020, the AER reported the security adjusted LMR for individual oil and gas licensees.[21] As of July 1, 2017, Manitok's LMR as reported by the AER was 2.83 evidencing sufficient available security or assets to satisfy its End of Life Obligations.[22] An LMR greater than 2.0 is better than two-thirds of all licensees in the Province of Alberta.

29. Riverside submits that if a specific security holder recovers as a result of equitable principles, it does not create an inequitable result if the National Bank of Canada ("**NBC**") or other creditor holding general security is not able to recover in respect of those assets. As noted previously, the general security holder is more sophisticated and has more information available to it prior to extending credit. As well, the general security holder does not have a direct connection with an improvement of the underlying assts. Additionally, in

---

[19] Redwater, at para 18.
[20] *Ibid.*
[21] Hamilton Affidavit at para 8.
[22] *Ibid,* at para 6.

this matter, NBC has already received certain funds from Manitok's estate that it would not have otherwise been entitled to post-Redwater.

iii. Timing of the Abandonment Orders

30. The Liened Assets were sold according to the Persist SAVO. On August 21, 2019, the AER issued abandonment orders in respect of certain of the remaining oil and gas assets of Manitok (the "**Abandonment Order**").[23] The Abandonment Order did not deal with any of the assets sold pursuant to the Persist SAVO as the responsibility for all End of Life Obligations in respect of those assets was assumed by the purchaser, Persist, pursuant to the purchase and sale agreement entered into between Persist and the Receiver.

31. The Court in Northern Badger characterized a debtor's existing liability with respect to the End of Life Obligations as "inchoate", existing from the day the wells were initially drilled.[24] Without an abandonment order issued, the End of Life Obligations remain, but they have not crystallized with sufficient certainty to require the bankrupt satisfy them in priority to its other, more concrete, debts.

32. Pursuant to the Persist SAVO, the Lien Claims were to be dealt with as follows (underline added):

> "(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, including without limitation in respect of any amounts or obligations accrued up to the Effective Date under any Crown or freehold mineral leases, surface leases or access rights, royalties, municipal property taxes, linear taxes (in the latter case, to the extent

[23] Eleventh Report of the Receiver, dated September 12, 2019 at App A.
[24] Panamericana de Bienesy Servicios SA v. Northern Badger Oil & Gas Ltd., 1991 ABCA 181 (ABCA) ("Northern Badger") at para 32.

that such taxes would otherwise constitute a Claim against the Assets), or for amounts accrued under Permitted Encumbrances contemplated by paragraphs (xv) and (xix) prior to the Effective Date, and any defaults under any leases, access rights or royalty contracts, up to the Effective Date, shall be deemed, as against the Purchaser and the counterparty thereto, to be cured."[25]

33. While the End of Life Obligations would soon crystallize on the issuance of the Abandonment Order, the proper time for determination of the estate's then current debt obligations is the moment immediately prior to the sale as outlined in the Persist SAVO. At such time, the End of Life Obligations were sufficiently uncertain as to allow for Riverside's priority to remain in respect of Lien Claims and Riverside submits that the Court should order distribution of the Holdback to Riverside on that basis.

iv. Considerations of the AER

34. The mandate of the AER as set out in REDA is:

"(a) to provide for the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta through the Regulator's activities"[26]

35. Additionally, the purpose of the OGCA is:

"(a) to effect the conservation of, and to prevent the waste of, the oil and gas resources of Alberta…

(c) to provide for the economic, orderly, efficient and responsible development in the public interest of the oil and gas resources of Alberta…

(d) to afford each owner the opportunity of obtaining the owner's share of the production of oil or gas from any pool"[27]

36. The AER has the obligation to provide for efficient, safe and orderly energy resource development in addition to weighing the environmental liabilities associated with such development. If the AER, relying on Redwater, purports to force the costs associated

---

[25] Persist SAVO at para 11.
[26] *Responsible Energy Development Act,* SA 2012, c. R-17.3 ("REDA"), s. 2(1).
[27] *Oil and Gas Conservation Act*, RSA 2000, c O-6 ("OGCA"), s. 4.

with unrelated End of Life Obligations to producing assets it will significantly limited potential production from valuable producing assets and ultimately fail in its responsibility to managed the reasonable development of energy resources. This is particularly true where such burdens fall on parties who have done work to improve unrelated assets and increase production on the assets, thereby contributing to overall reasonable and responsible development without having any responsibility in creating the unrelated environmental liabilities.

C. Unjust Enrichment Doctrine

37. As an extension to general equity considerations, Riverside submits that if the AER on behalf of the public were to receive the Holdback, they will have been unjustly enriched.

38. The fundamental principles for a claim of unjust enrichment are described in Peter[28]. Such an action arises when three elements are satisfied:

a. there must be an enrichment;

b. a corresponding deprivation; and

c. the absence of a juristic reason for the enrichment.

39. If the Holdback was to fall into the estate for distribution to the AER, then Riverside would clearly be deprived and the AER, or the general public, on whose behalf the AER accepts the funds, will have received the direct, corresponding enrichment.

40. In regards to the absence of a juristic reason, the Court in Garland outlined that provided it can be shown no juristic reason arises from an established category, those being contract, a disposition of law, a donative intent or other valid common law, equitable or statutory obligations, then a *prima facie* case shall have been made out that there is no juristic reason.[29]

---

[28] Peter v. Beblow, [1993] 1 S.C.R. 980 (SCC) ("Peter") at para 3.
[29] Garland v. Consumers' Gas Co. [2004] 204 SCC 25 (SCC) ("Garland") at para 44.

41. It has been held that the priority of distributions through bankruptcy is a sufficient juristic reason that there is no unjust enrichment where a creditor benefits from the failure of a trust claim through section 67(1)(a) of the BIA.[30] As a result of the decision in Redwater, distribution of and entitlement to the Holdback is not determined as a result of creditor priorities in bankruptcy. As the AER or the public is not a creditor of the estate, the effect of imposing a constructive trust in this scenario does not prejudice any creditor in bankruptcy or alter creditor priorities. It simply ensures that a portion of the benefit from the sale of the Liened Assets flows to the party who improved those assets.

42. Further, no contractual relationship exists between Riverside and the AER and as the Liened Assets do not have any unassumed End of Life Obligations, outside of the unnecessary application of the bankruptcy process as in Redwater, there is no proper juristic reason for the enrichment.

43. Upon proving the elements of unjust enrichment, the right to claim relief arises. The Court in Peter confirmed that a constructive trust may be an appropriate remedy where monetary damages are inadequate and there exists a link between the contribution and the interest claimed.[31]

44. Commonly, the concern for constructive trusts in a commercial context generally arises from a contract between the parties being the source of one party's deprivation resulting from their status as general creditor[32] and from the unfair application of the constructive trust to the detriment of other creditors of the bankrupt.[33] As noted above, no contract exists between Riverside and the AER and, as the funds from Manitok's estate do not fall to any of its creditors, there is no conflict.

45. Given Riverside's entitlement to a builders' lien, direct relationship with the Liened Assets and the inequitable result that would arise from an award of damages, Riverside submits a constructive trust in the Holdback is the appropriate remedy. If a constructive trust is found, then the Holdback would not fall into Manitok's estate and there would be no conflict with the decision in Redwater.

---

[30] Bassano Growers Ltd. v. Price Waterhouse Ltd. [1997] 214 A.R. 380 (Alta. Q.B.), at para 19.
[31] Peter, at para 29.
[32] Ellingsen, Re, 2000 BCCA 458 (B.C. C.A.) at para 32.
[33] *Ibid* at paras 36 and 37 favourably citing Barnabe v. Touhey (1995), 26 O.R. (3d) 477 (Ont. C.A.).

IV. CONCLUSION AND REMEDY SOUGHT

46. Riverside is entitled to a statutory lien as a result of work it performed to improved certain of Maintok's oil and gas assets, the Liened Assets. The Liened Assets were sold and any End of Life Obligations for the Liened Assets were assumed by the Purchaser. The proceeds of the sale were sufficient to create the Holdback.

47. The Receiver is now asking that the proceeds of sale from the Liened Assets be paid to the AER to cover End of Life Obligations that are unrelated to the Liened Assets and unrelated to the improvements in value of the Liened Assets that arose from the Riverside Work. Riverside has no relationship to Manitok's other oil and gas assets, yet it is suffering the burden of their End of Life Obligations.

48. Riverside submits that if the Court determines that the Holdback falls into the Manitok's estate it will disentitle Riverside from any benefit from its efforts, create conflict between provincial legislation and will not accord with long standing polluter-pay principles. Such an inequitable result which would lack fairness cannot be held and Riverside submits that on that basis, the Holdback should be distributed to Riverside.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the Town of Rocky Mtn. House, in the Province of Alberta, this 8th day of October, 2020.

HAMILTON BALDWIN LAW

Per: _____

Garrett SE Hamilton
Solicitors for the Respondent, Riverside Fuels Ltd.

TABLE OF AUTHORITIES

TAB 1

SUPREME COURT OF CANADA

CITATION: Orphan Well Association *v.* Grant Thornton Ltd., 2019 SCC 5, [2019] 1 S.C.R. 150

APPEAL HEARD: February 15, 2018
JUDGMENT RENDERED: January 31, 2019
DOCKET: 37627

BETWEEN:

Orphan Well Association and Alberta Energy Regulator
Appellants

and

Grant Thornton Limited and ATB Financial (formerly known as Alberta Treasury 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

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

REASONS FOR JUDGMENT: (paras. 1 to 164)	Wagner C.J. (Abella, Karakatsanis, Gascon and Brown JJ. concurring)
DISSENTING REASONS: (paras. 165 to 292)	Côté J. (Moldaver J. concurring)

Orphan Well Association and
Alberta Energy Regulator *Appellants*

v.

Grant Thornton Limited and
ATB Financial (formerly known as
Alberta Treasury 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*

Indexed as: Orphan Well Association *v.* Grant Thornton Ltd.

2019 SCC 5

File No.: 37627.

2018: February 15; 2019: January 31.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Division of powers — Federal paramountcy — Bankruptcy and insolvency — Environmental law — Oil and gas — Oil and gas companies in Alberta required by provincial comprehensive licensing regime to assume end-of-life responsibilities with respect to oil wells, pipelines, and facilities — Provincial regulator administering licensing regime and enforcing end-of-life obligations pursuant to statutory powers — Trustee in bankruptcy of oil and gas company not taking responsibility for company's unproductive oil and gas assets and seeking to walk away from environmental liabilities associated with them or to satisfy secured creditors' claims ahead of company's environmental liabilities — Whether regulator's use of powers under provincial legislation to enforce bankrupt company's compliance with end-of-life obligations conflicts with trustee's powers under federal bankruptcy legislation or with the order of priorities under such legislation — If so, whether provincial regulatory regime inoperative to extent of conflict by virtue of doctrine of federal paramountcy — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 14.06 — Oil and Gas Conservation Act, R.S.A. 2000, c. O-6, s. 1(1)(cc) — Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12, s. 134(b)(vi) — Pipeline Act, R.S.A. 2000, c. P-15, s. 1(1)(n).

In order to exploit oil and gas resources in Alberta, a company needs a property interest in the oil or gas (typically, a mineral lease with the Crown, which Canadian courts classify as a *profit à prendre*), surface rights and a licence issued by the Alberta Energy Regulator ("Regulator"). Under provincial legislation, the Regulator will not grant a licence to extract, process or transport oil and gas in Alberta unless the licensee 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 end-of-life obligations are known as "abandonment" and "reclamation".

The Licensee Liability Rating Program is one means by which the Regulator seeks to ensure that end-of-life obligations will be satisfied by licensees. 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. A licensee's LMR is calculated on a monthly basis and, where it dips below the prescribed ratio, the licensee is required to bring its LMR back up to the prescribed level by paying a security deposit, performing end-of-life obligations, or transferring licences with the Regulator's approval. If either the transferor or the transferee would have a post-transfer LMR below 1.0, the Regulator will normally refuse to approve the licence transfer.

The insolvency of an oil and gas company licensed to operate in Alberta engages Alberta's comprehensive licensing regime, which is binding on companies active in the oil and gas industry, and the *Bankruptcy and Insolvency Act* ("*BIA*"), federal legislation that governs the administration of a bankrupt's estate and the orderly and equitable distribution of property among its creditors. Alberta's *Environmental Protection and Enhancement Act* ("*EPEA*") ensures that a licensee's regulatory obligations will continue to be fulfilled when it is subject to insolvency proceedings by including the trustee of a licensee in the definition of "operator" for the purposes of the duty to reclaim and by providing that an order to perform reclamation work may be issued to a trustee. However, it expressly limits a trustee's liability in relation to such an order to the value of the assets in the bankrupt estate, absent gross negligence or wilful misconduct. The *Oil and Gas Conservation Act* ("*OGCA*") and the *Pipeline Act* take a more generic approach: they simply include trustees in the definition of "licensee". As a result, every power which these Acts give the Regulator against a licensee can theoretically also be exercised against a trustee. The Regulator has delegated the authority to abandon and reclaim "orphans" — 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 — to the Orphan Well Association ("OWA"), an independent non-profit entity. The OWA has no power to seek reimbursement of its costs, but 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 once it has completed its environmental work.

Redwater, a publicly traded oil and gas company, was first granted licences by the Regulator in 2009. Its principal assets are 127 oil and gas assets — wells, pipelines and facilities — and their corresponding licences. A few of its licensed wells are still producing and profitable, but the majority are spent and burdened with abandonment and reclamation liabilities that exceed their value. In 2013, ATB Financial, which had full knowledge of the end-of-life obligations associated with Redwater's assets, advanced funds to Redwater and, in return, was granted a security interest in Redwater's present and after-acquired property. In mid-2014, Redwater began to experience financial difficulties. Grant Thornton Limited ("GTL") was appointed as its receiver in 2015. At that time, Redwater owed ATB approximately $5.1 million and had 84 wells, 7 facilities and 36 pipelines, 72 of which were inactive or spent, but, since Redwater's LMR did not drop below the prescribed ratio until after it went into receivership, it never paid any security deposits to the Regulator.

Upon being advised of Redwater's receivership, the Regulator notified GTL that it was legally obligated to fulfill abandonment obligations for all licensed assets prior to distributing any funds or finalizing any proposal to creditors. The Regulator 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, and that the transfer would not cause a deterioration in Redwater's LMR. GTL concluded that it could not meet the Regulator's requirements because the cost of the end-of-life obligations for the spent wells would

likely exceed the sale proceeds for the productive wells. Based on this assessment, GTL informed the Regulator that it was taking possession and control only of Redwater's 17 most productive wells, 3 associated facilities and 12 associated pipelines ("Retained Assets"), and that 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. In response, the Regulator issued orders under the *OGCA* and the *Pipeline Act* requiring Redwater to suspend and abandon the Renounced Assets ("Abandonment Orders"). The Regulator imposed short deadlines, as it considered the Renounced Assets an environmental and safety hazard.

The Regulator and the OWA then filed an application for a declaration that GTL's renunciation of the Renounced Assets was void, and for orders requiring GTL to comply with the Abandonment Orders and to fulfill the end-of-life obligations associated with Redwater's licensed properties. 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 seeking approval to pursue a sales process excluding the Renounced Assets and an 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 Redwater's outstanding debts to the Regulator. A bankruptcy order was issued for Redwater and GTL was appointed as trustee. GTL invoked s. 14.06(4)(a)(ii) of the *BIA* in relation to the Renounced Assets.

The chambers judge and a majority of the Court of Appeal agreed with GTL and held that the Regulator's proposed use of its statutory powers to enforce Redwater's compliance with abandonment and reclamation obligations during bankruptcy conflicted 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. The dissenting judge in the Court of Appeal would have allowed the Regulator's appeal on the basis that there was no conflict between Alberta's environmental legislation and the *BIA*.

Held (Moldaver and Côté JJ. dissenting): The appeal should be allowed.

Per Wagner C.J. and Abella, Karakatsanis, Gascon and Brown JJ.: 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) of the *BIA* 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. Furthermore, 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*.

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. Given the procedural nature of the *BIA*, the bankruptcy regime relies heavily on the continued operation of provincial laws but, where there is a genuine conflict between provincial laws concerning property and civil rights and federal bankruptcy legislation, the *BIA* prevails. 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. As Redwater is a corporation that will never emerge from bankruptcy, only the former purpose is relevant here.

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. There is no conflict between the Alberta regulatory scheme and s. 14.06 of the *BIA*, because, under s. 14.06(4), a trustee's disclaimer of real property when there is an order to remedy any environmental condition or damage affecting that property protects the trustee from personal liability, while the ongoing liability of the bankrupt estate is unaffected. This interpretation is supported by the plain language of the section, the Hansard evidence, a previous decision of this Court and the French version of the section. The same concept is also found in both s. 14.06(1.2) and s. 14.06(2), which also specifically state that the trustee is not personally liable — 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.

Even assuming that GTL had successfully disclaimed in this case, no operational conflict or frustration of purpose would result from the fact that the Regulator requires GTL, as a licensee, to expend estate assets on abandoning the Renounced Assets. Furthermore, no conflict would be 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) of the *BIA* is caused by the mere theoretical possibility of personal liability under the *OGCA* or the *Pipeline Act*.

The end-of-life obligations binding on GTL are not claims provable in the Redwater bankruptcy. Not all environmental obligations enforced by a regulator will be claims provable in bankruptcy. The test set out by the Court in *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443 ("*Abitibi*"), must be applied to determine whether a particular regulatory obligation amounts to a claim provable in bankruptcy: (1) there must be a debt, a liability or an obligation to a creditor; (2) the debt, liability or obligation must be incurred before the debtor becomes bankrupt; and (3) it must be possible to attach a monetary value to the debt, liability or obligation. Only the first and third parts of the test are at issue in the instant case.

With respect to the first part of the test, *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. A regulator exercising a power to enforce a public duty is not a creditor of the individual or corporation subject to that duty. Here, 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. 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. The public is the beneficiary of those environmental obligations; the province does not stand to gain financially from them. Strictly speaking, this is sufficient to dispose of this aspect of the appeal.

As it may prove helpful in future cases, under the third part of the test, a court must determine 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. In the instant case, the Abandonment Orders and the LMR requirements fail to satisfy this part of the test. It is not established by the evidence that it is sufficiently certain that the

Regulator will perform the abandonments and advance a claim for reimbursement. This claim is too remote and speculative to be included in the bankruptcy process. Furthermore, 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.

In crafting the priority scheme of 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. 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 the effect of s. 14.06(7) in this case. Furthermore, Redwater's only substantial assets were affected by environmental conditions 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.

Per Moldaver and Côté JJ. (dissenting): GTL and ATB have satisfied their burden of demonstrating a genuine inconsistency between federal and provincial law

under both branches of the paramountcy test, namely operational conflict and frustration of purpose. Accordingly, the appeal should be dismissed.

Because Alberta's statutory regime does not recognize the disclaimers by trustees of assets encumbered by environmental liabilities as lawful by virtue of the fact that receivers and trustees are regulated as licensees who cannot disclaim assets, there is an unavoidable 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. An operational conflict arises where it is impossible to comply with both laws. 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. This interpretation exercise takes place within the guiding confines of cooperative federalism, which operates as a straightforward interpretive presumption — one that supports, rather than supplants, the modern approach to statutory interpretation. Courts should favour an interpretation of the federal legislation that allows the concurrent operation of both laws; however, where the proper meaning of the provision cannot support a harmonious interpretation, it is beyond a court's power to create harmony where Parliament did not intend it.

In the instant case, reliance on cooperative federalism must not result in an interpretation of s. 14.06(4) of the *BIA* that is inconsistent with its language, context and purpose. The natural meaning which appears when s. 14.06(4) is simply read

through is that it assumes and incorporates a pre-existing common law right to disclaim property in the context of bankruptcy and insolvency. This right is in keeping with the fundamental objective of trustees, which is the maximization of recovery for creditors as a whole by realizing the estate's valuable assets. It enables trustees 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) expresses the disclaimer right in unqualified terms and emphasizes that a trustee may not be held liable whenever that right is exercised. Parliament did not intend to condition the right to disclaim property on the actual existence of a risk of personal liability. Although the opening words of s. 14.06(4) refer to the personal liability of the trustee, when the words of the provision 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, their meaning becomes apparent. Avoiding personal liability is not the only effect of the appropriate exercise of this power. By properly disclaiming certain properties, the trustee is relieved of any liabilities associated with the disclaimed property and loses the ability to sell it for the benefit of the estate. The disclaimer right allows 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 objective of maximizing recovery. However, s. 14.06(4) does not relieve the estate of its liabilities or environmental obligations once a trustee exercises the disclaimer power. The disclaimed property ultimately reverts to the estate at the conclusion of the bankruptcy proceedings, as is the case with unrealized assets. 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 accordance with the predominant and well-established modern approach to statutory interpretation, courts must read statutory provisions in their entire context, as parts of a coherent whole. In s. 14.06(4) of the *BIA*, 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 purpose. Courts must read statutory provisions in their entire context, and Parliament is presumed to craft sections and subsections of legislation as parts of a coherent whole. The immediate statutory context surrounding s. 14.06(4), specifically, ss. 14.06(2), (5), (6) and (7), as well as the Hansard evidence, confirms that a trustee's right to disclaim property is not limited to protecting itself from personal liability.

The power to disclaim assets provided to trustees by s. 14.06(4) of the *BIA* was available to GTL on the facts of this case. The statutory conditions to the exercise of this power were met: the Abandonment Orders clearly relate to the remediation of an environmental condition. Additionally, the right of disclaimer is applicable in the context of the statutory regime governing the oil and gas industry. 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". GTL sought to disclaim *profits à prendre* and surface leases, which can be characterized as real property interests.

The requirement by the Regulator that GTL satisfy Redwater's environmental liabilities ahead of the estate's other debts contravenes the *BIA*'s priority scheme. The Province's licensing scheme therefore should be held inoperative under the second prong of the paramountcy test, frustration of purpose. Even where dual compliance with both federal and provincial law is, strictly speaking, possible, provincial legislation or provisions will be rendered inoperative to the extent that they have the effect of frustrating a valid federal legislative purpose. The focus of the analysis is on the effect of the provincial legislation or provision, not its purpose. In the instant case, if the environmental claims asserted by the Regulator (i.e., the Abandonment Orders) are provable in bankruptcy, the Regulator will not be permitted to assert those claims outside the bankruptcy process and ahead of Redwater's secured creditors because this would frustrate the purpose of the federal priority scheme.

In *Abitibi*, the Court established a three-part test, rooted in the language of the *BIA*, to determine whether a claim is provable in bankruptcy. 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. The language of *Abitibi* admits of no ambiguity, uncertainty or doubt: the only determination that has to be made is whether the regulatory body has exercised its enforcement power against a debtor. Most environmental regulatory bodies can be creditors, and government entities cannot systematically evade the

priority requirements of federal bankruptcy legislation under the guise of enforcing public duties. In the instant case, the first prong is satisfied. There is no doubt that the Regulator exercised its enforcement power against a debtor when it issued orders requiring Redwater to perform the environmental work on the non-producing properties. It is neither appropriate nor necessary in this case to attempt to redefine the first prong of the *Abitibi* test by narrowing the broad definition of "creditor" as the majority does.

There is no dispute that the second prong of the *Abitibi* test, which requires that the debt, liability or obligation be incurred before the debtor becomes bankrupt, is satisfied. The third prong asks whether it is sufficiently certain that the regulator will perform the work and make a claim for reimbursement. In this case, it is sufficiently certain that either the Regulator or its delegate, 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 that easily support this conclusion. First, he found that GTL was not in possession of the disclaimed properties and, in any event, had no ability to perform any kind of work on these assets because the environmental liabilities exceeded the value of the estate itself and Redwater had no working interest participants that would step in to perform the work. As a result, he concluded that there was no other party who could be compelled to carry out the work. Second, in light of the fact that neither GTL nor Redwater's working interest participants would (or could) undertake this work, the chambers judge found as a fact that the Regulator will

ultimately be responsible for the abandonment costs, since it has the power to seek recovery of abandonment costs and has actually performed the work on occasion, and has expressly stated an intention to seek reimbursement for the costs of abandoning the renounced assets. Third, the chambers judge found that the Regulator's only realistic alternative to performing the remediation work itself was to deem the renounced assets to be orphan wells. In this circumstance, he found that the legislation and evidence shows that if the Regulator deems a well an orphan, then the OWA will perform the work. In light of these factual determinations, the chambers judge rightly concluded that the sufficient certainty standard of *Abitibi* was satisfied because at a minimum, either the Regulator or the OWA will complete the abandonment work.

The majority elevates form over substance in concluding that the sufficient certainty standard is not satisfied when a regulatory body's delegate, as opposed to the regulatory body itself, performs the work. Considering the salient features of the OWA and its relationship with the Regulator, one must conclude that they are inextricably intertwined. When the Regulator exercises its statutory powers to declare a property an "orphan" under s. 70(2) of Alberta's *Oil and Gas Conservation Act*, it effectively delegates the abandonment work to the OWA. The majority's alternative conclusion that it is not sufficiently certain that even the OWA will perform the abandonment work would permit the Regulator 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.

Since it is sufficiently certain that the Regulator (or the OWA, as its delegate) will complete the abandonment and reclamation work, all three prongs of the *Abitibi* test are satisfied. The Regulator's Abandonment Orders constitute "claims provable in bankruptcy". It would undermine the *BIA*'s priority scheme and therefore frustrate an essential purpose of the *BIA* if the Regulator 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.

Cases Cited

By Wagner C.J.

Applied: *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 Alta. L.R. (2d) 45; *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443; **approved:** *Nortel Networks Corp., Re*, 2013 ONCA 599, 368 D.L.R. (4th) 122; *Strathcona (County) v. Fantasy Construction Ltd. (Trustee of)*, 2005 ABQB 559, 256 D.L.R. (4th) 536; **distinguished:** *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327; *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154; **referred to:** *Berkheiser v. Berkheiser*, [1957] S.C.R. 387; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624; *Peters v. Remington*, 2004 ABCA 5, 49 C.B.R. (4th) 273; *Garner v. Newton* (1916), 29 D.L.R. 276; *Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111; *Husky Oil Operations Ltd. v.*

Minister of National Revenue, [1995] 3 S.C.R. 453; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536; *GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601; *New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd*., 2005 BCCA 154, 251 D.L.R. (4th) 328; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781; *M. v. H.*, [1999] 2 S.C.R. 3; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686; *R. v. Elshaw*, [1991] 3 S.C.R. 24; *AbitibiBowater Inc., Re*, 2010 QCCS 1261, 68 C.B.R. (5th) 1; *Strathcona (County) v. Fantasy Construction Ltd. (Trustee of)*, 2005 ABQB 794, 261 D.L.R. (4th) 221; *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534; *Daishowa-Marubeni International Ltd. v. Canada*, 2013 SCC 29, [2013] 2 S.C.R. 336; *Alberta Energy Regulator v. Grant Thornton Limited*, 2017 ABCA 278, 57 Alta. L.R. (6th) 37.

By Côté J. (dissenting)

Newfoundland and Labrador v. AbitibiBowater Inc., 2012 SCC 67, [2012] 3 S.C.R. 443; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015]

3 S.C.R. 419; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189; *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724; *New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154, 251 D.L.R. (4th) 328; *Re Thompson Knitting Co., Ltd.*, [1925] 2 D.L.R. 1007; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 D.L.R. (4th) 280; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610; *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616; *R. v. L.T.H.*, 2008 SCC 49, [2008] 2 S.C.R. 739; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Teva Canada Ltd. v. TD Canada Trust*, 2017 SCC 51, [2017] 2 S.C.R. 317; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Nortel Networks Corp., Re*, 2013 ONCA 599, 6 C.B.R. (6th) 159; *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154; *Sydco Energy Inc. (Re)*, 2018 ABQB 75, 64 Alta. L.R. (6th) 156.

Statutes and Regulations Cited

Alberta Energy Regulator Administration Fees Rules, Alta. Reg. 98/2013.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 2 "claim provable in bankruptcy, provable claim or claim provable", "creditor", 14.06, (2), (4) [am. 1997, c. 12, s. 15(1)], 16 to 38, 40, 69.3(1), (2), 72(1), 80, 121 to 154, 169(4), 197(3).

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.8(8).

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

Constitution Act, 1867, ss. 91(21), 92(13), 92A(1)(c).

Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12, ss. 1(ddd), 112 to 122, 134(b), 137, 140, 142(1)(a)(ii), 227 to 230, 240, 245.

Oil and Gas Conservation Act, R.S.A. 2000, c. O-6, ss. 1(1)(a), (w), (cc), (eee), 11(1), 12(1), 18(1), 24(2), 25, 27 to 30, 68(d), 70(1), (2), 73(1), (2), 74, 106, 108, 110.

Oil and Gas Conservation Rules, Alta. Reg. 151/71, ss. 1.100(2), 3.012.

Orphan Fund Delegated Administration Regulation, Alta. Reg. 45/2001, ss. 3(2)(b), 6.

Pipeline Act, R.S.A. 2000, c. P-15, ss. 1(1)(a), (n), (t), 6(1), 9(1), 23 to 26, 51 to 54.

Responsible Energy Development Act, S.A. 2012, c. R-17.3, ss. 2(1)(a), 2(2)(h), 3(1), 28, 29.

Surface Rights Act, R.S.A. 2000, c. S-24, ss. 1(h), 15.

Authors Cited

Alberta. Energy Resources Conservation Board. *Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process*, March 12, 2013.

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: https://www.aer.ca/documents/bulletins/Bulletin-2016-16.pdf; archived version: https://www.scc-csc.ca/cso-dce/2019SCC-CSC5_1_eng.pdf).

Bankes, Nigel. *Majority of the Court of Appeal Confirm Chief Justice Wittmann's Redwater Decision*, May 3, 2017 (online: https://ablawg.ca/2017/05/03/majority-

of-the-court-of-appeal-confirms-chief-justice-wittmanns-redwater-decision; archived version: https://www.scc-csc.ca/cso-dce/2019SCC-CSC5_2_eng.pdf).

Bennett, Frank. *Bennett on Creditors' and Debtors' Rights and Remedies*, 5th ed. Toronto: Thomson Carswell, 2006.

Canada. House of Commons. Standing Committee on Industry. *Evidence*, No. 16, 2nd Sess., 35th Parl., June 11, 1996.

Canada. House of Commons. Standing Committee on Industry. *Evidence*, No. 21, 2nd Sess., 35th Parl., September 25, 1996.

Canada. Senate. *Proceedings of the Standing Senate Committee on Banking, Trade and Commerce*, No. 13, 2nd Sess., 35th Parl., November 4, 1996.

Goode, Roy. *Principles of Corporate Insolvency Law*, 4th ed. London: Sweet & Maxwell/Thomson Reuters, 2011.

Grand Robert de la langue française, 2e éd. Paris: Le Robert, 2001, "*ès*".

Klimek, Jennifer. *Insolvency and Environment Liability*. Toronto: Carswell, 1994.

Lederman, Sidney N., Alan W. Bryant and Michelle K. Fuerst. *The Law of Evidence in Canada*, 5th ed. Markham, Ont.: LexisNexis, 2018.

Lund, Anna J. "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.

Oxford English Dictionary (online: http://www.oed.com), "probably".

Robert & Collins (online: https://grc.bvdep.com/login_.asp), "*ès qualités*".

Silverstein, Lee. "Rejection of Executory Contracts in Bankruptcy and Reorganization" (1964), 31 *U. Chi. L. Rev*. 467.

Stewart, Fenner L. "How to Deal with a Fickle Friend? Alberta's Troubles with the Doctrine of Federal Paramountcy", in Janis P. Sarra and Barbara Romaine, eds., *Annual Review of Insolvency Law 2017*. Toronto: Thomson Reuters, 2018, 163.

Sullivan, Ruth. *Statutory Interpretation*, 3rd ed. Toronto: Irwin Law, 2016.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 6th ed. Markham, Ont.: LexisNexis, 2014.

APPEAL from a judgment of the Alberta Court of Appeal (Slatter, Schutz and Martin JJ.A.), 2017 ABCA 124, 47 C.B.R. (6th) 171, [2017] 6 W.W.R. 301, 8 C.E.L.R. (4th) 1, 50 Alta. L.R. (6th) 1, [2017] A.J. No. 402 (QL), 2017 CarswellAlta 695 (WL Can.), affirming a decision of Wittmann C.J., 2016 ABQB 278, 37 C.B.R. (6th) 88, [2016] 11 W.W.R. 716, 33 Alta. L.R. (6th) 221, [2016] A.J. No. 541 (QL), 2016 CarswellAlta 994 (WL Can.). Appeal allowed, Moldaver and Côté JJ. dissenting.

Ken Lenz, Q.C., *Patricia Johnston, Q.C.*, *Keely R. Cameron*, *Brad Gilmour* and *Michael W. Selnes*, for the appellants.

Kelly J. Bourassa, *Jeffrey Oliver*, *Tom Cumming*, *Ryan Zahara*, *Danielle Maréchal*, *Brendan MacArthur-Stevens* and *Chris Nyberg*, for the respondents.

Josh Hunter and *Hayley Pitcher*, for the intervener the Attorney General of Ontario.

Gareth Morley, *Aaron Welch* and *Barbara Thomson*, for the intervener the Attorney General of British Columbia.

Richard James Fyfe, for the intervener the Attorney General of Saskatchewan.

Robert Normey and *Vivienne Ball*, for the intervener the Attorney General of Alberta.

Adrian Scotchmer, for the intervener Ecojustice Canada Society.

Lewis Manning and *Toby Kruger*, for the intervener the Canadian Association of Petroleum Producers.

Nader R. Hasan and *Lindsay Board*, for the intervener Greenpeace Canada.

Christine Laing and *Shaun Fluker*, for the intervener Action Surface Rights Association.

Caireen E. Hanert and *Adam Maerov*, for the intervener the Canadian Association of Insolvency and Restructuring Professionals.

Howard A. Gorman, Q.C., and *D. Aaron Stephenson*, for the intervener the Canadian Bankers' Association.

The judgment of Wagner C.J. and Abella, Karakatsanis, Gascon and Brown JJ. was delivered by

THE CHIEF JUSTICE —

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) and a majority of the Court of Appeal (2017 ABCA 124, 47 C.B.R. (6th) 171) 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). A *profit à prendre* is fully assignable and has been defined as "a non-possessory interest in land, like an easement, which can be passed on from generation to generation, and remains with the land, regardless of changes in ownership" (F. L. Stewart, "How to Deal with a Fickle Friend? Alberta's Troubles with the Doctrine of Federal Paramountcy", in J. P. Sarra and B. Romaine, eds., *Annual Review of Insolvency Law 2017* (2018), 163 ("Stewart"), at p. 193). Solvent and insolvent companies alike will often hold *profits à prendre* in both producing and unproductive or spent wells. There are a variety of potential "working interest" arrangements whereby several parties can share an interest in oil and gas resources.

[12] The third thing a company needs in order to access and exploit Alberta's oil and gas resources, and the one most germane to this appeal, is a licence issued by

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

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

[14] The licences a company needs to recover, process and transport oil and gas are issued by the Regulator. The Regulator is not an agent of the Crown. It is established

as a corporation by s. 3(1) of the *Responsible Energy Development Act*, S.A. 2012, c. R-17.3 ("*REDA*"). It exercises a wide range of powers under the *OGCA* and the *Pipeline Act*. It also acts as the regulator in respect of energy resource activities under the *EPEA*, Alberta's more general environmental protection legislation (*REDA*, s. 2(2)(h)). The Regulator's mandate is set out in the *REDA* and includes "the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta" (s. 2(1)(a)). The Regulator is funded almost entirely by the industry it regulates, and it collects its budget through an administration fee (Stewart, at p. 219; *REDA*, ss. 28 and 29; *Alberta Energy Regulator Administration Fees Rules*, Alta. Reg. 98/2013).

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

[16] "Abandonment" refers to "the permanent dismantlement of a well or facility in the manner prescribed by the regulations or rules" made by the Regulator (*OGCA*, s. 1(1)(a)). Specifically, the abandonment of a well has been defined as "the process of sealing a hole which has been drilled for oil or gas, at the end of its useful life, to render it environmentally safe" (*Panamericana de Bienes y Servicios S.A. v.*

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

[17] A licensee must abandon a well or facility when ordered to do so by the Regulator or when required by the rules or regulations. The Regulator may order abandonment when "the Regulator considers that it is necessary to do so in order to protect the public or the environment" (*OGCA*, s. 27(3)). Under the rules, a licensee is required to abandon a well or facility, *inter alia*, on the termination of the mineral lease, surface lease or right of entry, where the Regulator cancels or suspends the licence, or where the Regulator notifies the licensee that the well or facility may constitute an environmental or safety hazard (*Oil and Gas Conservation Rules*, Alta. Reg. 151/71, s. 3.012). Section 23 of the *Pipeline Act* requires licensees to abandon pipelines in

similar situations. The duty to reclaim is established by s. 137 of the *EPEA*. This duty is binding on an "operator", a broader term which encompasses the holder of a licence issued by the Regulator (*EPEA*, s. 134(b)). Reclamation is governed by the procedural requirements set out in regulations (*Conservation and Reclamation Regulation*, Alta. Reg. 115/93).

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

transfer licences (with approval) in order to bring its LMR back up to the prescribed level.

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

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

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

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

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

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

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

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

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

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

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

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

[29] During this appeal, there was significant discussion of other regulatory regimes which Alberta *could* have adopted to prevent environmental costs associated with the oil and gas industry from being offloaded onto the public. What Alberta *has* chosen is a licensing regime which makes such costs an inherent part of the value of the licensed assets. This regime has the advantage of aligning with the polluter-pays principle, a well-recognized tenet of Canadian environmental law. This principle assigns polluters the responsibility for remedying environmental damage for which they are responsible, thereby incentivizing companies to pay attention to the environment in the course of their economic activities (*Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624, 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, at para. 23, quoting *Garner 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 *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443 ("*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, 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, 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, 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, at para. 18, quoting *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 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, 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, 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) <u>The Correct Interpretation of Section 14.06(4)</u>

(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 *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, 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. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123. 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. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, 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. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154, 251 D.L.R. (4th) 328.

[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 ("*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 and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781, at para. 44; *M. v. H.*, [1999] 2 S.C.R. 3, at para. 45; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686, 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, 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)

[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. (Trustee of)*, 2005 ABQB 794, 261 D.L.R. (4th) 221, at paras. 23-25, and *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R (4th) 534.

[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. (Trustee of)*, 2005 ABQB 559, 256 D.L.R. (4th) 536, 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. *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, 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. Canada*, 2013 SCC 29, [2013] 2 S.C.R. 336, 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, 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.

The reasons of Moldaver and Côté JJ. were delivered by

CÔTÉ J. (dissenting) —

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 *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443 — 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; 2017 ABCA 124, 50 Alta. L.R. (6th) 1). 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, at para. 40; see also *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, 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, 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, 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, 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, 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" (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 (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. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, 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. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154, 251 D.L.R. (4th) 328, at paras. 24-31; *Re Thompson Knitting Co., Ltd.*, [1925] 2 D.L.R. 1007 (Ont. S.C. (App. Div.), 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 Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 37, citing *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, 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, 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. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123 — 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; *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, <u>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</u>. [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 (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 (*Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, 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 *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, 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. L.T.H.*, 2008 SCC 49, [2008] 2 S.C.R. 739, 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, 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 (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, 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, at para. 65). It is "a step not to be lightly undertaken" (*Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, 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*.
>
> . . .
>
> 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, 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, 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, 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

[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).

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").

[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. Bar 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, 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.

APPENDIX

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

> **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.

Appeal allowed, MOLDAVER *and* CÔTÉ JJ. *dissenting.*

Solicitors for the appellants: Bennett Jones, Calgary; Alberta Energy Regulator, Calgary.

Solicitors for the respondents: Blake, Cassels & Graydon, Calgary; Cassels Brock & Blackwell, Calgary; Gowling WLG (Canada), Calgary.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.

Solicitor for the intervener the Attorney General of Alberta: Attorney General of Alberta, Edmonton.

Solicitor for the intervener Ecojustice Canada Society: Ecojustice Clinic at the University of Ottawa, Ottawa.

Solicitors for the intervener the Canadian Association of Petroleum Producers: Lawson Lundell, Calgary.

Solicitors for the intervener Greenpeace Canada: Stockwoods, Toronto.

Solicitor for the intervener Action Surface Rights Association: University of Calgary Public Interest Law Clinic, Calgary.

Solicitors for the intervener the Canadian Association of Insolvency and Restructuring Professionals: McMillan, Calgary.

Solicitors for the intervener the Canadian Bankers' Association: Norton Rose Fulbright Canada, Calgary.

TAB 2

Province of Alberta

JUDICATURE ACT

Revised Statutes of Alberta 2000
Chapter J-2

Current as of December 11, 2018

Office Consolidation

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

(i) the administration of justice where there exists no adequate remedy at law, and

(j) a grant of injunction to stay waste in a proper case notwithstanding that the party in possession claims by an adverse legal title.

(4) The rules of decision in matters mentioned in subsection (3), except where otherwise provided, shall be the same as governed the Court of Chancery in England in like cases on July 15, 1870.

RSA 1980 cJ-1 s5

Pronouncement on wills, etc.

6(1) The Court has jurisdiction

(a) to try the validity of last wills and testaments, whether relating to real or personal estate and whether probate has been granted or not, and

(b) to pronounce the wills and testaments to be void for fraud and undue influence or otherwise,

in the same manner and to the same extent as the Court has jurisdiction to try the validity of deeds and other instruments.

(2) The Court has the same jurisdiction as the Court of Chancery had in England on July 15, 1870, with regard to

(a) leases and sales of settled estates,

(b) enabling infants with the approbation of the Court to make binding settlements of their real and personal estates on marriage, and

(c) questions submitted for the opinion of the Court in the form of special cases on the part of those persons that by themselves, their committees or guardians, or otherwise, concur therein.

RSA 1980 cJ-1 s6

Jurisdiction regarding lunatics

7 In the case of lunatics and their property and estates, the jurisdiction of the Court includes, subject to the Rules of Court, the jurisdiction that in England is conferred on the Lord High Chancellor by a Commission from the Crown under the Sign Manual.

RSA 1980 cJ-1 s7

General jurisdiction

8 The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either

absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties to the proceeding may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

RSA 1980 cJ-1 s8

Province-wide jurisdiction

9 Each judge of the Court has jurisdiction throughout Alberta, and in all causes, matters and proceedings, other than those of the Court of Appeal, has and shall exercise all the powers, authorities and jurisdiction of the Court.

RSA 1980 cJ-1 s9

Part 2
Powers of the Court

Relief against forfeiture

10 Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures and, in granting relief, to impose any terms as to costs, expenses, damages, compensation and all other matters that the Court sees fit.

RSA 1980 cJ-1 s10

Declaration judgment

11 No proceeding is open to objection on the ground that a judgment or order sought is declaratory only, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

RSA 1980 cJ-1 s11

Canadian law

12 When in a proceeding in the Court the law of any province or territory is in question, evidence of that law may be given, but in the absence of or in addition to that evidence the Court may take judicial cognizance of that law in the same manner as of any law of Alberta.

RSA 1980 cJ-1 s12

Part performance

13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction, or

(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

TAB 3

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

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

Current to September 22, 2020

Last amended on November 1, 2019

À jour au 22 septembre 2020

Dernière modification le 1 novembre 2019

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

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

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

An Act respecting bankruptcy and insolvency

Short Title

Short title

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

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

Interpretation

Definitions

2 In this Act,

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

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

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

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

bank means

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

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

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

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

Loi concernant la faillite et l'insolvabilité

Titre abrégé

Titre abrégé

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

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

Définitions et interprétation

Définitions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

banque

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

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

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

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

biens [Abrogée, 2004, ch. 25, art. 7]

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

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

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

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

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

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

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

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*)

créancier garanti Personne titulaire d'une hypothèque, d'un gage, d'une charge ou d'un privilège sur ou contre les biens du débiteur ou une partie de ses biens, à titre de garantie d'une dette échue ou à échoir, ou personne dont la réclamation est fondée sur un effet de commerce ou garantie par ce dernier, lequel effet de commerce est détenu comme garantie subsidiaire et dont le débiteur n'est responsable qu'indirectement ou secondairement. S'entend en outre :

a) de la personne titulaire, selon le *Code civil du Québec* ou les autres lois de la province de Québec, d'un droit de rétention ou d'une priorité constitutive de droit réel sur ou contre les biens du débiteur ou une partie de ses biens;

b) lorsque l'exercice de ses droits est assujetti aux règles prévues pour l'exercice des droits hypothécaires au livre sixième du *Code civil du Québec* intitulé *Des priorités et des hypothèques* :

(i) de la personne qui vend un bien au débiteur, sous condition ou à tempérament,

(ii) de la personne qui achète un bien du débiteur avec faculté de rachat en faveur de celui-ci,

(iii) du fiduciaire d'une fiducie constituée par le débiteur afin de garantir l'exécution d'une obligation. (*secured creditor*)

date de la faillite S'agissant d'une personne, la date :

a) soit de l'ordonnance de faillite la visant;

b) soit du dépôt d'une cession de biens la visant;

c) soit du fait sur la base duquel elle est réputée avoir fait une cession de biens. (*date of the bankruptcy*)

débiteur Sont assimilées à un débiteur toute personne insolvable et toute personne qui, à l'époque où elle a commis un acte de faillite, résidait au Canada ou y exerçait des activités. S'entend en outre, lorsque le contexte l'exige, d'un failli. (*debtor*)

disposition [Abrogée, 2005, ch. 47, art. 2]

enfant [Abrogée, 2000, ch. 12, art. 8]

entreprise de service public Vise notamment la personne ou l'organisme qui fournit du combustible, de l'eau ou de l'électricité, un service de télécommunications, d'enlèvement des ordures ou de lutte contre la pollution ou encore des services postaux. (*public utility*)

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*)

failli Personne qui a fait une cession ou contre laquelle a été rendue une ordonnance de faillite. Peut aussi s'entendre de la situation juridique d'une telle personne. (*bankrupt*)

faillite L'état de faillite ou le fait de devenir en faillite. (*bankruptcy*)

fiducie de revenu Fiducie qui possède un actif au Canada et dont les parts sont inscrites à une bourse de valeurs mobilières visée par les Règles générales à la date de l'ouverture de la faillite, ou sont détenues en majorité par une fiducie dont les parts sont inscrites à une telle bourse à cette date. (*income trust*)

garantie financière S'il est assujetti soit à un intérêt ou, dans la province de Québec, à un droit garantissant le paiement d'une somme ou l'exécution d'une obligation relativement à un contrat financier admissible, soit à un accord de transfert de titres pour obtention de crédit, l'un ou l'autre des éléments suivants :

a) les sommes en espèces et les équivalents de trésorerie — notamment les effets négociables et dépôts à vue;

b) les titres, comptes de titres, droits intermédiés et droits d'acquérir des titres;

c) les contrats à terme ou comptes de contrats à terme. (*financial collateral*)

huissier-exécutant Shérif, huissier ou autre personne chargée de l'exécution d'un bref ou autre procédure sous l'autorité de la présente loi ou de toute autre loi, ou de toute autre procédure relative aux biens du débiteur. (*sheriff*)

intérêt relatif à des capitaux propres

a) S'agissant d'une personne morale autre qu'une fiducie de revenu, action de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle action et ne provenant pas de la conversion d'une dette convertible;

b) s'agissant d'une fiducie de revenu, part de celle-ci ou bon de souscription, option ou autre droit permettant d'acquérir une telle part et ne provenant pas de la conversion d'une dette convertible. (*equity interest*)

localité En parlant d'un débiteur, le lieu principal où, selon le cas :

a) il a exercé ses activités au cours de l'année précédant l'ouverture de sa faillite;

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*)

b) il a résidé au cours de l'année précédant l'ouverture de sa faillite;

c) se trouve la plus grande partie de ses biens, dans les cas non visés aux alinéas a) ou b). (*locality of a debtor*)

localité d'un débiteur [Abrogée, 2005, ch. 47, art. 2(F)]

ministre Le ministre de l'Industrie. (*Minister*)

moment de la faillite S'agissant d'une personne, le moment :

a) soit du prononcé de l'ordonnance de faillite la visant;

b) soit du dépôt d'une cession de biens la visant;

c) soit du fait sur la base duquel elle est réputée avoir fait une cession de biens. (*time of the bankruptcy*)

opération sous-évaluée Toute disposition de biens ou fourniture de services pour laquelle le débiteur ne reçoit aucune contrepartie ou en reçoit une qui est manifestement inférieure à la juste valeur marchande de celle qu'il a lui-même donnée. (*transfer at undervalue*)

ouverture de la faillite Relativement à une personne, le premier en date des événements suivants à survenir :

a) le dépôt d'une cession de biens la visant;

b) le dépôt d'une proposition la visant;

c) le dépôt d'un avis d'intention par elle;

d) le dépôt de la première requête en faillite :

(i) dans les cas visés aux alinéas 50.4(8) a) et 57 a) et au paragraphe 61(2),

(ii) dans le cas où la personne, alors qu'elle est visée par un avis d'intention déposé aux termes de l'article 50.4 ou une proposition déposée aux termes de l'article 62, fait une cession avant que le tribunal ait approuvé la proposition;

e) dans les cas non visés à l'alinéa d), le dépôt de la requête à l'égard de laquelle une ordonnance de faillite est rendue;

f) l'introduction d'une procédure sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*. (*date of the initial bankruptcy event*)

personne

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

a) Sont assimilés aux personnes les sociétés de personnes, associations non constituées en personne morale, personnes morales, sociétés et organisations coopératives, ainsi que leurs successeurs;

b) sont par ailleurs assimilés aux personnes leurs héritiers, liquidateurs de succession, exécuteurs testamentaires, administrateurs et autres représentants légaux. (*person*)

personne insolvable Personne qui n'est pas en faillite et qui réside au Canada ou y exerce ses activités ou qui a des biens au Canada, dont les obligations, constituant à l'égard de ses créanciers des réclamations prouvables aux termes de la présente loi, s'élèvent à mille dollars et, selon le cas :

a) qui, pour une raison quelconque, est incapable de faire honneur à ses obligations au fur et à mesure de leur échéance;

b) qui a cessé d'acquitter ses obligations courantes dans le cours ordinaire des affaires au fur et à mesure de leur échéance;

c) dont la totalité des biens n'est pas suffisante, d'après une juste estimation, ou ne suffirait pas, s'il en était disposé lors d'une vente bien conduite par autorité de justice, pour permettre l'acquittement de toutes ses obligations échues ou à échoir. (*insolvent person*)

personne morale Personne morale qui est autorisée à exercer des activités au Canada ou qui y a un établissement ou y possède des biens, ainsi que toute fiducie de revenu. Sont toutefois exclues les banques, banques étrangères autorisées au sens de l'article 2 de la *Loi sur les banques*, compagnies d'assurance, sociétés de fiducie ou sociétés de prêt constituées en personnes morales. (*corporation*)

prescrit

a) Dans le cas de la forme de documents à prescrire au titre de la présente loi et des renseignements qui doivent y figurer, prescrit par le surintendant en application de l'alinéa 5(4) e);

b) dans les autres cas, prescrit par les Règles générales. (*prescribed*)

proposition concordataire ou ***proposition*** S'entend :

a) à la section I de la partie III, de la proposition faite au titre de cette section;

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*)

settlement [Repealed, 2005, c. 47, s. 2]

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]

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

b) dans le reste de la présente loi, de la proposition faite au titre de la section I de la partie III ou d'une proposition de consommateur faite au titre de la section II de la partie III.

Est également visée la proposition ou proposition de consommateur faite en vue d'un concordat, d'un atermoiement ou d'un accommodement. (*proposal*)

réclamation prouvable en matière de faillite ou ***réclamation prouvable*** Toute réclamation ou créance pouvant être prouvée dans des procédures intentées sous l'autorité de la présente loi par un créancier. (*claim provable in bankruptcy*, *provable claim* or *claim provable*)

réclamation relative à des capitaux propres Réclamation portant sur un intérêt relatif à des capitaux propres et visant notamment :

a) un dividende ou un paiement similaire;

b) un remboursement de capital;

c) tout droit de rachat d'actions au gré de l'actionnaire ou de remboursement anticipé d'actions au gré de l'émetteur;

d) des pertes pécuniaires associées à la propriété, à l'achat ou à la vente d'un intérêt relatif à des capitaux propres ou à l'annulation de cet achat ou de cette vente;

e) une contribution ou une indemnité relative à toute réclamation visée à l'un des alinéas a) à d). (*equity claim*)

Règles générales Les Règles générales établies en application de l'article 209. (*General Rules*)

résolution ou ***résolution ordinaire*** Résolution adoptée conformément à l'article 115. (*resolution* or *ordinary resolution*)

résolution spéciale Résolution décidée par une majorité en nombre et une majorité des trois quarts en valeur des créanciers titulaires de réclamations prouvées, présents personnellement ou représentés par fondés de pouvoir à une assemblée des créanciers et votant sur la résolution. (*special resolution*)

séquestre officiel Fonctionnaire nommé en vertu du paragraphe 12(2). (*official receiver*)

surintendant Le surintendant des faillites nommé aux termes du paragraphe 5(1). (*Superintendent*)

(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., 1985, c. B-3, s. 2; R.S., 1985, c. 31 (1st Supp.), s. 69; 1992, c. 1, s. 145(F), c. 27, s. 3; 1995, c. 1, s. 62; 1997, c. 12, s. 1; 1999, c. 28, s. 146, c. 31, s. 17; 2000, c. 12, s. 8; 2001, c. 4, s. 25, c. 9, s. 572; 2004, c. 25, s. 7; 2005, c. 3, s. 11, c. 47, s. 2; 2007, c. 29, s. 91, c. 36, s. 1; 2012, c. 31, s. 414; 2015, c. 3, s. 6(F); 2018, c. 10, s. 82.

surintendant des institutions financières Le surintendant des institutions financières nommé en application du paragraphe 5(1) de la *Loi sur le Bureau du surintendant des institutions financières*. (*Superintendent of Financial Institutions*)

syndic ou ***syndic autorisé*** Personne qui détient une licence ou est nommée en vertu de la présente loi. (*trustee* or *licensed trustee*)

tribunal Sauf aux alinéas 178(1)a) et a.1) et aux articles 204.1 à 204.3, tout tribunal mentionné aux paragraphes 183(1) ou (1.1). Y est assimilé tout juge de ce tribunal ainsi que le greffier ou le registraire de celui-ci, lorsqu'il exerce les pouvoirs du tribunal qui lui sont conférés au titre de la présente loi. (*court*)

union de fait Relation qui existe entre deux conjoints de fait. (*common-law partnership*)

valeurs nettes dues à la date de résiliation La somme nette obtenue après compensation des obligations mutuelles des parties à un contrat financier admissible effectuée conformément à ce contrat. (*net termination value*)

L.R. (1985), ch. B-3, art. 2; L.R. (1985), ch. 31 (1er suppl.), art. 69; 1992, ch. 1, art. 145(F), ch. 27, art. 3; 1995, ch. 1, art. 62; 1997, ch. 12, art. 1; 1999, ch. 28, art. 146, ch. 31, art. 17; 2000, ch. 12, art. 8; 2001, ch. 4, art. 25, ch. 9, art. 572; 2004, ch. 25, art. 7; 2005, ch. 3, art. 11, ch. 47, art. 2; 2007, ch. 29, art. 91, ch. 36, art. 1; 2012, ch. 31, art. 414; 2015, ch. 3, art. 6(F); 2018, ch. 10, art. 82.

Designation of beneficiary

2.1 A change in the designation of a beneficiary in an insurance contract is deemed to be a disposition of property for the purpose of this Act.

1997, c. 12, s. 2; 2004, c. 25, s. 8; 2005, c. 47, s. 3.

Désignation de bénéficiaires

2.1 La modification de la désignation du bénéficiaire d'une police d'assurance est réputée être une disposition de biens pour l'application de la présente loi.

1997, ch. 12, art. 2; 2004, ch. 25, art. 8; 2005, ch. 47, art. 3.

Superintendent's division office

2.2 Any notification, document or other information that is required by this Act to be given, forwarded, mailed, sent or otherwise provided to the Superintendent, other than an application for a licence under subsection 13(1), shall be given, forwarded, mailed, sent or otherwise provided to the Superintendent at the Superintendent's division office as specified in directives of the Superintendent.

1997, c. 12, s. 2.

Bureau de division

2.2 Sauf dans le cas de la demande de licence prévue au paragraphe 13(1), les notifications et envois de documents ou renseignements à effectuer au titre de la présente loi auprès du surintendant le sont au bureau de division spécifié par ses instructions.

1997, ch. 12, art. 2.

3 [Repealed, 2005, c. 47, s. 4]

3 [Abrogé, 2005, ch. 47, art. 4]

Definitions

4 (1) In this section,

entity means a person other than an individual; (*entité*)

Définitions

4 (1) Les définitions qui suivent s'appliquent au présent article.

entité Personne autre qu'une personne physique. (*entity*)

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.

responsabilité personnelle relativement aux frais engagés par toute personne exécutant l'ordonnance :

a) si, dans les dix jours suivant l'ordonnance ou dans le délai fixé par celle-ci, dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur ou pendant la durée de la suspension visée à l'alinéa b) :

(i) il s'y conforme,

(ii) il abandonne, après avis à la personne ayant rendu l'ordonnance, tout droit sur l'immeuble en cause ou tout intérêt sur le bien réel en cause, en dispose ou s'en dessaisit;

b) pendant la durée de la suspension de l'ordonnance qui est accordée, sur demande présentée dans les dix jours suivant l'ordonnance visée à l'alinéa a) ou dans le délai fixé par celle-ci, ou dans les dix jours suivant sa nomination si l'ordonnance est alors en vigueur :

(i) soit par le tribunal ou l'autorité qui a compétence relativement à l'ordonnance, en vue de permettre au syndic de la contester,

(ii) soit par le tribunal qui a compétence en matière de faillite, en vue d'évaluer les conséquences économiques du respect de l'ordonnance;

c) si, avant que l'ordonnance ne soit rendue, il avait abandonné tout droit sur l'immeuble en cause ou tout intérêt sur le bien réel en cause ou y avait renoncé, ou s'en était dessaisi.

Stay may be granted

(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.

Suspension

(5) En vue de permettre au syndic d'évaluer les conséquences économiques du respect de l'ordonnance, le tribunal peut en ordonner la suspension après avis et pour la période qu'il estime indiqués.

Costs for remedying not costs of administration

(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.

Frais

(6) Si le syndic a abandonné tout droit sur l'immeuble en cause ou tout intérêt sur le bien réel en cause ou y a renoncé, les réclamations pour les frais de réparation du fait ou dommage lié à l'environnement et touchant le bien ne font pas partie des frais d'administration.

Priority of claims

(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

Priorité des réclamations

(7) En cas de faillite, de proposition ou de mise sous séquestre administrée par un séquestre, toute réclamation de Sa Majesté du chef du Canada ou d'une province contre le débiteur pour les frais de réparation du fait ou

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.

dommage lié à l'environnement et touchant un de ses immeubles ou biens réels est garantie par une sûreté sur le bien en cause et sur ceux qui sont contigus à celui où le dommage est survenu et qui sont liés à l'activité ayant causé le fait ou le dommage; la sûreté peut être exécutée selon le droit du lieu où est situé le bien comme s'il s'agissait d'une hypothèque ou autre garantie sur celui-ci et, par dérogation aux autres dispositions de la présente loi et à toute règle de droit fédéral et provincial, a priorité sur tout autre droit, charge, sûreté ou réclamation visant le bien.

Claim for clean-up costs

(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.

1992, c. 27, s. 9; 1997, c. 12, s. 15; 2004, c. 25, s. 16; 2005, c. 47, s. 17; 2007, c. 36, s. 9.

Précision

(8) Malgré le paragraphe 121(1), la réclamation pour les frais de réparation du fait ou dommage lié à l'environnement et touchant l'immeuble ou le bien réel du débiteur constitue une réclamation prouvable, que la date du fait ou dommage soit antérieure ou postérieure à celle de la faillite ou du dépôt de la proposition.

1992, ch. 27, art. 9; 1997, ch. 12, art. 15; 2004, ch. 25, art. 16; 2005, ch. 47, art. 17; 2007, ch. 36, art. 9.

Effect of defect or irregularity in appointment

14.07 No defect or irregularity in the appointment of a trustee vitiates any act done by the trustee in good faith.

1992, c. 27, s. 9.

Vice ou irrégularité dans la nomination

14.07 Aucune erreur ou irrégularité dans la nomination d'un syndic ne vicie un acte accompli de bonne foi par lui.

1992, ch. 27, art. 9.

Corporations as Trustees

Sociétés

Majority of officers and directors must hold licences

14.08 A body corporate may hold a licence as a trustee only if a majority of its directors and a majority of its officers hold licences as trustees.

1992, c. 27, s. 9.

Administrateurs titulaires de licences

14.08 Une personne morale ne peut être titulaire d'une licence de syndic que si la majorité de ses administrateurs et la majorité de ses dirigeants sont titulaires d'une telle licence.

1992, ch. 27, art. 9.

Acts of body corporate

14.09 A body corporate that holds a licence as a trustee may perform the duties and exercise the powers of a trustee only through a director or officer of the body corporate who holds a licence as a trustee.

1992, c. 27, s. 9.

Actes des personnes morales

14.09 La personne morale titulaire d'une licence de syndic ne peut exercer ses fonctions à ce titre que par l'intermédiaire d'un de ses administrateurs ou dirigeants qui est lui-même titulaire d'une telle licence.

1992, ch. 27, art. 9.

Not carrying on business of trust company

14.1 Every body corporate that is incorporated by or under an Act of Parliament and that holds a licence as a

Distinction entre les sociétés de fiducie

14.1 Toute personne morale de droit fédéral, titulaire d'une licence de syndic, peut exercer les fonctions de

shall vest in any person that the court may appoint, or, in default of any appointment, revert to the bankrupt for all the estate, or interest or right of the trustee in the estate, on any terms and subject to any conditions, if any, that the court may order.

Final statement of receipts and disbursements

(3) If an order is made under subsection (1), the trustee shall, without delay, prepare the final statements of receipts and disbursements referred to in section 151.

R.S., 1985, c. B-3, s. 181; 2004, c. 25, s. 86; 2005, c. 47, s. 109.

Stay on issue of order

182 (1) An order of discharge or annulment shall be dated on the day on which it is made, but it shall not be issued or delivered until the expiration of the time allowed for an appeal, and, if an appeal is entered, not until the appeal has been finally disposed of.

(2) [Repealed, 1992, c. 27, s. 65]

R.S., 1985, c. B-3, s. 182; 1992, c. 27, s. 65.

mais les biens du failli sont dévolus à la personne que le tribunal peut nommer, ou, à défaut de cette nomination, retournent au failli pour tout droit, domaine ou intérêt du syndic, aux conditions, s'il en est, que le tribunal peut ordonner.

État définitif des recettes et des débours

(3) Malgré l'annulation de la faillite, le syndic prépare sans délai l'état définitif des recettes et des débours visé à l'article 151.

L.R. (1985), ch. B-3, art. 181; 2004, ch. 25, art. 86; 2005, ch. 47, art. 109.

Suspension de l'émission de l'ordonnance

182 (1) L'ordonnance de libération ou d'annulation porte la date à laquelle elle est rendue, mais ne peut être émise ou délivrée avant l'expiration du délai accordé pour un appel ni, si appel est interjeté, avant que l'appel ait été finalement jugé.

(2) [Abrogé, 1992, ch. 27, art. 65]

L.R. (1985), ch. B-3, art. 182; 1992, ch. 27, art. 65.

PART VII

Courts and Procedure

Jurisdiction of Courts

Courts vested with jurisdiction

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

(a) in the Province of Ontario, the Superior Court of Justice;

(b) [Repealed, 2001, c. 4, s. 33]

(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

(d) in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;

(e) in the Province of Prince Edward Island, the Supreme Court of the Province;

(f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;

PARTIE VII

Tribunaux et procédure

Compétence des tribunaux

Tribunaux compétents

183 (1) Les tribunaux suivants possèdent la compétence en droit et en equity qui doit leur permettre d'exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant leurs termes respectifs, tels que ces termes sont maintenant ou peuvent par la suite être tenus, pendant une vacance judiciaire et en chambre :

a) dans la province d'Ontario, la Cour supérieure de justice;

b) [Abrogé, 2001, ch. 4, art. 33]

c) dans les provinces de la Nouvelle-Écosse et de la Colombie-Britannique, la Cour suprême;

d) dans les provinces du Nouveau-Brunswick et d'Alberta, la Cour du Banc de la Reine;

e) dans la province de l'Île-du-Prince-Édouard, la Cour suprême;

f) dans les provinces du Manitoba et de la Saskatchewan, la Cour du Banc de la Reine;

(g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court; and

(h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

g) dans la province de Terre-Neuve-et-Labrador, la Division de première instance de la Cour suprême;

h) au Yukon, la Cour suprême du Yukon, dans les Territoires du Nord-Ouest, la Cour suprême des Territoires du Nord-Ouest et, au Nunavut, la Cour de justice du Nunavut.

Superior Court jurisdiction in the Province of Quebec

(1.1) In the Province of Quebec, the Superior Court is invested with the jurisdiction that will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during its term, as it is now, or may be hereafter, held, and in vacation and in chambers.

Compétence de la Cour supérieure de la province de Québec

(1.1) Dans la province de Québec, la Cour supérieure possède la compétence pour exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant son terme, tel que celui-ci est maintenant ou peut par la suite être tenu, pendant une vacance judiciaire et en chambre.

Courts of appeal — common law provinces

(2) Subject to subsection (2.1), the courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

Cours d'appel — provinces de common law

(2) Sous réserve du paragraphe (2.1), les cours d'appel du Canada, dans les limites de leur compétence respective, sont, en droit et en equity, conformément à leur procédure ordinaire, sauf divergences prévues par la présente loi ou par les Règles générales, investies de la compétence d'entendre et de juger les appels interjetés des tribunaux exerçant juridiction de première instance en vertu de la présente loi.

Court of Appeal of the Province of Quebec

(2.1) In the Province of Quebec, the Court of Appeal, within its jurisdiction, is invested with power and jurisdiction, according to its ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals from the Superior Court.

Cour d'appel de la province de Québec

(2.1) Dans la province de Québec, la Cour d'appel, dans les limites de sa compétence, est, conformément à sa procédure ordinaire, sauf divergences prévues par la présente loi ou par les Règles générales, investie de la compétence d'entendre et de juger les appels interjetés de la Cour supérieure.

Supreme Court of Canada

(3) The Supreme Court of Canada has jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.

R.S., 1985, c. B-3, s. 183; R.S., 1985, c. 27 (2nd Supp.), s. 10; 1990, c. 17, s. 3; 1998, c. 30, s. 14; 1999, c. 3, s. 15; 2001, c. 4, s. 33; 2002, c. 7, s. 83; 2015, c. 3, s. 9.

Cour suprême du Canada

(3) La Cour suprême du Canada a compétence pour entendre et décider, suivant sa procédure ordinaire, tout appel ainsi autorisé et pour adjuger les frais.

L.R. (1985), ch. B-3, art. 183; L.R. (1985), ch. 27 (2e suppl.), art. 10; 1990, ch. 17, art. 3; 1998, ch. 30, art. 14; 1999, ch. 3, art. 15; 2001, ch. 4, art. 33; 2002, ch. 7, art. 83; 2015, ch. 3, art. 9.

Appointment of officers

184 Each of the following persons, namely,

(a) the Chief Justice of the court,

(b) in Quebec, the Chief Justice or the Associate Chief Justice in the district to which the Chief Justice or Associate Chief Justice was appointed,

(c) in Yukon, the Commissioner of Yukon,

Nomination de registraires, etc.

184 Chacune des personnes énumérées ci-dessous procède aux nominations et affectations de registraires, commis et autres fonctionnaires en matière de faillite qu'elle juge utiles pour l'expédition des questions au sujet desquelles la présente loi accorde compétence ou pouvoir, et peut spécifier ou restreindre la compétence territoriale de ces registraires, commis ou autres fonctionnaires :

a) le juge en chef du tribunal;

Province of Alberta

BUILDERS' LIEN ACT

Revised Statutes of Alberta 2000
Chapter B-7

Current as of July 1, 2012

Office Consolidation

Alberta Queen's Printer
7th Floor, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

(a) the work under a contract or a subcontract or a substantial part of it is ready for use or is being used for the purpose intended, and

(b) the work under a contract or a subcontract cannot be completed expeditiously for reasons beyond the control of the contractor or the subcontractor,

the value of the work to be completed or materials to be furnished is to be deducted from the contract price in determining substantial performance.

1985 c14 s3

Valuation of work done

4 For the purposes of this Act, the value of the work actually done and materials actually furnished shall be calculated on the basis of

(a) the contract price, or

(b) the actual value of the work done and materials furnished, if there is not a specific contract price.

1985 c14 s3

Creation and Extent of Lien

Waiver prohibited

5 An agreement by any person that this Act does not apply or that the remedies provided by it are not to be available for the person's benefit is against public policy and void.

RSA 1980 cB-12 s3

Creation of lien

6(1) Subject to subsection (2), a person who

(a) does or causes to be done any work on or in respect of an improvement, or

(b) furnishes any material to be used in or in respect of an improvement,

for an owner, contractor or subcontractor has, for so much of the price of the work or material as remains due to the person, a lien on the estate or interest of the owner in the land in respect of which the improvement is being made.

(2) When work is done or materials are furnished

(a) preparatory to,

(b) in connection with, or

(c) for an abandonment operation in connection with,

the recovery of a mineral, then, notwithstanding that a person holding a particular estate or interest in the mineral concerned has not requested the work to be done or the material to be furnished, the lien given by subsection (1) attaches to all estates and interests in the mineral concerned, other than the estate in fee simple in the mines and minerals, unless the person holding the estate in fee simple in the mines and minerals has expressly requested the work or the furnishing of material, in which case the lien also attaches to the estate in fee simple in the mines and minerals but not to that person's estate, if any, in the rest of the land.

(3) A lien attaching to an estate or interest in mines and minerals also attaches to the minerals when severed from the land.

(4) For the purposes of this Act, a person who rents equipment to an owner, contractor or subcontractor is, while the equipment is on the contract site or in the immediate vicinity of the contract site, deemed to have performed a service and has a lien for reasonable and just rental of the equipment while it is used or is reasonably required to be available for the purpose of the work.

RSA 1980 cB-12 s4;1985 c14 s4

Highways and irrigation districts

7(1) No lien exists with respect to a public highway or for any work or improvement caused to be done on it by a municipal corporation.

(2) No lien exists with respect to land held by an irrigation district or for any work or improvement caused to be done by an irrigation district.

RSA 1980 cB-12 s5;1999 cI-11.7 s214

Limitation of lien

8(1) When the same lien attaches to estates or interests in more than one lot in respect of a separate improvement on each such lot, the lien does not apply so as to make the owner of any one lot liable in respect of that lot for a sum in excess of the price of the work done or material furnished in respect of the improvement on the lot less a proportionate share of any money paid to the person claiming the lien in respect of the work done on or the material furnished for all the lots to which the lien attaches.

(iii) direct that at the trial of the action any particular issue or issues arising on the application be determined,

(d) the court may make any further order or direction that it considers necessary or desirable including, among other things, an order that the property be sold pursuant to this Act and an order that the action be entered for trial,

(e) the court may order that any lienholder or other party be given the carriage of the proceedings, and

(f) the court may order that questioning under Part 5 of the *Alberta Rules of Court* be conducted in the action, but no questioning may be conducted without an order of the court.

RSA 2000 cB-7 s53;2009 c53 s28

Appointment of receiver and trustee

54(1) At any time after a statement of claim has been issued to enforce a lien, any person interested in the property to which the lien attaches or that is otherwise affected by the lien may apply to the court for the appointment of a receiver of the rents and profits from the property against which the claim of lien is registered, and the court may order the appointment of a receiver on any terms and on the giving of any security or without security, as the court considers appropriate.

(2) At any time after a statement of claim has been issued to enforce a lien, any person interested in the property to which the lien attaches or that is otherwise affected by the lien may apply to the court for the appointment of a trustee and the court may, on the giving of any security or without security, as the court considers appropriate, appoint a trustee

(a) with power to manage, sell, mortgage or lease the property subject to the supervision, direction and approbation of the court, and

(b) with power, on approval of the court, to complete or partially complete the improvement.

(3) Mortgage money advanced to the trustee as the result of any of the powers conferred on the trustee under this section takes priority over all liens existing at the date of the appointment of the trustee.

(4) Any property directed to be sold under this section may be offered for sale subject to any mortgage or other charge or encumbrance if the court so directs.

(5) The net proceeds of any receivership and the proceeds of any sale made by a trustee under this section shall be paid into court and are subject to the claims of all lienholders, mortgagees and other parties interested in the property sold as their respective rights may be determined.

(6) The court shall make all necessary orders for the completion of the sale, for the vesting of the property in the purchaser and for possession.

(7) A vesting order under subsection (6) vests the title of the property free from all liens, encumbrances and interests of any kind including dower, except in cases where the sale is made subject to any mortgage, charge, encumbrance or interest.

RSA 1980 cB-12 s40;1985 c14 s24

Uncompleted or abandoned contract

55(1) Subject to subsection (2), a lienholder may enforce the lienholder's lien notwithstanding the non-completion or abandonment of any contract under which that lien arises.

(2) Subsection (1) does not apply in favour of a contractor or subcontractor whose contract provides that nothing is to be paid until completion of the contract.

RSA 1980 cB-12 s41

Consolidation of actions

56 If more than one action is commenced to enforce liens in respect of the same land, the court

(a) may, on the application of any person interested, consolidate the actions into one action, and

(b) may give the conduct of the consolidated action to any plaintiff as it considers fit.

RSA 1980 cB-12 s42

Entering action for trial

57 When a defence has been filed and no order is made on the pre-trial application for the holding of a trial, the plaintiff or any other party may enter the action for trial.

RSA 1980 cB-12 s43

TAB 5

Most Negative Treatment: Check subsequent history and related treatments.

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.).

End of Document

TAB 6

Province of Alberta

RESPONSIBLE ENERGY DEVELOPMENT ACT

Statutes of Alberta, 2012
Chapter R-17.3

Current as of June 26, 2020

Office Consolidation

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

(ii) by the Lieutenant Governor in Council pursuant to section 68;

(s) "specified enactment" means

(i) the *Environmental Protection and Enhancement Act*,

(ii) the *Public Lands Act*,

(iii) the *Water Act*,

(iv) Part 8 of the *Mines and Minerals Act*,

(v) a regulation under an enactment referred to in subclauses (i) to (iv), or

(vi) any enactment prescribed by the regulations.

(2) A reference in this Act to "any other enactment" means a reference to an energy resource enactment or a specified enactment where the context so requires.

Mandate of Regulator

2(1) The mandate of the Regulator is

(a) to provide for the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta through the Regulator's regulatory activities, and

(b) in respect of energy resource activities, to regulate

(i) the disposition and management of public lands,

(ii) the protection of the environment, and

(iii) the conservation and management of water, including the wise allocation and use of water,

in accordance with energy resource enactments and, pursuant to this Act and the regulations, in accordance with specified enactments.

(2) The mandate of the Regulator is to be carried out through the exercise of its powers, duties and functions under energy resource enactments and, pursuant to this Act and the regulations, under specified enactments, including, without limitation, the following powers, duties and functions:

TAB 7

Province of Alberta

OIL AND GAS CONSERVATION ACT

Revised Statutes of Alberta 2000
Chapter O-6

Current as of June 15, 2020

Office Consolidation

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

(2) The decision of the Regulator is final as to whether any product or mixture comes within a definition in subsection (1) or as to whether a definition in subsection (1) is applicable in a particular case.

RSA 2000 cO-6 s1;2006 c23 s60;2009 c20 s7;2010 c14 s3;2011 c11 s5;2012 cR-17.3 s97(2);2020 c4 s1(2)

Description of land

2 In this Act and in any regulations or rules or orders made pursuant to this Act, land may be described or referred to as if it were surveyed into sections in accordance with the *Surveys Act* whether or not the land is so surveyed, and reference to a legal subdivision, section or township in land that is not so surveyed is deemed to refer to that which would be the legal subdivision, section or township if the land were so surveyed.

RSA 2000 cO-6 s2;2012 cR-17.3 s97(33)

Application of Act

3 This Act applies to every well and facility situated in Alberta whenever drilled or constructed, and to any substance obtained or obtainable from such a well or facility, notwithstanding any terms to the contrary in any lease or grant from the Crown in right of Canada or from any other person.

RSA 1980 cO-5 s3;1983 cO-5.5 s30;2000 c12 s1(3)

Part 1
Object and Application of Act

Purposes of Act

4 The purposes of this Act are

(a) to effect the conservation of, and to prevent the waste of, the oil and gas resources of Alberta;

(b) to secure the observance of safe and efficient practices in the locating, spacing, drilling, equipping, constructing, completing, reworking, testing, operating, maintenance, repair, suspension and abandonment of wells and facilities and in operations for the production of oil and gas or the storage or disposal of substances;

(c) to provide for the economic, orderly, efficient and responsible development in the public interest of the oil and gas resources of Alberta;

(c.1) to provide for the responsible management of a well, facility, well site or facility site throughout its life cycle;

(d) to afford each owner the opportunity of obtaining the owner's share of the production of oil or gas from any pool;

(e) to provide for the recording and the timely and useful dissemination of information regarding the oil and gas resources of Alberta;

(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 Regulator has jurisdiction.

RSA 2000 cO-6 s4;2010 c14 s3;2012 cR-17.3 s97(31); 2020 c4 s1(3)

Part 2 Repealed 2012 cR-17.3 s97(3).

Part 3
General Powers

General powers

7 The Regulator, subject to section 77, with the approval of the Lieutenant Governor in Council, may make any just and reasonable orders and directions the Regulator considers necessary to effect the purposes of this Act and that are not otherwise specifically authorized by this Act.

RSA 2000 cO-6 s7;2012 cR-17.3 s97(31);2020 c4 s1(4)

Conditions of approval

8(1) Any order of the Lieutenant Governor in Council under this Act may be made subject to any terms or conditions that the Lieutenant Governor in Council prescribes.

(2) An order of the Lieutenant Governor in Council granting any approval or authorization under this Act and made before June 2, 1972 is not invalid by reason only of the fact that the order was made subject to any terms or conditions.

(3) If the holder of an approval contravenes or fails to comply with any term or condition contained in an order of the Lieutenant Governor in Council approving or authorizing the Regulator's approval,

(a) the Regulator may cancel an approval granted by it under this Act or may take any other remedial measures that it considers suitable in the circumstances, or

(b) the Lieutenant Governor in Council may amend, vary, add to or replace any terms or conditions contained in the order.

RSA 2000 cO-6 s8;2012 cR-17.3 s97(31),(32)

TAB 8

Most Negative Treatment: Distinguished
Most Recent Distinguished: Zenteno v. Ticknor | 2010 CarswellOnt 10987, 215 A.C.W.S. (3d) 170, [2012] W.D.F.L. 3698, [2012] W.D.F.L. 3740 | (Ont. S.C.J., May 30, 2010)

1993 CarswellBC 44
Supreme Court of Canada

Peter v. Beblow

1993 CarswellBC 1258, 1993 CarswellBC 44, [1993] 1 S.C.R. 980, [1993] 3 W.W.R. 337, [1993] R.D.F. 369, [1993] B.C.W.L.D. 1264, [1993] W.D.F.L. 721, [1993] S.C.J. No. 36, 101 D.L.R. (4th) 621, 150 N.R. 1, 23 B.C.A.C. 81, 39 W.A.C. 81, 39 A.C.W.S. (3d) 646, 44 R.F.L. (3d) 329, 48 E.T.R. 1, 77 B.C.L.R. (2d) 1, J.E. 93-660, EYB 1993-67100

CATHERINE PETER v. WILLIAM BEBLOW

La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Iacobucci JJ.

Heard: November 12, 1992
Judgment: March 25, 1993
Docket: Doc. 22258

Proceedings: reversed *Peter v. Beblow* ((1990)), 1990 CarswellBC 237, 50 B.C.L.R. (2d) 266, 29 R.F.L. (3d) 268, 39 E.T.R. 113, [1991] 1 W.W.R. 419 ((B.C. C.A.))

Counsel: *G. William Wagner* and *R.C. Bernhardt*, for appellant.
Nuala J. Hillis and *Jessie MacNeil*, for respondent.

Subject: Family; Insolvency; Estates and Trusts; Property
Related Abridgment Classifications
Family law
VII Division of property
VII.2 Determination of ownership of property
VII.2.a Application of trust principles
VII.2.a.i Resulting and constructive trusts
VII.2.a.i.B Constructive trusts generally
Headnote
Family Law --- Family property on marriage breakdown — Determination of ownership of property — Application of trust principles — Resulting and constructive trusts — Constructive trusts generally
Family law — Unmarried couples — Property — Constructive and resulting trusts — Woman in long-term common law relationship maintaining and improving property and helping raise family without compensation — Court considering requirements for unjust enrichment — Court considering nexus between contribution and property necessary for constructive trust — Court awarding property to woman under constructive trust.
Trusts — Constructive trusts — Woman in long-term common law relationship maintaining and improving property and helping raise family without compensation — Court considering requirements for unjust enrichment — Court considering nexus between contribution and property necessary for constructive trust — Court awarding property to woman under constructive trust.
Restitution — Unjust enrichment — Woman in long-term common law relationship maintaining and improving property and helping raise family without compensation — Court considering requirements for unjust enrichment — Court considering nexus between contribution and property necessary for constructive trust — Court awarding property to woman under constructive trust.

The man and woman lived together in a common law relationship in the man's house for over 12 years. The woman cared for both sets of children while they remained at home. She cooked, cleaned, washed clothes, looked after the garden and worked on the property. The man did not pay the woman for her work. Both contributed to the purchase of groceries and supplies, the man contributing a greater share. The woman worked outside the home part-time during the summers, and purchased a property elsewhere. The man paid off his mortgage on the house and bought a houseboat and a van. After the parties separated, the house remained vacant. The woman brought an action claiming that the man had been unjustly enriched by her work. She sought to have a constructive trust imposed respecting the house or, alternatively, damages. The trial judge found that the man had been unjustly enriched since he had obtained the woman's services without compensation. He also found that the woman was under no obligation to perform the work without reasonable expectation of compensation, and that the man ought to have known that. He concluded that she had conferred a proprietary benefit upon the house in an amount just over its assessed value. As the man was living elsewhere and a monetary judgment would be impracticable since he was living on his pension, the fairest apportionment would be to transfer the house to the woman. The British Columbia Court of Appeal allowed the man's appeal on the grounds that the woman was not deprived, that she had no reasonable expectation of compensation, and that there was insufficient nexus between her contribution and the property. The woman appealed.

Held:

Appeal allowed.

Per MCLACHLIN J. (LA FOREST, SOPINKA and IACOBUCCI JJ. concurring): Unjust enrichment has three elements: 1) an enrichment; 2) a corresponding deprivation; and 3) the absence of a juristic reason for the enrichment. One remedy for unjust enrichment is a monetary award. The remedy of constructive trust arises where monetary damages are inadequate and where there is a link between the contribution that founds the action and the property in which the constructive trust is claimed. Here the three elements necessary to establish a claim for unjust enrichment were established. The woman's housekeeping and child-care services constituted a benefit to the man. Those services constituted a corresponding detriment to the woman. Finally, since there was no obligation existing between the parties which would justify the unjust enrichment, there was no juristic reason for the enrichment.

In determining whether there is an absence of juristic reason for the enrichment, the test is flexible. The fundamental concern is the legitimate expectation of the parties. In family cases, this concern may raise certain subsidiary matters: whether the plaintiff conferred the benefit as a valid gift, or obligation owed the defendant; whether the plaintiff submitted to, or compromised, the defendant's honest claim; whether public policy supports the enrichment. Here the first and third factors could be argued. The law presumes no duty on a common law spouse to perform work and services for her partner. As the trial judge found on the facts that the woman was under no obligation to perform the work without reasonable expectation of compensation, the woman's services were neither performed pursuant to obligation nor were they a gift. Concerning public policy, there is no logical reason to distinguish domestic services from other contributions. Refusing to put a price on these services systematically devalues women's contributions to the family economy and contributes to the feminization of poverty. Today courts regularly recognize the value of domestic services. Although the legislature has excluded unmarried couples from matrimonial property legislation, it is precisely where an injustice arises without a legal remedy that equity finds a role. Accordingly, there were no juristic arguments that would justify the unjust enrichment.

In determining the proper remedy for unjust enrichment the same general principles apply in both commercial and in family cases. The first step is to determine whether a monetary award is insufficient and whether sufficient nexus between the contribution and the property has been made out. In considering whether a monetary award is insufficient the court may consider the probability of the award being paid as well as the special interest in the property acquired by the contributions. The extent of the interest is to be determined on the basis of the actual value of the matrimonial property — the "value-survived" approach. The "value-received" approach applies only to a monetary award. Where the claim is for an interest in the property one must necessarily determine what portion of the property's value is attributable to the plaintiff's services. A "value-received" approach to property would present practical problems with calculation. Moreover, a "value-survived" approach would accord best with the expectations of most parties, who expect to share in the wealth generated by their partnership. The trial judge's approach accorded with these principles. He assessed the value received by the woman, held that a monetary judgment would be inadequate, and concluded that there was a sufficiently direct connection between the services rendered and the property to support a constructive trust. Considering the woman's proper share of all the family assets, the evidence supported the trial judge's conclusion that the woman had established a constructive trust entitling her to title to the family home. Her services

helped preserve the property and saved the man large sums of money which he used to pay off his mortgage and to purchase a houseboat and a van.

Per CORY J. (concurring) (L'HEUREUX-DUBÉ and GONTHIER JJ. concurring):

A constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he or she would be unjustly enriched if he or she were permitted to retain it. The constructive trust may be applied where the spouse has contributed either to the acquisition of property or to its preservation, maintenance or improvement. This remedy may be applied to common law relationships. Here the trial judge specifically found that the woman's services had enriched the man.

Particularly in a matrimonial or long-term common law relationship it should, in the absence of cogent evidence to the contrary, be taken that the enrichment of one party will result in a deprivation of the other. The constructive trust is used to redress gains made through a breach of trust in a commercial or business relationship. Parties involved in long-term common law relationships will also base their actions on mutual trust. They too are entitled, in appropriate circumstances, to the remedy of constructive trust. In today's society it is unreasonable to assume that the presence of love automatically implies the gift of one party's services to another. Nor is it unreasonable for the party providing the domestic labour to share in the parties' property when the relationship is ended. The balancing of benefits in a matrimonial or common law relationship cannot be accomplished with the precision possible in a commercial relationship. The trial judge must consider the nature of the relationship, its duration and the contributions of the parties. Here there was ample evidence to justify the trial judge's finding that the woman had suffered deprivation. As a result of the relationship, including the efforts of the woman, the house was looked after and maintained. A 12-year relationship was long enough to provide a strong presumption that the services provided by the woman would not be used solely to enrich the man. The woman worked to create a home for the man, which involved many hours of work per week. The test regarding juristic reasons for the enrichment is an objective one. In a common law relationship, it is not necessary that there be evidence of promises to marry or to compensate the claimant for the services provided. Rather, where a person provides "spousal services" to another, those services should be taken as having been given with the expectation of compensation unless there is evidence to the contrary. Here the trial judge appropriately drew the inference that the woman would reasonably have had an expectation of sharing the wealth she helped to create. All the conditions for unjust enrichment were made out.

While there is a need to limit the use of the constructive trust remedy in a commercial context, the same proposition should not be rigorously applied in a family relationship. Unlike a commercial relationship, in a family relationship the work, services and contributions provided by one of the parties need not be directly linked to a specific property. As long as there was no compensation provided for one party's services then it can be inferred that the provision of those services permitted the other party to acquire lands or to improve them. It follows that in a quasi-marital relationship where third party rights are not involved, the choice between a monetary award and a constructive trust will be discretionary and should be exercised flexibly. The decision as to which property, if there is more than one, should be made the subject of a constructive trust is also a discretionary one. Where the relationship is short or there are no assets surviving its dissolution, a monetary award should be made. A monetary payment might also be more appropriate than a constructive trust if the plaintiff's entitlement is small or could be satisfied apart from the property, if the defendant has any special attachment to the property, or if an award to the plaintiff of an interest in the property might cause hardship to the defendant. Here the woman contributed to the maintenance and preservation of the house. The trial judge was correct in finding that a monetary award would be impracticable. The property was vacant and the woman might have formed an emotional attachment to it. It was both reasonable and appropriate to choose the house for a constructive trust.

The two methods of evaluating the contribution of a party in a matrimonial relationship are the "value received" approach and the "value surviving" approach. While the former has traditionally been used in constructive trust cases, there is no reason why the latter approach could not be used. The remedy should be flexible. Nevertheless, the value surviving approach will often be preferable. This method will usually be more equitable and will more closely accord with the parties' expectations. Further, this method will avoid the difficult task of putting a dollar value on domestic services. Here the trial judge used a value received approach. Awarding the house to the woman reflected a fair assessment of her contribution to the relationship.

Table of Authorities

Cases considered:

Canadian Aero Service Ltd. v. O'Malley (1973), [1974] S.C.R. 592, 40 D.L.R. (3d) 371, 11 C.P.R. (2d) 206 — *referred to*

Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd., [1981] Ch. 105, [1980] 2 W.L.R. 202, [1979] 3 All E.R. 1025 — *considered*
Davidson v. Worthing (1986), 9 B.C.L.R. (2d) 202, 6 R.F.L. (3d) 113, 26 E.T.R. 60 (S.C.) — *referred to*
Everson v. Rich (1988), 16 R.F.L. (3d) 337, 31 E.T.R. 26, 53 D.L.R. (4th) 470, 71 Sask. R. 133 (C.A.) — *applied*
Grant v. Edwards, [1986] Ch. 638, [1986] 3 W.L.R. 114, [1986] 2 All E.R. 426 (C.A.) — *not followed*
Herman v. Smith (1984), 34 Alta. L.R. (2d) 90, 42 R.F.L. (2d) 154, 18 E.T.R. 169, 56 A.R. 74 (Q.B.) — *referred to*
Houghen v. Monnington (1991), 37 R.F.L. (3d) 279, 9 B.C.A.C. 222 (C.A.) — *overruled*
Hunter Engineering Co. v. Syncrude Canada Ltd., [1989] 1 S.C.R. 426, [1989] 3 W.W.R. 385, 35 B.C.L.R. (2d) 145, 92 N.R. 1, 57 D.L.R. (4th) 321 — *considered*
Hussey v. Palmer, [1972] 1 W.L.R. 1286, [1972] 3 All E.R. 744 (C.A.) — *referred to*
Hyette v. Pfenniger (1991), 39 R.F.L. (3d) 30, additional reasons at 39 R.F.L. (3d) at 44 (B.C.S.C.) — *overruled*
Kshywieski v. Kunka Estate, [1986] 3 W.W.R. 472, 39 Man. R. (2d) 8, 21 E.T.R. 229, 50 R.F.L. (2d) 421 (C.A.) — *overruled*
LAC Minerals Ltd. v. International Corona Resources Ltd., [1989] 2 S.C.R. 574, 6 R.P.R. (2d) 1, 44 B.L.R. 1, 35 E.T.R. 1, 69 O.R. (2d) 287, 26 C.P.R. (3d) 97, 61 D.L.R. (4th) 14, 101 N.R. 239, 36 O.A.C. 57 — *applied*
Lawrence v. Lindsey (1982), 21 Alta. L.R. (2d) 141, 28 R.F.L. (2d) 356, 38 A.R. 462 (Q.B.) — *referred to*
Moge v. Moge, [1992] 3 S.C.R. 813, [1993] 1 W.W.R. 481, 43 R.F.L. (3d) 345, 145 N.R. 1 — *considered*
Murdoch v. Murdoch, [1975] 1 S.C.R. 423, [1974] 1 W.W.R. 361, 13 R.F.L. 185, 41 D.L.R. (3d) 367 — *referred to*
Murray v. Roty (1983), 41 O.R. (2d) 705, 34 R.F.L. (2d) 404, 14 E.T.R. 237, 147 D.L.R. (3d) 438 (C.A.) — *referred to*
Peel (Regional Municipality) v. Canada, [1992] 3 S.C.R. 762 — *referred to*
Pettkus v. Becker, [1980] 2 S.C.R. 834, 19 R.F.L. (2d) 165, 8 E.T.R. 143, 117 D.L.R. (3d) 257, 34 N.R. 384 — *applied*
Prentice v. Lang (1987), 10 R.F.L. (3d) 364 (B.C.S.C.) — *overruled*
Rathwell v. Rathwell, [1978] 2 S.C.R. 436, [1978] 2 W.W.R. 101, 1 E.T.R. 307, 1 R.F.L. (2d) 1, 83 D.L.R. (3d) 289 — *considered*
Rawluk v. Rawluk, [1990] 1 S.C.R. 70, 23 R.F.L. (3d) 337, 65 D.L.R. (4th) 161, 36 E.T.R. 1, 103 N.R. 321, 71 O.R. (2d) 480, 38 O.A.C. 81 — *distinguished*
Sorochan v. Sorochan, [1986] 2 S.C.R. 38, [1986] 5 W.W.R. 289, 46 Alta. L.R. (2d) 97, 2 R.F.L. (3d) 225, 29 D.L.R. (4th) 1, 69 N.R. 81, 23 E.T.R. 143, [1986] R.D.I. 448, [1986] R.D.F. 501, 74 A.R. 67 — *applied*
White v. Central Trust Co. (1984), 54 N.B.R. (2d) 293, 140 A.P.R. 293, 7 D.L.R. (4th) 236, 17 E.T.R. 78 (C.A.) — *considered*

Statutes considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) — *referred to*

Words and phrases considered:

CONSTRUCTIVE TRUST

In Austin Wakeman Scott and William Franklin Fratcher, *The Law of Trusts*, vol. 5, 4th ed. (Boston: Little, Brown, 1989) at p. 304, the following definition appears:

A constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it.

The constructive trust, based on analogy to the formal trust of traditional equity, is a proprietary concept . . . for a constructive trust to arise, the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution.

. . . . .

. . . monetary compensation must be inadequate and there must be a link between the services rendered and the property in which the trust is claimed.

Appeal from judgment of British Columbia Court of Appeal, [1991] 1 W.W.R. 419, 50 B.C.L.R. (2d) 266, 39 E.T.R. 113, 29 R.F.L. (3d) 268, reversing judgment of Arkell L.J.S.C. awarding common law wife matrimonial home under constructive trust.

***McLachlin J. (La Forest, Sopinka and Iacobucci JJ.* concurring):**

1 I have had the advantage of reading the reasons of Justice Cory. While I agree with his conclusion and with much of his analysis, my reasons differ in some respects on two matters critical to this appeal: the issues raised by the requirement of the absence of juristic reason for an enrichment and the nature and application of the remedy of constructive trust.

2 In recent decades, Canadian courts have adopted the equitable concept of unjust enrichment inter alia as the basis for remedying the injustice that occurs where one person makes a substantial contribution to the property of another person without compensation. The doctrine has been applied to a variety of situations, from claims for payments made under mistake to claims arising from conjugal relationships. While courts have not been adverse to applying the concept of unjust enrichment in new circumstances, they have insisted on adhering to the fundamental principles which have long underlain the equitable doctrine of unjust enrichment. As stated by La Forest J.A. (as he then was) in *White v. Central Trust Co.* (1984), 7 D.L.R. (4th) 236, at p. 246, "... the well recognized categories of unjust enrichment must be regarded as clear examples of the more general principle that transcends them."

3 The basic notions are simple enough. An action for unjust enrichment arises when three elements are satisfied: (1) an enrichment; (2) a corresponding deprivation; and (3) the absence of a juristic reason for the enrichment. These proven, the action is established and the right to claim relief made out. At this point, a second doctrinal concern arises: the nature of the remedy. "Unjust enrichment" in equity permitted a number of remedies, depending on the circumstances. One was a payment for services rendered on the basis of quantum meruit or quantum valebat. Another equitable remedy, available traditionally where one person was possessed of legal title to property in which another had an interest, was the constructive trust. While the first remedy to be considered was a monetary award, the Canadian jurisprudence recognized that in some cases it might be insufficient. This may occur, to quote Justice La Forest in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at p. 678, "if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property." Or to quote Dickson J., as he then was, in *Pettkus v. Becker*, [1980] 2 S.C.R. 834, at p. 852, where there is a "contribution [to the property] sufficiently substantial and direct as to entitle [the plaintiff] to a portion of the profits realized upon sale of [the property]." In other words, the remedy of constructive trust arises, where monetary damages are inadequate and where there is a link between the contribution that founds the action and the property in which the constructive trust is claimed.

4 Notwithstanding these rather straightforward doctrinal underpinnings, their application has sometimes given rise to difficulty. There is a tendency on the part of some to view the action for unjust enrichment as a device for doing whatever may seem fair between the parties. In the rush to substantive justice, the principles are sometimes forgotten. Policy issues often assume a large role, infusing such straightforward discussions as whether there was a "benefit" to the defendant or a "detriment" to the plaintiff. On the remedies side, the requirements of the special proprietary remedy of constructive trust are sometimes minimized. As Professor Palmer has said: "The constructive trust idea stirs the judicial imagination in ways that assumpsit, quantum meruit and other terms as sociated with quasi-contract have never quite succeeded in duplicating" (G.E. Palmer, *The Law of Restitution*, vol. 1, at p. 16). Occasionally the remedial notion of constructive trust is even conflated with unjust enrichment itself, as though where one is found the other must follow.

5 Such difficulties have to some degree complicated the case at bar. At the doctrinal level, the simple question of "benefit" and "detriment" became infused with moral and policy questions of when the provision of domestic services in a quasi-matrimonial situation can give rise to a legal obligation. At the stage of remedy, the trial judge proceeded as if he were making a monetary award, and then, without fully explaining how, awarded the appellant the entire interest in the matrimonial home on the basis of a constructive trust. It is only by a return to the fundamental principles laid out in cases like *Pettkus v. Becker* and *Lac Minerals*, that one can cut through the conflicting findings and submissions on these issues and evaluate whether in fact the appellant has made out a claim for unjust enrichment, and if so what her remedy should be.

1. Is the Appellant's Claim for Unjust Enrichment Made Out?

6 I share the view of Cory J. that the three elements necessary to establish a claim for unjust enrichment — an enrichment, a corresponding deprivation, and the absence of any juristic reason for the enrichment — are made out in this case. The appellant's housekeeping and child-care services constituted a benefit to the respondent (1st element), in that he received household services without compensation, which in turn enhanced his ability to pay off his mortgage and other assets. These services also constituted a corresponding detriment to the appellant (2nd element), in that she provided services without compensation. Finally, since there was no obligation existing between the parties which would justify the unjust enrichment and no other arguments under this broad heading were met, there is no juristic reason for the enrichment (3rd element). Having met the three criteria, the plaintiff has established an unjust enrichment giving rise to restitution.

7 The main arguments on this appeal centred on whether the law should recognize the services which the appellant provided as being capable of founding an action for unjust enrichment. It was argued, for example, that the services cannot give rise to a remedy based on unjust enrichment because the appellant had voluntarily assumed the role of wife and stepmother. It was also said that the law of unjust enrichment should not recognize such services because they arise from natural love and affection. These arguments raise moral and policy questions and require the Court to make value judgments.

8 The first question is: where do these arguments belong? Are they part of the benefit — detriment analysis, or should they be considered under the third head — the absence of juristic reason for the unjust enrichment? The Court of Appeal, for example, held that there was no "detriment" on these grounds. I hold the view that these factors may most conveniently be considered under the third head of absence of juristic reason. This Court has consistently taken a straightforward economic approach to the first two elements of the test for unjust enrichment: *Pettkus v. Becker*, supra; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 [[1986] 5 W.W.R. 289]; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (hereinafter "*Peel*"). It is in connection with the third element — absence of juristic reason for the enrichment — that such considerations may more properly find their place. It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are "unjust".

9 What matters should be considered in determining whether there is an absence of juristic reason for the enrichment? The test is flexible, and the factors to be considered may vary with the situation before the court. For example, different factors may be more relevant in a case like *Peel*, supra, at p. 803, a claim for unjust enrichment between different levels of government, than in a family case.

10 In every case, the fundamental concern is the legitimate expectation of the parties: *Pettkus v. Becker*, supra. In family cases, this concern may raise the following subsidiary questions:

11 (i) Did the plaintiff confer the benefit as a valid gift or in pursuance of a valid common law, equitable or statutory obligation which he or she owed to the defendant?

12 (ii) Did the plaintiff submit to, or compromise, the defendant's honest claim?

13 (iii) Does public policy support the enrichment?

14 In the case at bar, the first and third of these factors were argued. It was argued first that the appellant's services were rendered pursuant to a common law or equitable obligation which she had assumed. Her services were part of the bargain she made when she came to live with the respondent, it was said. He would give her and her children a home and other husbandly services, and in turn she would look after the home and family.

15 This Court has held that a common law spouse generally owes no duty at common law, in equity or by statute to perform work or services for her partner. As Dickson C.J., speaking for the Court put it in *Sorochan v. Sorochan*, supra, at p. 46, the common law wife "was under no obligation, contractual or otherwise, to perform the work and services in the home or on the land." So there is no general duty presumed by the law on a common law spouse to perform work and services for her partner.

16 Nor, in the case at bar was there any obligation arising from the circumstances of the parties. The trial judge held that the appellant was "under no obligation to perform the work and assist in the home without some reasonable expectation of receiving something in return other than the drunken physical abuse which she received at the hands of the respondent." This puts an end to the argument that the services in question were performed pursuant to obligation. It also puts an end to the argument that the appellant's services to her partner were a "gift" from her to him. The central element of a gift at law — intentional giving to another without expectation of remuneration — is simply not present.

17 The third factor mentioned above raises directly the issue of public policy. While it may be stated in different ways, the argument at base is simply that some types of services in some types of relationships should not be recognized as supporting legal claims for policy reasons. More particularly, homemaking and childcare services should not, in a marital or quasi-marital relationship, be viewed as giving rise to equitable claims against the other spouse.

18 I concede at the outset that there is some judicial precedent for this argument. Professor Marcia Neave has observed generally that "analysis of the principles applied in English, Australian and Canadian courts sometimes fails to confront this question directly ... Courts which deny or grant remedies usually conceal their value judgments within statements relating to doctrinal requirements." (Marcia Neave, "Three Approaches to Family Property Disputes — Intention/Belief, Unjust Enrichment and Unconscionability," in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts*, at p. 251). More pointedly, Professor Farquhar has observed that many courts have strayed from the framework of *Sorochan* for public policy reasons: "the courts ... have, after *Sorochan*, put up warning signs that there are aspects of relationships that are not to be analyzed in the light of unjust enrichment and constructive trust." (Keith B. Farquhar, "Causal Connection in Constructive Trust After *Sorochan v. Sorochan*" (1989), 7 Can. J. of Family Law 337, at p. 343). The public policy issue has been summed up as follows by Professor Neave at p. 251: "whether a remedy, either personal or proprietary, should be provided to a person who has made contributions to family resources." On the judicial side, the view of the respondent is pointedly stated in *Grant v. Edwards*, [1986] 2 All E.R. 426, at p. 439, per Browne-Wilkinson V.C.:

> Setting up house together, having a baby and making payments to general housekeeping expenses ... may all be referable to the mutual love and affection of the parties and not specifically referable to the claimant's belief that she has an interest in the house.

Proponents of this view, Professor Neave, at p. 253 argues, "regard it as distasteful to put a price upon services provided out of a sense of love and commitment to the relationship. They suggest it is unfair for a recipient of indirect or non-financial contributions to be forced to provide recompense for those contributions." To support this position, the respondent cites several cases. *Kshywieski v. Kunka Estate* (1986), 50 R.F.L. (2d) 421 [[1986] 3 W.W.R. 472] (Man. C.A.); *Houghen v. Monnington* (1991), 37 R.F.L. (3d) 279 (B.C.C.A.); *Prentice v. Lang* (1987), 10 R.F.L. (3d) 364 (B.C.S.C.); *Hyette v. Pfenniger*, B.C.S.C., Dec. 19, 1991 [now reported (1991), 39 R.F.L. (3d) 30, additional reasons at 39 R.F.L. (3d) at 44].

19 It is my view that this argument is no longer tenable in Canada, either from the point of view of logic or authority. From the point of view of logic, I share the view of Professors Hovius and Youdan [*The Law of Family Property*] that "there is no logical reason to distinguish domestic services from other contributions" (at p. 146). The notion that household and childcare services are not worthy of recognition by the court fails to recognize the fact that these services are of great value, not only to the family, but to the other spouse. As Lord Simon observed nearly thirty years ago: "The cock-bird can feather his nest precisely because he is not required to spend most of his time sitting on it" ("With All My Worldly Goods," *Holdsworth Lecture* (University of Birmingham, 20th March 1964), at p. 32). The notion, moreover, is a pernicious one that systematically devalues the contributions which women tend to make to the family economy. It has contributed to the phenomenon of the feminization of poverty which this Court identified in *Moge v. Moge*, [1992] 3 S.C.R. 813 [[1993] 1 W.W.R. 481], per L'Heureux-Dubé J., at pp. 853-54.

20 Moreover, the argument cannot stand with the jurisprudence which this and other courts have laid down. Today courts regularly recognize the value of domestic services. This became clear with the Court's hold ing in *Sorochan*, leading one author to comment that "the Canadian Supreme court has finally recognized that domestic contribution is of equal value as financial

contribution in trusts of property in the familial context" (Mary Welstead, "Domestic Contribution and Constructive Trusts: The Canadian Perspective," [1987] Denning L.J. 151, at p. 161). If there could be any doubt about the need for the law to honestly recognize the value of domestic services, it must be considered to have been banished by *Moge v. Moge*, supra. While that case arose under the *Divorce Act*, R.S.C. 1985 c. 3 (2nd Supp.), the value of the services does not change with the legal remedy invoked.

21 I cannot give credence to the argument that legal recognition of the value of domestic services will do violence to the law and the social structure of our society. It has been recognized for some time that such services are entitled to recognition and compensation under the *Divorce Act* and the provincial Acts governing the distribution of matrimonial property. Yet society has not been visibly harmed. I do not think that similar recognition in the equitable doctrine of unjust enrichment will have any different effect.

22 Finally, I come to the argument that, because the legislature has chosen to exclude unmarried couples from the right to claim an interest in the matrimonial assets on the basis of contribution to the relationship, the court should not use the equitable doctrine of unjust enrichment to remedy the situation. Again, the argument seems flawed. It is precisely where an injustice arises without a legal remedy that equity finds a role. This case is much stronger than *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70, where I dissented on the ground that the statute expressly pronounced on the very matter with respect to which equity was invoked.

23 Accordingly, I would agree with Cory J. that there are no juristic arguments which would justify the unjust enrichment, and the third element is made out. Like him, I conclude that the plaintiff was enriched, to the benefit of the defendant, and that no justification existed to vitiate the unjust enrichment claim. The claim for unjust enrichment is accordingly made out and it remains only to determine the appropriate remedy.

2. Remedy — Monetary Judgment or Constructive Trust?

24 The other difficult aspect of this case is the question of whether the remedy which the trial judge awarded — title to the matrimonial home — is justified on the principles governing the action for unjust enrichment. Two remedies are possible: an award of money on the basis of the value of the services rendered, i.e., quantum meruit; and the one the trial judge awarded, title to the house based on a constructive trust.

25 In Canada the concept of the constructive trust has been used as a vehicle for compensating for unjust enrichment in appropriate cases. The constructive trust, based on analogy to the formal trust of traditional equity, is a proprietary concept. The plaintiff is found to have an interest in the property. A finding that a plaintiff is entitled to a remedy for unjust enrichment does not imply that there is a constructive trust. As I wrote in *Rawluk*, supra, for a constructive trust to arise, the plaintiff must establish a direct link to the property which is the subject of the trust by reason of the plaintiff's contribution. This is the notion underlying the constructive trust in *Pettkus v. Becker*, supra, and *Sorochan v. Sorochan*, supra, as I understand those cases. It was also affirmed by La Forest J. in *Lac Minerals*, supra.

26 My colleague Cory J. suggests that, while a link between the contribution and the property is essential in commercial cases for a constructive trust to arise, it may not be required in family cases. He writes [pp. 31-32]:

> ... La Forest J. concluded [in *Lac Minerals*, supra] that the constructive trust should only be awarded when the personal monetary award is insufficient; that is, when there is reason to grant to the plaintiff the additional rights that flow from recognition of a right to property.
>
> I agree with my colleague that there is a need to limit the use of the constructive trust remedy in a commercial context. Yet I do not think the same proposition should be rigorously applied in a family relationship.

27 I doubt the wisdom of dividing unjust enrichment cases into two categories — commercial and family — for the purpose of determining whether a constructive trust lies. A special rule for family cases finds no support in the jurisprudence. Neither *Pettkus*, nor *Rathwell* [*Rathwell v. Rathwell*, [1978] 2 W.W.R. 101], nor *Sorochan* suggest such a departure. Moreover, the notion that one can dispense with a link between the services rendered and the property which is claimed to be subject to the

trust is inconsistent with the proprietary nature of the notion of constructive trust. Finally, the creation of special rules for special situations might have an adverse effect on the development of this emerging area of equity. The same general principles should apply for all contexts, subject only the demonstrated need for alteration. Wilson J. in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 [35 B.C.L.R. (2d) 145, [1989] 3 W.W.R. 385], at p. 519 (adopted by La Forest J. in *Lac Minerals*, supra, at p. 675), warns against confining constructive trust remedies to family law cases stating that: "to do so would be to impede the growth and impair the flexibility crucial to the development of equitable principles." The same result, I fear, may flow from developing special rules for finding constructive trusts in family cases. In short, the concern for clarity and doctrinal integrity with which this Court has long been preoccupied in this area mandates that the basic principles governing the rights and remedies for unjust enrichment remain the same for all cases.

28 Nor does the distinction between commercial cases and family cases on the remedy of constructive trust appear to be necessary. Where a monetary award is sufficient, there is no need for a constructive trust. Where a monetary award is insufficient in a family situation, this is usually related to the fact the claimant's efforts have given her a special link to the property, in which case a constructive trust arises.

29 For these reasons, I hold the view that in order for a constructive trust to be found, in a family case as in other cases, monetary compensation must be inadequate and there must be a link between the services rendered and the property in which the trust is claimed. Having said this, I echo the comments of Cory J. at p. 28 [p. 32] that the courts should exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases.

30 The next question is the extent of the contribution required to give rise to a constructive trust. A minor or indirect contribution is insufficient. The question, to quote Dickson C.J. in *Pettkus v. Becker*, supra, at p. 852, is whether "[the plaintiff's] contribution [was] sufficiently substantial and direct as to entitle her to a portion of the profits realized upon sale of the ... property." Once this threshold is met, the amount of the contribution governs the extent of the constructive trust. As Dickson C.J. wrote in *Pettkus v. Becker*, supra, at pp. 852-53:

> Although equity is said to favour equality, as stated in *Rathwell*, it is not every contribution which will entitle a spouse to a one-half interest in the property. *The extent of the interest must be proportionate to the contribution, direct or indirect, of the claimant. Where the contributions are unequal, the shares will be unequal*. [Emphasis added.]

Cory J. advocates a flexible approach to determining whether a constructive trust is appropriate; an approach "based on common sense and a desire to achieve a fair result for both parties" (at p. 28 [p. 32]). While agreeing that courts should avoid becoming overly technical on matters which may not be susceptible of precise monetary valuation, the principle remains that the extent of the trust must reflect the extent of the contribution.

31 Before leaving the principles governing the remedy of constructive trust, I turn to the manner in which the extent of the trust is determined. The debate centres on whether it is sufficient to look at the value of the services which the claimant has rendered (the "value received" approach), or whether regard should be had to the amount by which the property has been improved (the "value survived" approach). Cory J. expresses a preference for a "value survived" approach. However, he also suggests, at p. 31 [pp. 33-34], that "there is no reason why quantum meruit or the value received approach could not be utilized to quantify the value of the constructive trust." With respect, I cannot agree. It seems to me that there are very good reasons, both doctrinal and practical, for referring to the "value survived" when assessing the value of a constructive trust.

32 From the point of view of doctrine, "the extent of the interest must be proportionate to the contribution" to the property: *Pettkus v. Becker*, supra, at p. 852. How is the contribution to the property to be determined? One starts, of necessity, by defining the property. One goes on to determine what portion of that property is attributable to the claimant's efforts. This is the "value survived" approach. For a monetary award, the "value received" approach is appropriate; the value conferred on the property is irrelevant. But where the claim is for an interest in the property one must of necessity, it seems to me, determine what portion of the value of the property claimed is attributable to the claimant's services.

33 I note, as does my colleague, that there may also be practical reasons for favouring a "value survived" approach. Cory J., alludes to the practical problems with balancing benefits and detriments as required by the "value received" approach, leading some to question whether it is the least attractive approach in most family property cases (see *Davidson v. Worthing* (1986), 6 R.F.L. (3d) 113 [9 B.C.L.R. (2d) 202] (S.C.), McEachern C.J.S.C.; Hovius and Youdan at pp. 136ff). Moreover, a "value survived" approach arguably accords best with the expectations of most parties; it is more likely that a couple expects to share in the wealth generated from their partnership, rather than to receive compensation for the services performed during the relationship.

34 To summarize, it seems to me that the first step in determining the proper remedy for unjust enrichment is to determine whether a monetary award is insufficient and whether the nexus between the contribution and the property described in *Pettkus v. Becker* has been made out. If these questions are answered in the affirmative the plaintiff is entitled to the proprietary remedy of constructive trust. In looking at whether a monetary award is insufficient the court may take into account the probability of the award's being paid as well as the special interest in the property acquired by the contributions: per La Forest J. in *Lac Minerals*. The value of that trust is to be determined on the basis of the actual value of the matrimonial property — the "value survived" approach. It reflects the court's best estimate of what is fair having regard to the contribution which the claimant's services have made to the value surviving, bearing in mind the practical difficulty of calculating with mathematical precision the value of particular contributions to the family property.

35 I turn now to the application of these principles to the case at bar. The trial judge began by assessing the value received by the respondent (the quantum meruit). He went on to conclude that a monetary judgment would be inadequate. The respondent had few assets other than his houseboat and van, and no income save for a War Veteran's Allowance. The judge concluded, as I understand his reasons, that there was a sufficiently direct connection between the services rendered and the property to support a constructive trust, stating that "[the appellant] has shown that there was a positive proprietary benefit conferred by her upon the Sicamous property." Accordingly, he held that the remedy of constructive trust was made out. This approach accords with principles discussed above. In effect, the trial judge found the monetary award to be inadequate on the grounds that it would not be paid and on the ground of a special contribution to the property. These findings support the remedy of constructive trust in the property.

36 The remaining question is the quantification of the trust. The trial judge calculated the quantum meruit for her housekeeping for 12 years at $350 per month and reduced that figure by 50% "for the benefits she received." The final amount was $25,200. He then reasoned that, since the services rendered amounted to $25,200 after appropriate deductions, it follows that the appellant should receive title to the respondent's property, valued at $23,200. The missing step in this analysis is the failure to link the value received with the value surviving. As discussed above, a constructive trust cannot be quantified by simply adding up the services rendered; the court must determine the extent of the contribution which the services have made to the parties' property.

37 Notwithstanding the trial judge's failure to make this link, his conclusion that the appellant had established a constructive trust entitling her to title to the family home can be maintained if a trust of this magnitude is supported on the evidence. This brings me to a departure from the methods used below. The parties and the Court of Appeal appear to have treated the house as a single asset rather than as part of a family enterprise. This led to the argument that the appellant could not be entitled to full ownership in the house because the respondent had contributed to its value as well. The approach I would take — and the approach I believe the trial judge implicitly to have taken — is to consider the appellant's proper share of all the family assets. This joint family venture, in effect, was no different from the farm which was the subject of the trust in *Pettkus v. Becker*.

38 With this in mind, I turn to the evidence on the extent of the contribution. The appellant provided extensive household services, over a period of 12 years, including care for the children while they were living at the house and maintenance of the property. The testimony of the plaintiff's son provides a general idea of her contribution to the family enterprise:

> Q. What sort of things did she do?
>
> A. She did all the motherly duties for all of us ...

> A. When [the defendant's] two sons and my brother and I were there still, even when my sisters were there, that was quite a long time ago, I was quite young, so there was nothing really bad then, but after the sisters left, she took care of all the duties, cooking and stuff like that, cleaning, laundry. She had her ringer washer, she would do the laundry, she'd worked in the garden, things like that. She took care of all things around the house, when he was gone especially ...
>
> Q. Do you remember what work your mother did in the yard outside?
>
> A. M'hm, they both got together doing the garden, he would do the roto-tilling, they would both take care of the planting and stuff; when he was gone, she would do all the weeding and keeping up. They would share the watering of the garden. She put together three or four flower gardens all herself, except for the hard heavy work, like lifting rocks, when she first started, that was shared by all of us, including the kids.

Of all the chores performed around the property, the son states that the various siblings had minor chores, such as chopping wood and making beds. "Everything else, the major stuff, she would take care of." Other evidence, including testimony from Catherine Peter and William Beblow, supports this picture of the appellant's contribution. The trial judge held that while the respondent worked in the construction business:

> ... he would be away from home during the week and would return on the weekend whenever possible. While he was absent, the plaintiff would care for the property in the home and care for the children while he was away ...
>
> In effect, the plaintiff by moving into the respondent's home became his housekeeper on a full-time basis without remuneration except for the food and shelter that she and the children received until the children left home.

39 The respondent also contributed to the value of the family enterprise surviving at the time of breakup; he generated most of the family income and helped with the maintenance of the property.

40 Clearly, the appellant's contribution — the "value received" by the respondent — was considerable. But what then of the "value surviving"? It seems clear that the maintenance of the family enterprise through work in cooking, cleaning, and landscaping helped preserve the property and saved the respondent large sums of money which he was able to use to pay off his mortgage and to purchase a houseboat and a van. The appellant, for her part, had purchased a lot with her outside earnings. All these assets may be viewed as assets of the family enterprise to which the appellant contributed substantially.

41 The question is whether, taking the parties' respective contributions to the family assets and the value of the assets into account, the trial judge erred in awarding the appellant a full interest in the house. In my view, the evidence is capable of supporting the conclusion that the house reflects a fair approximation of the value of the appellant's efforts as reflected in the family assets. Accordingly, I would not disturb the award.

42 I would allow the appeal with costs.

Cory J. **(concurring) (*L'Heureux-Dubé* and *Gonthier JJ.* concurring):**

43 The issue in this appeal is whether the provision of domestic services during 12 years of cohabitation in a common law relationship is sufficient to establish the proprietary link which is required before the remedy of constructive trust can be applied to redress the unjust enrichment of one of the partners in the relationship. Further, consideration must be given to the extent to which the remedy of constructive trust should be applied in terms of amount or proportion.

Factual Background

44 In April 1973, the respondent asked the appellant to come and live with him. That same month, the appellant together with her 4 children moved into the respondent's home in Sicamous, B.C. At the time, 2 children of the respondent were living in the home. The parties continued to live together in a common law relationship for over 12 years, separating in June 1985.

During this entire time the appellant acted as the wife of the respondent. She was a stepmother to his children until 1977 while they remained in the home. As well, she cared for her own children, the last one leaving in 1980.

45 During the 12 years, the appellant cooked, cleaned, washed clothes and looked after the garden. As well, she worked on the Sicamous property, undertaking such projects as painting the fence, planting a cedar hedge, buying flowers and shrubs for the property and building a rock garden. She built a pig pen. She kept chickens for a few years, butchering and cooking them for the family. During the winters, the appellant shovelled snow, chopped wood and made kindling. The respondent did not pay the appellant for any of her work. Both the appellant and the respondent contributed to the purchase of groceries and household supplies, although the respondent contributed a greater share.

46 In the first year of the relationship the appellant did not undertake outside work and spent 8 hours a day doing housework and work on the Sicamous property. In subsequent years, she took part-time work as a cook from June to October. During these months she worked some six hours a day at a rate of $4.50 per hour. Except for one winter when she worked at a bakery, the appellant received unemployment insurance benefits in the winter months.

47 Throughout the relationship, the respondent worked on a more or less full-time basis as a grader operator. His work frequently took him out of town to various locations in British Columbia.

48 Before he met the appellant, the respondent had lived in a common law relationship with another woman for 5 years. When she left his home he hired housekeepers. The last housekeeper he had before the appellant came to his home was paid at a rate of $350 per month.

49 The trial judge accepted the appellant's testimony that the respondent had asked her to live with him because he needed someone to care for his 2 children. This need arose when the welfare authorities expressed some concern that the respondent left the children alone when he was working away from home.

50 When the parties met, the appellant had savings of $100. In 1976, she purchased a property in Saskatchewan for $2,500. She sold this property in 1980 for $8,000 and purchased a property at 100 Mile House for $6,500. She used the remainder of the sale proceeds for a trip to Reno. At the time of trial, the appellant still owned the 100 Mile House property.

51 The respondent had purchased the Sicamous property in 1971 for $8,500. Some $900 was paid in cash and the balance of $7,600 was secured by a mortgage. The respondent was able to pay off the mortgage in 1975. The estimated market value of the Sicamous property as of 1987 was $17,800. The property's assessed value in that year was $23,200. In that same year, the respondent rented the property. The tenants were given an option to purchase it for $28,000. The option was not exercised.

52 With the passage of time, the respondent began to drink heavily and became verbally and physically abusive to the appellant. As a result, the appellant moved out of the Sicamous home on June 7, 1985. At the time of the trial, she was on welfare and lived in a trailer court in Sicamous. The respondent by that time had retired and was living on a houseboat in Enderby, B.C. The Sicamous house and property were vacant.

53 The appellant brought an action claiming that the respondent had been unjustly enriched over the years of the relationship as a result of the work which she performed in his home without payment of any kind. She sought to have a constructive trust imposed on her behalf in respect of the Sicamous property or in the alternative, monetary damages as compensation for the labour and services she provided to the respondent.

Courts Below

Trial Judgment

54 On the basis of *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38 [[1986] 5 W.W.R. 289], the trial judge determined that in order to establish an unjust enrichment, the plaintiff must prove:

(1) enrichment;

(2) a corresponding deprivation; and

(3) the absence of any juristic reason for the enrichment.

55 He decided there must also be a clear causal connection between the spousal contribution founding the unjust enrichment and the property which is alleged to be the subject of the constructive trust.

56 The trial judge found that there had been an enrichment since the respondent had obtained the services of a housekeeper, homemaker and stepmother to his children without compensation. He further found that the plaintiff was deprived of any compensation from her labour since she devoted the majority of her time and energy and some of the monies which she earned for the benefit of the respondent, his children and his Sicamous property. Lastly, he found that there was no juristic reason for the enrichment, that is to say the appellant was under no obligation to perform the work and assist in the home without some reasonable expectation of compensation. He found that she was entitled to receive something other than the drunken physical abuse to which she had been subjected by the respondent. He concluded that the respondent ought to have known that the appellant would have a reasonable expectation that she would be compensated. He also concluded that she had shown that there was a proprietary benefit conferred by her upon the Sicamous property.

57 The trial judge then considered what would be a fair and equitable compensation. He took into account the realities of the relationship and the assets and income of the parties in order to fashion the appropriate relief. He observed that if the appellant had been employed as a housekeeper for 12 years at $350 per month, the amount the respondent had paid his last housekeeper before the appellant moved in, she would have earned $50,400. He allowed a 50 percent reduction for the benefits the appellant had received in the relationship and settled on the amount which should be paid to her as $25,200.

58 He then concluded that the fairest disposition of the case would be to award the Sicamous property to the appellant. He noted that the respondent was living in Enderby, on a houseboat. He noted that the respondent also had a van. The respondent was living on a War Veteran's Allowance and was retired. It was obvious to the trial judge that a monetary judgment would be impracticable, probably unrealistic and would not be reasonable under the circumstances. He therefore concluded that the fairest apportionment would be to have the house and land in Sicamous transferred to the appellant free and clear of encumbrances.

Court of Appeal

59 The respondent on the appeal [(1990), 50 B.C.L.R. (2d) 266, [1991] 1 W.W.R. 419] contended that, the trial judge had erred first in finding that there had been an unjust enrichment of the respondent, and secondly, that even if there had been an unjust enrichment, that he had erred in ordering the transfer of the Sicamous property to the appellant.

60 Macdonald J.A., writing on behalf of the court, observed that it had been conceded that the respondent had indeed been enriched by receiving the benefit of the appellant's labour and services. Thus, the first condition of *Sorochan* had been met. However, he found that the remaining conditions had not been fulfilled. The Court of Appeal disagreed with the trial judge's finding that there had been any deprivation suffered by the appellant. It found that the appellant had not been deprived as she and her children had lived in the respondent's home rent-free with the respondent's contributing more for the family's groceries than she had. He noted that the appellant had been able to acquire property and he took this as evidence that the appellant had not suffered any deprivation.

61 Macdonald J.A. further concluded that even if there was an imbalance sufficient to support a finding of deprivation, the unjust enrichment claim did not meet the third condition, namely the absence of any juristic reason for the enrichment. In his view, the appellant had failed to establish, as required by *Sorochan*, that she had prejudiced herself on the reasonable expectation of receiving something in return for her work and services. He stressed that there was not, as in other cases, the holding out of a promise to marry. Even though the respondent would, when he was drinking, ask the appellant to marry him, she never took those requests seriously.

62 Finally, even if all the conditions of unjust enrichment had been met, Macdonald J.A. disagreed with the trial judge's disposition. In his view, there was not a sufficient nexus between the appellant's contribution and the Sicamous property to entitle the appellant to receive, by way of relief, the property itself rather than a monetary judgment. He decided at p. 272 that the "relatively minor gardening activities and household tasks and expenditures over the 12 years of cohabitation" fell short of establishing a positive contribution to the acquisition, preservation, maintenance or improvement of the property. As a result, it was held that there was no legal ground upon which an order could be made transferring the property to the appellant. The appeal was allowed and the appellant's action was dismissed.

Position of the Respondent

63 The respondent conceded that there was an unjust enrichment but contended that there was no corresponding deprivation suffered by the appellant. It was said that she was adequately compensated for her services by the respondent's provision of free shelter and a large portion of the groceries.

64 Second, it was argued that the domestic services provided by the appellant did not establish any causal link to or proprietary interest in the Sicamous property.

65 The Court of Appeal clearly agreed with the respondent on these issues. With respect, I believe they erred in reaching these conclusions.

Should the Doctrines of Unjust Enrichment and Constructive Trust be Applied to "Common Law" Relationships?

66 It may be helpful to review once again the application and extension of the doctrine of constructive trust. In Scott, *The Law of Trusts*, vol. 5 (4th ed. 1989) at p. 304 the following definition appears:

> A constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. [Footnote omitted.]

67 This definition, which appeared in the same form in earlier editions, was cited with approval in the dissenting reasons of Laskin J. (as he then was) in *Murdoch v. Murdoch*, [1975] 1 S.C.R. 423 [[1974] 1 W.W.R. 361]. In later decisions of this Court the definition has provided a basis for the application of the constructive trust remedy in matrimonial situations.

68 In *Pettkus v. Becker*, [1980] 2 S.C.R. 834, Dickson J. (as he then was) writing for the majority, applied the doctrine of constructive trust to a common law relationship. He noted that a court must first determine whether a claim for unjust enrichment has been established. If it has, then a court must determine whether, in the circumstances presented, a constructive trust is the appropriate remedy to apply to redress the unjust enrichment. In order to determine that there has been an unjust enrichment, the following three conditions must be fulfilled:

69 (1) there has been an enrichment;

70 (2) a corresponding deprivation has been suffered by the person who supplied the enrichment; and

71 (3) there is an absence of any juristic reason for the enrichment itself.

72 The importance of *Pettkus v. Becker*, was emphasized in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426 [35 B.C.L.R. (2d) 145, [1989] 3 W.W.R. 385]. There at p. 471 Dickson C.J. wrote:

> The constructive trust has existed for over two hundred years as an equitable remedy for certain forms of unjust enrichment ... Until the decision of this Court in *Pettkus v. Becker*, the constructive trust was viewed largely in terms of the law of trusts, hence the need for the existence of a fiduciary relationship. In *Pettkus v. Becker*, the Court moved to an approach more in line with restitutionary principles by explicitly recognizing constructive trust as one of the remedies for unjust enrichment.

73 Subsequently, this Court made it clear that the constructive trust remedy may also be applied in circumstances where the spouse has contributed not to the acquisition of property but rather to its preservation, maintenance or improvement. In *Sorochan v. Sorochan*, supra, Dickson C.J. gave the reasons for a unanimous Court. There the parties had never married but had cohabited on a farm in Alberta from 1940 to 1982. It is significant that before the parties began living together the defendant was, together with his brother, the owner of the farmland. Thus the lands were not acquired during the period of cohabitation. During the time they lived together the parties had 6 children. The plaintiff did all the domestic work associated with running the household and caring for the children. Both parties worked on the farm. It was conceded that the plaintiff did substantial and arduous work. For many years the defendant worked as a travelling sales representative and during those periods the plaintiff frequently assumed sole responsibility for the work on the farm.

74 It was held that the defendant had been unjustly enriched. That enrichment resulted from his receiving the benefit of the plaintiff's years of labour in the home and on the farm. This obviously resulted in valuable savings. It was pointed out that through the plaintiff's years of labour, the farm was maintained and preserved and did not deteriorate through neglect or disuse. It was found that the plaintiff's maintenance and preservation of the land coffered a significant benefit to the defendant.

75 Thus, it can be seen that the remedy provided by the constructive trust may, in appropriate cases, be applied to common law relationships where the plaintiff's contribution to the land was directed only to its maintenance and preservation. Those contributions which have been considered sufficient to justify the application of a constructive trust have been indirect financial contributions as in *Pettkus v. Becker*, supra, and work on the property which contributed to its maintenance as in *Sorochan*.

Should the Remedy of Constructive Trust be Applied to the Case at Bar?

1. Enrichment

76 It should not be forgotten that the trial judge specifically found that there had been an enrichment to the respondent "since he obtained the services of the plaintiff as a housekeeper, homemaker and in fact stepmother without compensation." Indeed, it was conceded before us that the respondent was enriched by the work and contributions of the appellant.

2. A Corresponding Deprivation

77 It is again important to first consider the finding of the trial judge on this issue. He stated:

> ... the plaintiff was deprived of any compensation for her labour since she devoted the majority of her time and energy and some of the monies she earned towards the benefit of the respondent, his children and his property.

78 That finding would seem sufficient in itself to warrant the conclusion that the appellant suffered a deprivation which corresponds to the enrichment of the respondent.

79 Indeed, I would have thought that if there is enrichment, that it would almost invariably follow that there is a corresponding deprivation suffered by the person who provided the enrichment. There is ample support for the proposition that once enrichment has been found, the conclusion that the plaintiff has suffered a corresponding deprivation is virtually automatic. In *Sorochan*, supra, Dickson C.J. suggested that benefit and deprivation are essentially two sides of the same coin. He wrote at pp. 45-46:

> Moreover, the case law indicates that the full-time devotion of one's labour and earnings without compensation can readily be viewed as a deprivation. In *Murray v. Roty* (1983), 41 O.R. (2d) 705 (Ont. C.A.), for example, a case involving a joint business and farm operation, Cory J.A., commented (at p. 710): "For eight years of her life she devoted all of her time and energy and almost all of her wages for the benefit of Roty. The deprivation is obvious".

In *Everson v. Rich* (1988), 16 R.F.L. (3d) 337, the Saskatchewan Court of Appeal, applying *Sorochan*, stated at p. 342:

> The spousal services provided by the appellant were valuable services and did constitute a benefit conferred upon the respondent. The provision of those services was a detriment to the claimant by virtue of the use of her time and energy.

80 I agree with his reasoning. As a general rule, if it is found that the defendant has been enriched by the efforts of the plaintiff there will, almost as a matter of course, be deprivation suffered by the plaintiff. As Professor James McLeod pointed out ((1988), 16 R.F.L. (3d) 338) in his annotation of *Everson v. Rich*, supra, "the deprivation requirement is satisfied by showing the plaintiff expended effort or does not have what he/she had or might have had." Particularly in a matrimonial or long term common law relationship it should, in the absence of cogent evidence to the contrary, be taken that the enrichment of one party will result in a deprivation of the other.

81 Business relationships concerned with commercial affairs may, as a result of the conduct of one of the corporations involved, result in a court's granting a constructive trust remedy. The constructive trust has been appropriately used to redress a gain made through a breach of trust in a commercial or business relationship (See for example: *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592). Yet how much closer and trusting must be a long term common law relationship. In marriages or marriage-like relationships commercial matters and a great deal more will be involved. Clearly, parties to a family relationship will, in a commercial sense, share funds and financial goals. More importantly, couples such as the parties to this case will strive to make a home. By that I mean a place that provides safety, security and love and which is as well frequently the place where children may be cared for and nurtured. In a relationship that involves living and sleeping together, couples will share their worst fears and frustrations and their fondest dreams and aspirations. They will plan and work together to achieve their goals. Just as much as parties to a formal marriage, the partners in a long term common law relationship will base their actions on mutual love and trust. They too are entitled, in appropriate circumstances, to the relief provided by the remedy of constructive trust.

82 This remedy should be granted despite the fact that family will seldom keep the same careful financial records as business associates. Nonetheless, fairness requires that the constructive trust remedy be available to them and applied on an equitable basis without a minute scrutiny of their respective financial contributions. Indeed, in a situation such as the one presented in this case, it may be very difficult to assess the value of making a house a home and of sharing the struggle to raise children to become responsible adults.

83 In the present case, although there was no formal marriage, the couple lived and worked together in the most intimate of relationships. They shared work and the monies which they earned. The amount of the contributions may have been varied and unequal. Yet the very fact that in addition to her household work the appellant contributed something of the income from her outside employment indicates that there was a real sharing of income. As a result of the relationship, the Sicamous property was looked after and maintained. None of this could have been achieved without the efforts of the appellant.

84 Certainly, it cannot be said that the relationship was so short-lived that it should not give rise to mutual rights and obligations. Twelve years is not an insignificant period of time to live in a relationship based on mutual trust and confidence. In those circumstances, there is a strong presumption that the services provided by one party will not be used solely to enrich the other. Both the reasonable expectations of the parties and equity will require that upon the termination of the relationship, the parties will receive an appropriate compensation based on the contribution each has made to the relationship.

85 The respondent asserts that because the appellant loved him she could not have expected to receive compensation or an interest in the property in return for the contributions she made to the home and family. However, in today's society it is unreasonable to assume that the presence of love automatically implies a gift of one party's services to another. Nor is it unreasonable for the party providing the domestic labour required to create a home to expect to share in the property of the parties when the relationship is terminated. Women no longer are expected to work exclusively in the home. It must be recognized that when they do so, women forgo outside employment to provide domestic services and child care. The granting of relief in the form of a personal judgment or property interest to the provider of domestic services should adequately reflect the fact that the income earning capacity and the ability to acquire assets by one party has been enhanced by the unpaid domestic services of the other. Marcia Neave in "Three Approaches to Family Property Disputes — Intention/Belief, Unjust Enrichment and Unconscionability", in T.G. Youdan, ed., *Equity, Fiduciaries and Trusts* (1989), lucidly sets out the position in this way at p. 254:

> The characterization of domestic services as gifts reflects a view of family relationships which is now out-dated and has a differential impact on women, since they are the main providers of such services. Women no longer work exclusively in

> the home. Those who do so sacrifice income that could otherwise be earned in paid work. Couples who decide that one partner, usually the woman, will forgo paid employment to provide domestic services and provide child care, presumably believe that this arrangement will maximize their economic resources. Grant of relief, whether personal or proprietary, to the provider of domestic services would recognize that the income-earning capacity of one partner and his ability to acquire assets have been enhanced by the unpaid services of the other and that those services were only provided free because it was believed that the relationship would continue.

86 This same reasoning has been recently applied in the context of divorce in *Moge v. Moge*, [1992] 3 S.C.R. 813 [[1993] 1 W.W.R. 481]. It is appropriate to recognize that the same principle should be applied to long term common law relationships.

87 In the present case it cannot be said, as the respondent suggests, that the contributions of the appellant were minor or that they were compensated by the provision of free accommodation. It is true that the appellant did not devote all of her energy to the home or family business as did Mary Sorochan or Charlotte Murray. However, the mere fact that the appellant was able to engage in part-time employment does not detract from the fact that she provided extensive and valuable services to the respondent for which she was not compensated.

88 It cannot be forgotten that the trial judge recognized that the appellant worked to create a "home" for the respondent. The nature and extent of her efforts were clear from the evidence, but one rather touching indication of her dedication is that she helped the children to make Christmas gifts. The value of the commitment of a homemaker such as the appellant should not be underestimated. The partner who provides domestic services often works far in excess of 40 hours per week in order to provide a "home". Women who work in the home may have given up a career or a type of work which would enable them to improve their earning capacity. These are matters which should be taken into account when considering both the benefits conferred and the deprivation suffered by a claimant who has been a partner in a long term common law relationship.

89 The balancing of benefits conferred and received in a matrimonial or common law relationship cannot be accomplished with precision. Although it may well be essential in a commercial relationship to closely scrutinize the contributions made by each of the business partners to the acquisition of property, such an approach would be unrealistic and unfair in the context of a family relationship. Ordinarily, the trial judge will be in the best position to assess all the evidence presented and to estimate the contribution made by each of the parties. The nature of the relationship, its duration and the contributions of the parties must be considered. Equity and fairness should form the basis for the assessment. There was ample evidence presented in this case to justify the finding of the trial judge that there had been a deprivation suffered by the appellant.

Absence of Juristic Reason for the Enrichment

90 In *Pettkus v. Becker*, supra, Dickson J. had this to say at p. 849 with regard to juristic reasons for the enrichment:

> ... I hold that where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.

91 The test put forward is an objective one. The parties entering a marriage or a common law relationship will rarely have considered the question of compensation for benefits. If asked, they might say that because they loved their partner, each worked to achieve the common goal of creating a home and establishing a good life for themselves. It is just and reasonable that the situation be viewed objectively and that an inference be made that, in the absence of evidence establishing a contrary intention, the parties expected to share in the assets created in a matrimonial or quasi-matrimonial relationship, should it end.

92 *Kshywieski v. Kunka Estate* (1986), 50 R.F.L. (2d) 421, [[1986] 3 W.W.R. 472], is a decision of the Manitoba Court of Appeal. It determined that, in the absence of evidence of a promise of marriage, a promise of compensation or an expectation on the part of the plaintiff that she would be remunerated for her services, it was not unjust for the defendant or his estate to retain the benefit of the spousal service conferred upon him by the plaintiff. Professor McLeod in his annotation ((1986), 50 R.F.L. (2d) 421) summarized the conclusion in this case in these words at p. 422:

> Without some prejudicial conduct such as request, inducement, acquiescence or the holding out of future benefit, no restitutionary relief could be awarded.

93 In the case at bar the British Columbia Court of Appeal relied on the *Kshywieski* decision. It concluded that because the respondent's promises to marry the appellant were made when he was drunk, she could not have taken them seriously. As a result, it was found that there was no prejudice occasioned by the appellant. In my view, the Court of Appeal was in error in this conclusion.

94 It is not necessary that there be evidence of promises to marry or to compensate the claimant for the services provided. Rather, where a person provides "spousal services" to another, those services should be taken as having been given with the expectation of compensation unless there is evidence to the contrary. This was the approach properly taken by the Saskatchewan Court of Appeal in *Everson v. Rich*, supra.

95 In the case at bar, the trial judge appropriately drew the inference that, in light of the duration of the relationship and the appellant's contribution to the home and property, she would reasonably have had an expectation of sharing the wealth she helped to create. He concluded that:

> ... there is no juristic reason for the enrichment. She was under no obligation to perform the work and assist in the home without some reasonable expectation of receiving something in return other than the drunken physical abuse which she received at the hands of the respondent.

96 When a claimant is under no obligation contractual, statutory or otherwise to provide the work and services to the recipient, there will be an absence of juristic reasons for the enrichment. See *Murray v. Roty* (1983), 41 O.R. (2d) 705; *Pettkus v. Becker*, supra; *Sorochan v. Sorochan*, supra.

97 In summary then, there was unjust enrichment of the respondent by the work of the appellant. The appellant suffered a corresponding deprivation. There was no juristic reason for the enrichment, that is to say there was no obligation of any kind upon the appellant to provide the services to the respondent. It follows that the trial judge was correct in his finding that there had been an unjust enrichment, a corresponding deprivation and no juristic reason for providing the enriching services. It remains to be considered what remedy should have been provided in the circumstances. Would a monetary judgment have been appropriate or should the remedy of constructive trust have been granted?

The Appropriate Remedy

98 In *Sorochan v. Sorochan*, it was noted that although the constructive trust provides an important judicial means of remedying unjust enrichment, there are other remedies available, such as monetary damages. The first question to be resolved is which remedy is appropriate in the circumstances of this case? In *Sorochan* it was said that: the court must consider whether there is a causal connection between the deprivation suffered by the plaintiff and the property in question, because in order to justify the imposition of a constructive trust a court must be satisfied that there is a "clear proprietary relationship" between the services rendered and the disputed assets. The same case confirmed that a flexible approach should be taken in applying the constructive trust remedy and specifically approved of the position adopted by other courts in *Murray v. Roty*, supra; *Hussey v. Palmer*, [1972] 1 W.L.R. 1286; *Lawrence v. Lindsey* (1982), 28 R.F.L. (2d) 356 (Alta. Q.B.). At p. 50, Dickson C.J. wrote:

> In my view, the constructive trust remedy should not be confined to cases involving property acquisition. While it is important to require that some nexus exist between the claimant's deprivation and the property in question, the link need not always take the form of a contribution to the actual acquisition of the property. A contribution relating to the preservation, maintenance or improvement of property may also suffice.

99 In addition to the causal connection requirement Dickson C.J. stated that the claimant must have reasonably expected to receive an interest in the property and that the respondent ought to have been aware of that expectation. He also observed that in considering whether a constructive trust is the appropriate remedy the duration of the relationship should be taken into account.

100 The difficulty of establishing a causal connection between unjust enrichment arising from the provision of domestic services and the property has been the subject of scholarly debate (See for example: Ralph E. Scane "Relationships 'Tantamount to Spousal', Unjust Enrichment, and Constructive Trusts" (1991), 70 Can. Bar Rev. 260; Keith B. Farquhar, "Causal Connection in Constructive Trusts" (1986-88), 8 Est. & Tr. Q. 161; Berend Hovius and Timothy G. Youdan, *The Law of Family Property* (1991); Ian Narev, "Unjust Enrichment and De Facto Relationships" (1991), 6 Auckland U.L. Rev. 504). As Professor Ralph Scane (at p. 289) put it, the difficulty with looking for a causal connection in such cases is "that the unjust enrichment created by receipt the benefit of [domestic] services ... seeps throughout all of the assets of the defendant". Thus, the contributions which indirectly created accumulated family wealth for the parties cannot be traced to any one property. However, I do not think that the required link between the deprivation suffered and the property in question is as difficult to establish as it may seem.

101 This Court has specifically recognized that indirect financial contributions to the maintenance of property will be sufficient to establish the requisite property connection for the imposition of a constructive trust. In *Pettkus v. Becker*, supra, the fact that Ms. Becker paid the rent, purchased the food and clothing and looked after other living expenses, enabled Mr. Pettkus to save his entire income, a goodly amount of money which he later used to purchase property. Even though Ms. Becker's financial contributions did not directly finance the purchase of the property, it was held that her indirect financial contribution was sufficient to entitle her to a proprietary interest in the property purchased by Mr. Pettkus upon the dissolution of the relationship.

102 It seems to me that in a family relationship the work, services and contributions provided by one of the parties need not be clearly and directly linked to a specific property. As long as there was no compensation paid for the work and services provided by one party to the family relationship then it can be inferred that their provision permitted the other party to acquire lands or to improve them. In this case the work of the appellant permitted the respondent to pay off the mortgage and, as well, to purchase a houseboat and a cabin cruiser. In the circumstances, the trial judge was justified in applying the constructive trust to the property which he felt would best redress the unjust enrichment and would treat both parties in a just and equitable manner.

103 Goff and Jones support the imposition of a constructive trust in family situations where the plaintiff's contributions cannot be traced to a particular property (*The Law of Restitution* (3rd ed., 1984)). They rely on the case of *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd.*, [1981] Ch. 105, where the plaintiff paid under a mistake of fact over $2 million to the defendants, who discovered the mistake within two days, did nothing to correct it and went into liquidation some four weeks later. Goulding J. held that the defendant was a constructive trustee of the money paid under mistake. But he left open the question whether equity's traditional tracing rules should be applied in order to identify the plaintiff's payment. Goff and Jones maintain that if the tracing rules were applied then it is extremely unlikely that the plaintiff's claim would succeed. Yet, as they point out, it would seem unjust to allow the defendant's general creditors to benefit from the mistaken payment when the defendant knew of the mistake and did nothing to correct it. Therefore, the authors argue on p. 80 of their book that:

> To protect a plaintiff the court will have to impose a trust on, or a lien over, the defendant's unencumbered assets for the plaintiff's benefit even if those assets cannot be "identified" through the application of traditional equitable tracing rules. If a court reaches this conclusion it will do so because it recognises that a trust or lien should be imposed simply because the defendant's assets were swollen by the mistaken payment.

104 In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, it was determined that the constructive trust is not reserved to situations where a right of property is recognized. As a remedy, the constructive trust may be used to *create* a right of property and this obviates the need to find a pre-existing property right by means of equitable tracing rules. However, La Forest J. indicated that a restitutionary proprietary remedy should not automatically be granted. He found that, since proprietary rights give the plaintiff priority over the legitimate claims of third party creditors, further guidance was needed for determining those situations in which it would be appropriate to award a proprietary remedy. Thus, La Forest J. concluded that the constructive trust should only be awarded when the personal monetary award is insufficient; that is, when there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property.

105 I agree with my colleague that there is a need to limit the use of the constructive trust remedy in a commercial context. Yet I do not think the same proposition should be rigorously applied in a family relationship. In a marital or quasi-marital relationship,

the expectations the parties will have regarding their contributions and interest in the assets acquired are, I expect, very different from the expectation of the parties engaged in a commercial transaction. As I have said, it is unlikely that couples will ever turn their minds to the issue of their expectations about their legal entitlements at the outset of their marriage or common law relationship. If they were specifically asked about their expectations, I would think that most couples would probably state that they did not expect to be compensated for their contribution. Rather, they would say, if the relationship were ever to be dissolved, then they would expect that both parties would share in the assets or wealth that they had helped to create. Thus, rather than expecting to receive a fee for their services based on their market value, they would expect to receive, on a dissolution of their relationship, a fair share of the property or wealth which their contributions had helped the parties to acquire, improve, or to maintain. The remedy provided by the constructive trust seems to best accord with the reasonable expectations of the parties in a marriage or quasi-marital relationship. Nevertheless, in situations where the rights of bona fide third parties would be affected as a result of granting the constructive trust remedy it may well be inappropriate to do so. (See: Berend Hovius and Timothy G. Youdan, *The Law of Family Property*, at p. 146.)

106 It follows that in a quasi-marital relationship in those situations where the rights of third parties are not involved, the choice between a monetary award and a constructive trust will be discretionary and should be exercised flexibly. Ordinarily both partners will have an interest in the property acquired, improved or maintained during the course of the relationship. The decision as to which property, if there is more than one, should be made the subject of a constructive trust is also a discretionary one. It too should be based on common sense and a desire to achieve a fair result for both parties.

107 There will of course be situations where an award for a monetary sum may be the most appropriate remedy. For example where the relationship is of short duration or where there are no assets surviving its dissolution, a monetary award should be made. Professors Berend Hovius and Timothy G. Youdan (*Law of Family Property*, at p. 147) provide the following list of factors which I think are helpful in determining that a monetary distribution may be more appropriate than a constructive trust:

108 (a) is the "plaintiff's entitlement ... relatively small compared to the value of the whole property in question";

109 (b) is the "defendant ... able to satisfy the plaintiff's claim without a sale of the property" in question;

110 (c) does "the plaintiff [have any] special attachment to the property in question";

111 (d) what "hardship might be caused to the defendant if the plaintiff obtained the rights flowing from [the award] of an interest in the property."

112 In this case the appellant contributed to the maintenance and the preservation of the home. She painted the fence, planted the cedar hedge, installed the rock garden and built the chicken coop. Nevertheless, her principal contribution was made through the provision of domestic services. Her work around the house and in caring for the children saved the respondent the expense of hiring a housekeeper and someone to care for the children. As a result he was able to use the money which he had saved to purchase other property and to pay off the mortgage on the Sicamous property.

113 The trial judge found, that since the respondent was now retired and living on a War Veteran's Allowance, a monetary award would be "impracticable, probably unrealistic and would not be reasonable under the circumstances" and imposed a constructive trust upon the Sicamous property. I think he was correct in doing so. It could reasonably be inferred that given the work she had done, the appellant would expect to receive a share in the Sicamous property when the relationship ended. Further, although there was no specific evidence that the appellant had formed an emotional attachment to the property, it would not have been unreasonable for the trial judge to have inferred this in light of the work which she had done on the property. In addition, the property was vacant at the time of the trial and the respondent was retired and living on his veteran's pension in another community. Clearly, he has no particular attachment to the property. A monetary award would be meaningless. Therefore, it was both reasonable and appropriate to choose the Sicamous property as the object of the constructive trust. In the circumstances of this case, the application of the constructive trust remedy was eminently suitable.

Was the Amount of the Appellant's Interest Reasonably Determined?

114 There are, generally speaking, two methods of evaluating the contribution of a party in a matrimonial relationship. The first method is based upon the value received. This can be thought of as quantum meruit, that is the amount the defendant would have had to pay for the services on a purely business basis to any other person doing the work that was provided by the claimant. Alternatively, it can be based upon what is termed "value surviving" which apportions the assets accumulated by the couple on the basis of the contributions made by each. Value surviving is the approach that has been traditionally employed in cases of constructive trust. However, there is no reason why quantum meruit or the value received approach could not be utilized to quantify the value of the constructive trust. The remedy should be flexible so that it can be readily adapted to the situation presented in any given case. In many cases the cost of retaining and presenting expert evidence as to the value of the property may be beyond the reach of the parties and at times clearly impractical. This in itself indicates the need for maintaining flexibility in the remedy.

115 Here, the trial judge undertook the same type of quantum meruit analysis employed in *Herman v. Smith* (1984), 42 R.F.L. (2d) 152 (Alta. Q.B.). That is, he calculated the appellant's contributions on the basis of what the respondent would have been required to pay a housekeeper. It has to be noted that his calculations were favourable to the respondent in that he used the amount paid prior to the commencement of the common law relationship as a basis for the calculation and then reduced it by 50 percent to allow for the value of the accommodation that the appellant received from the respondent. This was a fair means of calculating the amount due to the appellant.

116 Nonetheless, I would observe that the value surviving approach will often be the preferable method of determining the quantum of a claimant's share. This method will usually be more equitable and will more closely accord with the expectation of the parties as to how the assets which they have accumulated should be divided upon termination of the relationship. Further, the utilization of the value surviving method will avoid the difficult task of assigning a precise dollar value to the services provided by someone who has dedicated him- or herself to raising children and caring for a home. Instead, the contributions of the parties can more accurately be expressed as a percentage of the accumulated wealth existing at the termination of the relationship. Thus, for pragmatic reasons, the value surviving method may be the preferable one in many cases. No matter which method is used, equity and fairness should guide the court in determining the value and contributions made by the parties. In this case awarding the Sicamous property to the appellant reflected a fair assessment of her contribution to the relationship.

Disposition

117 In the result, I would allow the appeal, set aside the order of the Court of Appeal and restore the judgment of the trial judge. The appellant should have her costs throughout these proceedings.

Appeal allowed.

TAB 9

Most Negative Treatment: Distinguished
Most Recent Distinguished: Hope v. Parkdale No. 498 (Rural Municipality) | 2016 SKCA 19, 2016 CarswellSask 78, 476 Sask. R. 10, 666 W.A.C. 10, 263 A.C.W.S. (3d) 229, 396 D.L.R. (4th) 84, 48 M.P.L.R. (5th) 91 | (Sask. C.A., Feb 10, 2016)

2004 SCC 25, 2004 CSC 25
Supreme Court of Canada

Garland v. Consumers' Gas Co.

2004 CarswellOnt 1558, 2004 CarswellOnt 1559, 2004 SCC 25, 2004 CSC 25, [2004] 1 S.C.R. 629, [2004] A.C.S. No. 21, [2004] S.C.J. No. 21, 130 A.C.W.S. (3d) 32, 186 O.A.C. 128, 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 72 O.R. (3d) 80 (note), 72 O.R. (3d) 80, 9 E.T.R. (3d) 163, J.E. 2004-931, REJB 2004-60672

Gordon Garland, Appellant v. Enbridge Gas Distribution Inc., previously known as Consumers' Gas Company Limited, Respondent and Attorney General of Canada, Attorney General for Saskatchewan, Toronto Hydro-Electric System Limited, Law Foundation of Ontario and Union Gas Limited, Interveners

Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps, Fish JJ.

Heard: October 9, 2003
Judgment: April 22, 2004 *
Docket: 29052

Proceedings: reversing (2001), 19 B.L.R. (3d) 10 (Ont. C.A.); affirming (2000), 185 D.L.R. (4th) 536 (Ont. S.C.J.); and reversing (2000), 2000 CarswellOnt 1673 (Ont. S.C.J.); additional reasons to (2000), 185 D.L.R. (4th) 536 (Ont. S.C.J.)

Counsel: Michael McGowan, Barbara L. Grossman, Dorothy Fong and Christopher D. Woodbury for appellant
Fred D. Cass, John D. McCamus and John J. Longo for respondent
Christopher M. Rupar for intervener Attorney General of Canada
Thomson Irvine for intervener Attorney General for Saskatchewan
Alan H. Mark and Kelly L. Friedman for intervener Toronto Hydro-Electric System Limited
Mark M. Orkin, Q.C., for intervener Law Foundation of Ontario
Patricia D.S. Jackson and M. Paul Michell for intervener Union Gas Limited

Subject: Criminal; Public; Restitution
Related Abridgment Classifications
Public law
IV Public utilities
IV.2 Operation of utility
IV.2.e Collection of utility charges
IV.2.e.iii Miscellaneous
Public law
IV Public utilities
IV.3 Actions by and against public utilities
IV.3.d Practice and procedure
IV.3.d.iii Miscellaneous
Restitution and unjust enrichment
I General principles

I.4 Bars to recovery
I.4.e Miscellaneous

Headnote

Public utilities --- Operation of utility — Collection of utility charges — General
Receipt of late payment penalties by gas company constitutes unjust enrichment giving rise to restitutionary claim — Gas company ordered to repay late payment penalties in excess of interest limit set out in s. 347 of Criminal Code from 1994 forward.
Restitution --- General principles — Bars to recovery — Miscellaneous issues
Receipt of late payment penalties by gas company constitutes unjust enrichment giving rise to restitutionary claim — Gas company ordered to repay late payment penalties in excess of interest limit set out in s. 347 of Criminal Code from 1994 forward.
Public utilities --- Actions by and against public utilities — Practice and procedure — General
Plaintiff in action against gas company for restitution of late payment penalties entitled to his costs throughout.
Services publics --- Exploitation d'un service public — Recouvrement des redevances aux services publics — En général
Perception par la compagnie de gaz de pénalités pour paiement en retard constituait un enrichissement sans cause et donnait ouverture à une réclamation de restitution — Compagnie de gaz s'est vu ordonner de rembourser les pénalités pour paiement en retard excédant le taux d'intérêt maximal énoncé à l'art. 347 du Code criminel, et ce, à partir de l'année 1994.
Restitution --- Principes généraux — Motifs empêchant le recouvrement — Questions diverses
Perception par la compagnie de gaz de pénalités pour paiement en retard constituait un enrichissement sans cause et donnait ouverture à une réclamation de restitution — Compagnie du gaz s'est vu ordonner de rembourser les pénalités pour paiement en retard excédant le taux d'intérêt maximal énoncé à l'art. 347 du Code criminel, et ce, à partir de l'année 1994.
Services publics --- Actions intentées par ou contre les services publics — Procédure — En général
Demandeur dans le cadre de l'action qu'il avait intentée contre la compagnie de gaz afin d'obtenir la restitution des pénalités pour paiement en retard avait droit aux dépens devant toutes les cours.

The plaintiff brought a class action on behalf of more than 500,000 customers of a gas company. He claimed that the late payment penalties charged by the gas company on overdue payments violated s. 347 of the Criminal Code. The case reached the Supreme Court of Canada, which held that the penalties constituted the charging of a criminal rate of interest contrary to s. 347 of the Code. The plaintiff brought a second action claiming restitution for unjust enrichment of charges received by the gas company in violation of s. 347. The gas company moved for summary judgment dismissing this action. The motions judge granted the gas company's motion, finding that the action was a collateral attack on the order of the Ontario Energy Board, which had approved the creation of the late payment penalties. The plaintiff appealed. The appeal was dismissed. A majority of the Ontario Court of Appeal disagreed with the motions judge's reasons but held that the plaintiff's unjust enrichment claim could not be made out. The plaintiff appealed.

Held: The appeal was allowed.

The receipt of late payment penalties by the gas company constituted unjust enrichment giving rise to a restitutionary claim. The gas company was ordered to repay those penalties, collected from 1994 forward, that were in excess of the interest limit set out in s. 347 of the Criminal Code.

When money is transferred from plaintiff to defendant, there is an enrichment. Without doubt, the gas company received the money from the late payment penalties and the money was available to it to carry on its business. The availability of that money constituted a benefit to the gas company and there was no juristic reason for the enrichment.

The proper approach to the juristic reason analysis has two parts. First, the plaintiff must show that there is no juristic reason from an established category, such as a contract or a disposition of law, to deny recovery. If there is no juristic reason, then the plaintiff has made out a prima facie case. The prima facie case can be rebutted if the defendant demonstrates another reason to deny recovery. A de facto burden of proof is placed on the defendant to show why the enrichment should be retained.

In this case, the only possible juristic reason from an established category (disposition of law) that could be used to justify the enrichment was the existence of Ontario Energy Board orders creating the late payment penalties. The orders were not a juristic reason for the enrichment, however, because they were rendered inoperative to the extent of their conflict with s. 347 of the Criminal Code. The plaintiff had made out a prima facie case for unjust enrichment and it fell to the gas company to show a juristic reason for the enrichment outside the established categories.

From 1981 to 1994 the gas company's reliance on the inoperative orders of the Ontario Energy Board provided a juristic reason for the enrichment. Section 347 of the Criminal Code was enacted in 1981 and the action was commenced in 1994. Between

1981 and 1994 no suggestion could be made that the gas company knew that the late payment penalties violated s. 347 of the Code. The gas company's reliance on the board's orders in the absence of actual or constructive notice that the orders were inoperative was sufficient to provide a juristic reason for the enrichment during this period. When the plaintiff commenced the first action in 1994, however, the gas company was put on notice that it might be violating the Code. This possibility became a reality in 1998, when the Supreme Court of Canada held, in the first action, that the late payment penalties were in excess of the s. 347 limits. After the gas company was put on notice of a serious possibility of a Criminal Code violation, the gas company could no longer reasonably rely on the board's orders to authorize the penalties. After the commencement of the action in 1994, there was no longer a juristic reason for the enrichment of the gas company. After 1994 the plaintiff was entitled to restitution of the portion of the penalties paid that exceeded the 60 per cent rate of interest set out in s. 347 of the Criminal Code.

The gas company could not rely on the defence of change of position. The penalties were obtained in contravention of the Criminal Code and, as a result, it could not be unjust for the gas company to have to return them.

Neither could the gas company rely on the defence set out in s. 25 of the Ontario Energy Board Act. This defence must be read down to exclude protection from civil liability that arises out of Criminal Code violations.

The doctrines of exclusive jurisdiction and collateral attack were likewise not defences on which the gas company could rely. The Ontario Energy Board did not have exclusive jurisdiction over this dispute. Although the dispute involved rate orders, at its heart it was a private law matter within the competence of the civil courts and the board had jurisdiction to order the remedy sought by the plaintiff. Furthermore, the action did not constitute an impermissible collateral attack on the board's orders. The object of the plaintiff's action was not to invalidate or render inoperable the board's orders but rather to recover money that had been illegally collected by the gas company as a result of the board orders. The plaintiff was not the object of the orders, and he was not seeking to avoid the orders by bringing the action.

The regulated industries defence was unavailable to the gas company. The language in s. 347 of the Criminal Code does not support the notion that a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state.

Because the gas company was not a government official acting under colour of authority, it could not rely on the de facto doctrine to exempt it from liability. The underlying purpose of the de facto doctrine is to preserve law and order and the authority of the government. Those interests were not at stake in this litigation.

A preservation order was not appropriate. The gas company had ceased to collect the late payment penalties at a criminal rate and, if a preservation order was made, there were no future late payment penalties to which it could attach. For those late payment penalties paid between 1994 and 2004, a preservation order would serve no practical purpose. The plaintiff did not allege that the gas company was impecunious or that there was any reason to believe that it would not satisfy a judgment against it. Furthermore, the plaintiff did not satisfy the criteria set out in R. 45.02 of the Rules of Civil Procedure.

The plaintiff was entitled to his costs of all the proceedings throughout, regardless of the outcome of any future litigation.

Le demandeur a exercé un recours collectif au nom de plus de 500 000 clients d'une compagnie de gaz. Il a soutenu que les pénalités pour paiement en retard imposées par la compagnie à l'égard des paiements dus contrevenaient à l'art. 347 du Code criminel. L'affaire s'est rendue jusqu'en Cour suprême du Canada, qui a statué que les pénalités pour paiement en retard constituaient un taux d'intérêt criminel contrevenant à l'art. 347 du Code. Le demandeur a intenté une deuxième action, cette fois en restitution pour enrichissement sans cause des pénalités pour paiement en retard perçues par la compagnie en contravention de l'art. 347. La compagnie a présenté une requête en jugement sommaire afin d'obtenir le rejet de la deuxième action. Le juge saisi de la requête de la compagnie l'a accueillie au motif qu'il s'agissait d'une contestation indirecte de l'ordonnance de la Commission de l'énergie de l'Ontario approuvant la création des pénalités pour paiement en retard. Le demandeur a interjeté appel. Le pourvoi a été rejeté. Les juges majoritaires de la Cour d'appel étaient en désaccord avec les motifs du premier juge, mais ils ont quand même estimé que l'enrichissement sans cause n'avait pas été établi. Le demandeur a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

La perception par la compagnie des pénalités pour paiement en retard constituait un enrichissement sans cause donnant ouverture à une demande de restitution. La compagnie s'est vu ordonner de rembourser les pénalités payées à partir de 1994, lesquelles excédaient le taux d'intérêt maximal prévu par l'art. 347 du Code criminel.

Le transfert d'un montant d'argent du demandeur au défendeur constitue un enrichissement. Il n'y avait aucun doute que la compagnie avait perçu l'argent provenant des pénalités et qu'elle aurait pu l'utiliser dans l'exploitation de son entreprise. La

disponibilité de l'argent constituait un avantage pour la compagnie et il n'existait aucun motif juridique pouvant justifier un tel enrichissement.

Il convient de scinder en deux l'étape de l'analyse du motif juridique. Premièrement, le demandeur doit démontrer qu'il n'existe aucun motif juridique appartenant à une catégorie établie permettant de refuser le recouvrement. S'il n'existe aucun motif juridique appartenant à une catégorie établie, alors le demandeur a prouvé sa cause de façon prima facie. Le défendeur peut réfuter la preuve prima facie en démontrant qu'il existe une autre raison justifiant de refuser le recouvrement. Le défendeur a l'obligation de facto de démontrer pourquoi il devrait conserver ce dont il s'est enrichi.

En l'espèce, le motif juridique appartenant à une catégorie établie (disposition légale) qui pouvait servir à justifier l'enrichissement était l'existence des ordonnances de la Commission de l'énergie de l'Ontario ayant créé les pénalités pour paiement en retard. Ces ordonnances ne constituaient cependant pas un motif juridique justifiant l'enrichissement puisqu'elles étaient inopérantes dans la mesure où elles entraient en conflit avec l'art. 347 du Code criminel. Le demandeur avait prouvé l'enrichissement sans cause de façon prima facie et c'était alors à la compagnie qu'il revenait de démontrer l'existence d'un motif juridique n'appartenant pas aux catégories qui puisse justifier l'enrichissement.

Le fait que, à partir de 1981 jusqu'en 1994, la compagnie se soit fondée sur les ordonnances inopérantes de la CEO était un motif juridique justifiant l'enrichissement. L'article 347 du Code criminel a été adopté en 1981 et cette action a été intentée en 1994. Rien ne prouvait que la compagnie savait, entre 1981 et 1994, que les pénalités contrevenaient à l'art. 347 du Code. Le fait que la compagnie se soit fondée sur les ordonnances de la Commission, sans savoir véritablement ou vraisemblablement qu'elles étaient inopérantes, suffisait pour fournir un motif juridique justifiant l'enrichissement pendant cette période. La compagnie a par ailleurs été avisée de la possibilité qu'elle puisse contrevenir au Code lorsque le demandeur a intenté son action en 1994. Cette possibilité est devenue réalité lorsque la Cour suprême du Canada a statué, dans le cadre de la première action, que les pénalités excédaient les limites de l'art. 347. Dès que la compagnie a été avisée qu'il existait une réelle possibilité que les pénalités puissent violer le Code, elle ne pouvait alors plus raisonnablement se fonder sur les ordonnances de la Commission pour autoriser les pénalités. Elle n'avait donc plus de motif juridique justifiant l'enrichissement dès après l'institution de l'action en 1994. Le demandeur avait donc droit, à partir de 1994, à la restitution de la portion des pénalités payées qui excédaient le taux d'intérêt de 60 pour cent prévu par l'art. 347 du Code criminel.

La compagnie ne pouvait invoquer le moyen de défense fondé sur le changement de situation. Les pénalités ont été obtenues en contravention du Code criminel et, par conséquent, il ne pouvait être injuste pour la compagnie d'avoir à les rembourser.

La compagnie ne pouvait non plus invoquer le moyen de défense prévu par l'art. 25 de la Loi sur la Commission de l'énergie de l'Ontario. Ce moyen de défense doit recevoir une interprétation stricte afin de pouvoir exclure la protection contre la responsabilité civile pouvant découler de contraventions au Code criminel.

La compagnie ne pouvait pas non plus invoquer les théories de la compétence exclusive et de la contestation indirecte. La Commission de l'énergie de l'Ontario n'avait pas compétence exclusive à l'égard du litige. Même si ce dernier impliquait des ordonnances en matière de taux, il portait principalement sur une question de droit privée relevant de la compétence des tribunaux civils, et la Commission n'avait pas compétence pour ordonner la réparation demandée par le demandeur. De plus, l'action ne constituait pas une contestation indirecte inacceptable des ordonnances de la Commission. L'action du demandeur ne visait pas à obtenir que les ordonnances de la Commission soient invalidées ou déclarées inopérantes, mais plutôt à obtenir le recouvrement de l'argent illégalement perçu par la compagnie en raison des ordonnances de la Commission. Le demandeur n'était pas régi par les ordonnances et il n'y avait aucune crainte qu'il ait cherché à éviter les ordonnances en intentant l'action.

Le moyen de défense fondé sur la réglementation de l'industrie ne pouvait non plus être invoqué par la compagnie. Rien dans l'art. 347 du Code criminel ne pouvait appuyer la théorie qu'un régime de réglementation provincial ne pouvait être contraire à l'intérêt public ni constituer une infraction contre l'État.

La compagnie n'était pas un fonctionnaire qui agissait avec une apparence d'autorité et ne pouvait donc se fonder sur le principe de la validité de facto pouvant l'exonérer de toute responsabilité. L'objectif sous-jacent du principe de la validité de facto était d'assurer le respect de la loi et l'ordre ainsi que de l'autorité du gouvernement. De tels intérêts n'étaient pas en jeu dans ce litige. Il n'était pas approprié d'accorder une ordonnance de conservation. La compagnie avait cessé de percevoir les pénalités pour paiement en retard qui étaient à un taux criminel; une telle ordonnance ne pouvait se rattacher à aucune pénalité à venir. Quant aux pénalités payées de 1994 à 2004, une ordonnance de conservation ne serait d'aucune utilité pratique. Le demandeur n'a pas allégué que la compagnie était démunie ou qu'il existait des raisons de croire qu'elle n'exécuterait pas un jugement rendu contre elle. De plus, le demandeur n'a pas satisfait au critère énoncé dans la règle 45.02 des Règles de procédure civile.

Le demandeur avait droit aux dépens devant toutes les cours, quelle que soit l'issue de tout autre litige ultérieur.

Table of Authorities

Cases considered by *Iacobucci J.*:

Amax Potash Ltd. v. Saskatchewan, [1977] 2 S.C.R. 576, [1976] 6 W.W.R. 61, 11 N.R. 222, 71 D.L.R. (3d) 1, 1976 CarswellSask 76, 1976 CarswellSask 115 (S.C.C.) — considered

Becker v. Pettkus, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165, 1980 CarswellOnt 299, 1980 CarswellOnt 644 (S.C.C.) — followed

Berardinelli v. Ontario Housing Corp., [1979] 1 S.C.R. 275, 8 C.P.C. 100, 90 D.L.R. (3d) 481, 23 N.R. 298, 1978 CarswellOnt 462, 1978 CarswellOnt 596 (S.C.C.) — considered

Canada (Attorney General) v. Law Society (British Columbia), 1982 CarswellBC 133, 1982 CarswellBC 743, [1982] 2 S.C.R. 307, 37 B.C.L.R. 145, [1982] 5 W.W.R. 289, 19 B.L.R. 234, 43 N.R. 451, 137 D.L.R. (3d) 1, 66 C.P.R. (2d) 1 (S.C.C.) — considered

Garland v. Consumers' Gas Co., 1998 CarswellOnt 4053, 1998 CarswellOnt 4054, 231 N.R. 1, 40 O.R. (3d) 479 (headnote only), 165 D.L.R. (4th) 385, 129 C.C.C. (3d) 97, 114 O.A.C. 1, 20 C.R. (5th) 44, 49 M.P.L.R. (2d) 77, [1998] 3 S.C.R. 112 (S.C.C.) — considered

Gorman v. Karpnale Ltd., [1991] 2 A.C. 548, [1991] 3 W.L.R. 10, [1992] 4 All E.R. 512 (U.K. H.L.) — considered

M & D Farm Ltd. v. Manitoba Agricultural Credit Corp., 1999 CarswellMan 368, 1999 CarswellMan 369, [1999] 9 W.W.R. 356, 176 D.L.R. (4th) 585, 245 N.R. 165, [1999] 2 S.C.R. 961, 35 C.P.C. (4th) 1, 138 Man. R. (2d) 161, 202 W.A.C. 161 (S.C.C.) — referred to

Mack v. Canada (Attorney General), 2002 CarswellOnt 2927, 217 D.L.R. (4th) 583, 96 C.R.R. (2d) 254, 60 O.R. (3d) 737, 60 O.R. (3d) 756, 165 O.A.C. 17, 24 Imm. L.R. (3d) 1 (Ont. C.A.) — referred to

Mahar v. Rogers Cablesystems Ltd., 34 Admin. L.R. (2d) 51, 25 O.R. (3d) 690, 1995 CarswellOnt 1195 (Ont. Gen. Div.) — referred to

Multiple Access Ltd. v. McCutcheon, [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.) — referred to

Oldfield v. Transamerica Life Insurance Co. of Canada, 2002 SCC 22, 2002 CarswellOnt 724, 2002 CarswellOnt 725, 210 D.L.R. (4th) 1, [2002] I.L.R. I-4058, 284 N.R. 104, 35 C.C.L.I. (3d) 165, 156 O.A.C. 310, 59 O.R. (3d) 160 (note), [2002] 1 S.C.R. 742 (S.C.C.) — referred to

Ontario Hydro v. Kelly, 159 D.L.R. (4th) 543, 1998 CarswellOnt 1695, 39 O.R. (3d) 107, 17 C.C.P.B. 186, 8 Admin. L.R. (3d) 128 (Ont. Gen. Div.) — referred to

Peel (Regional Municipality) v. Canada, (sub nom. *Peel (Regional Municipality) v. Ontario)* 144 N.R. 1, 12 M.P.L.R. (2d) 229, 98 D.L.R. (4th) 140, [1992] 3 S.C.R. 762, 59 O.A.C. 81, 1992 CarswellNat 15, 55 F.T.R. 277 (note), 1992 CarswellNat 659 (S.C.C.) — followed

Peter v. Beblow, [1993] 3 W.W.R. 337, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, 150 N.R. 1, 48 E.T.R. 1, 77 B.C.L.R. (2d) 1, 44 R.F.L. (3d) 329, [1993] R.D.F. 369, 1993 CarswellBC 44, 1993 CarswellBC 1258 (S.C.C.) — followed

R. v. Jorgensen, 43 C.R. (4th) 137, 102 C.C.C. (3d) 97, 129 D.L.R. (4th) 510, 189 N.R. 1, 87 O.A.C. 1, 32 C.R.R. (2d) 189, (sub nom. *R. v. Hawkins)* 25 O.R. (3d) 824, 1995 CarswellOnt 1185, [1995] 4 S.C.R. 55, 1995 CarswellOnt 985 (S.C.C.) — followed

R. v. Litchfield, 14 Alta. L.R. (3d) 1, 161 N.R. 161, 25 C.R. (4th) 137, [1993] 4 S.C.R. 333, 86 C.C.C. (3d) 97, 145 A.R. 321, 55 W.A.C. 321, 1993 CarswellAlta 160, 1993 CarswellAlta 568 (S.C.C.) — referred to

R. v. Wilson, [1983] 2 S.C.R. 594, 4 D.L.R. (4th) 577, 51 N.R. 321, [1984] 1 W.W.R. 481, 26 Man. R. (2d) 194, 9 C.C.C. (3d) 97, 37 C.R. (3d) 97, 1983 CarswellMan 154, 1983 CarswellMan 189 (S.C.C.) — considered

Rathwell v. Rathwell, [1978] 2 S.C.R. 436, [1978] 2 W.W.R. 101, 83 D.L.R. (3d) 289, 19 N.R. 91, 1 E.T.R. 307, 1 R.F.L. (2d) 1, 1978 CarswellSask 36, 1978 CarswellSask 129 (S.C.C.) — followed

RBC Dominion Securities Inc. v. Dawson, 111 D.L.R. (4th) 230, 114 Nfld. & P.E.I.R. 187, 356 A.P.R. 187, 1994 CarswellNfld 308 (Nfld. C.A.) — referred to

Reference re Excise Tax Act (Canada), (sub nom. *Reference re Goods & Services Tax)* 2 Alta. L.R. (3d) 289, (sub nom. *Reference re Goods & Services Tax)* 20 W.A.C. 161, (sub nom. *Reference re Bill C-62)* [1992] G.S.T.C. 2, (sub nom.

Reference re Goods & Services Tax) [1992] 4 W.W.R. 673, *(*sub nom. *Reference re Goods & Services Tax)* 138 N.R. 247, *(*sub nom. *Reference re Goods & Services Tax)* 127 A.R. 161, *(*sub nom. *Reference re Goods & Services Tax)* [1992] 2 S.C.R. 445, *(*sub nom. *Reference re Goods & Services Tax (Alberta))* 94 D.L.R. (4th) 51, *(*sub nom. *Reference re GST Implementing Legislation)* 5 T.C.T. 4165, 1992 CarswellAlta 61, 1992 CarswellAlta 469 (S.C.C.) — referred to

Reference re Language Rights Under s. 23 of Manitoba Act, 1870 & s. 133 of Constitution Act, 1867, [1985] 1 S.C.R. 721, [1985] 4 W.W.R. 385, 19 D.L.R. (4th) 1, 59 N.R. 321, 35 Man. R. (2d) 83, 1985 CarswellMan 183, 1985 CarswellMan 450 (S.C.C.) — considered

Sharwood & Co. v. Municipal Financial Corp., 2001 CarswellOnt 749, 197 D.L.R. (4th) 477, 12 B.L.R. (3d) 219, 142 O.A.C. 350, 53 O.R. (3d) 470 (Ont. C.A.) — referred to

Sprint Canada Inc. v. Bell Canada, 1997 CarswellOnt 4135, 79 C.P.R. (3d) 31 (Ont. Gen. Div.) — referred to

Storthoaks (Rural Municipality) v. Mobil Oil Canada Ltd., [1976] 2 S.C.R. 147, [1975] 4 W.W.R. 591, 5 N.R. 23, 55 D.L.R. (3d) 1, 1975 CarswellSask 56, 1975 CarswellSask 97 (S.C.C.) — considered

Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 2003 C.L.L.C. 220-071, 232 D.L.R. (4th) 385, 9 Admin. L.R. (4th) 161, 311 N.R. 201, 120 L.A.C. (4th) 225, 179 O.A.C. 291, [2003] 3 S.C.R. 77, 17 C.R. (6th) 276 (S.C.C.) — referred to

Transport North American Express Inc. v. New Solutions Financial Corp., 2004 SCC 7, 2004 CarswellOnt 512, 2004 CarswellOnt 513, 40 B.L.R. (3d) 18, 316 N.R. 84, 235 D.L.R. (4th) 385, [2004] 1 S.C.R. 249, [2004] S.C.J. No. 9, 70 O.R. (3d) 255 (note), 18 C.R. (6th) 1, 17 R.P.R. (4th) 1, 183 O.A.C. 342 (S.C.C.) — referred to

Statutes considered:

Code civil du Québec, L.Q. 1991, c. 64

art. 1493 — referred to

art. 1494 — referred to

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

s. 91 ¶ 19 — referred to

s. 91 ¶ 27 — referred to

s. 92 ¶ 13 — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 15 — considered

s. 347 — referred to

s. 347(1) — considered

s. 347(1)(b) — referred to

Municipal Franchises Act, R.S.O. 1990, c. M.55

Generally — referred to

Ontario Energy Board Act, R.S.O. 1990, c. O.13

Generally — referred to

s. 18 — considered

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B

s. 25 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

R. 45.02 — considered

APPEAL by plaintiff from judgment reported at 2001 CarswellOnt 4244, 19 B.L.R. (3d) 10, 152 O.A.C. 244, 57 O.R. (3d) 127, 208 D.L.R. (4th) 494 (Ont. C.A.), dismissing plaintiff's appeal from judgment granting gas company's motion to dismiss action against it.

POURVOI du demandeur à l'encontre de l'arrêt publié à 2001 CarswellOnt 4244, 19 B.L.R. (3d) 10, 152 O.A.C. 244, 57 O.R. (3d) 127, 208 D.L.R. (4th) 494 (Ont. C.A.), qui a rejeté son pourvoi à l'encontre du jugement ayant accueilli la requête de la compagnie de gaz en rejet de l'action intentée contre elle.

***Iacobucci J.*:**

1 At issue in this appeal is a claim by customers of a regulated utility for restitution for unjust enrichment arising from late payment penalties levied by the utility in excess of the interest limit prescribed by s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46. More specifically, the issues raised include the necessary ingredients to a claim for unjust enrichment, the defences that can be mounted to resist the claim, and whether other ancillary orders are necessary.

2 For the reasons that follow, I am of the view to uphold the appellant's claim for unjust enrichment and therefore would allow the appeal.

I. Facts

3 The respondent Consumers' Gas Company Limited, now known as Enbridge Gas Distribution Inc., is a regulated utility which provides natural gas to commercial and residential customers throughout Ontario. Its rates and payment policies are governed by the Ontario Energy Board ("OEB" or "Board") pursuant to the *Ontario Energy Board Act*, R.S.O. 1990, c. O.13 ("OEBA"), and the *Municipal Franchises Act*, R.S.O. 1990, c. M.55. The respondent cannot sell gas or charge for gas-related services except in accordance with rate orders issued by the Board.

4 Consumers' Gas bills its customers on a monthly basis, and each bill includes a due date for the payment of current charges. Customers who do not pay by the due date incur a late payment penalty ("LPP") calculated at 5 per cent of the unpaid charges for that month. The LPP is a one-time penalty and does not compound or increase over time.

5 The LPP was implemented in 1975 following a series of rate hearings conducted by the OEB. In granting Consumers' Gas's application to impose the penalty, the Board noted that the primary purpose of the LPP is to encourage customers to pay their bills promptly, thereby reducing the cost to Consumers' Gas of carrying accounts receivable. The Board also held that such costs, along with any special collection costs arising from late payments, should be borne by the customers who cause them to be incurred, rather than by the customer base as a whole. In approving a flat penalty of 5 per cent, the OEB rejected the alternative course of imposing a daily interest charge on overdue accounts. The Board reasoned that an interest charge would not provide sufficient incentive to pay by a named date, would give little weight to collection costs, and might seem overly complicated. The Board recognized that if a bill is paid very soon after the due date, the penalty would, if calculated as an interest charge, be a very high rate of interest. However, it noted that customers could avoid such a charge by paying their bills on time, and that, in any event, in the case of the average bill the dollar amount of the penalty would not be very large.

6 The appellant Gordon Garland is a resident of Ontario and has been a Consumers' Gas customer since 1983. He and his wife paid approximately $75 in LPP charges between 1983 and 1995. In a class action on behalf of over 500,000 Consumers' Gas customers, Garland asserted that the LPPs violate s. 347 of the *Criminal Code*. That case also reached the Supreme Court of Canada, which held that charging the LPPs amounted to charging a criminal rate of interest under s. 347 and remitted the matter back to the trial court for further consideration (*Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112 (S.C.C.) ("*Garland #1*")). Both parties have now brought cross-motions for summary judgment.

7 The appellant now seeks restitution for unjust enrichment of LPP charges received by the respondent in violation of s. 347 of the Code. He also seeks a preservation order requiring Consumers' Gas to hold LPPs paid during the pendency of the litigation subject to possible repayment.

8 The motions judge granted the respondent's motion for summary judgment, finding that the action was a collateral attack on the OEB order. He dismissed the application for a preservation order. A majority of the Court of Appeal disagreed with the motions judge's reasons, but dismissed the appeal on the grounds that the appellant's unjust enrichment claim could not be made out.

II. Relevant Statutory Provisions

9 *Ontario Energy Board Act*, R.S.O. 1990, c. O.13

> 18. An order of the Board is a good and sufficient defence to any proceeding brought or taken against any person in so far as the act or omission that is the subject of the proceeding is in accordance with the order.

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B

> 25. An order of the Board is a good and sufficient defence to any proceeding brought or taken against any person in so far as the act or omission that is the subject of the proceeding is in accordance with the order.

Criminal Code, R.S.C. 1985, c. C-46

> 15. No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the act or omission occurs.
>
> . . . . .
>
> 347.(1) Notwithstanding any Act of Parliament, every one who
>
> (a) enters into an agreement or arrangement to receive interest at a criminal rate, or
>
> (b) receives a payment or partial payment of interest at a criminal rate,
>
> is guilty of
>
> (c) an indictable offence and is liable to imprisonment for a term not exceeding five years, or
>
> (d) an offence punishable on summary conviction and is liable to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months or to both.

III. Judicial History

A. Ontario Superior Court (2000), 185 D.L.R. (4th) 536

10 As this case raised no factual disputes, all parties agreed that summary judgment was the proper procedure on the motion. Winkler J. found that the appellant's claim could not succeed in law and that there was no serious issue to be tried. In so finding, he held that the "regulated industries defence" was not a complete defence to the claim. On his reading of the relevant case law, the dominant consideration was whether the express statutory language affords a degree of flexibility to provincial regulators. Section 347 affords no such flexibility, so the defence is not available.

11 Nor, in Winkler J.'s view, did s. 15 of the *Criminal Code* act as a defence. Section 15 was a provision of very limited application, originally enacted to ensure that persons serving the Monarch *de facto* could not be tried for treason for remaining faithful to the unsuccessful claimant to the throne. While it could have a more contemporary application, it was limited on its face to actions or omissions occurring pursuant to the authority of a sovereign power. As the OEB was not a sovereign power, it did not apply.

12 Winkler J. found that the proposed action was a collateral attack on the OEB's orders. The OEBA indicated repeatedly that the OEB has exclusive control over matters within its jurisdiction. In addition, interested parties were welcome to participate in OEB hearings, and OEB orders were reviewable. The appellant did not avail himself of any of these opportunities, choosing instead to challenge the validity of the OEB orders in the courts. Winkler J. found that, unless attacked directly, OEB orders are valid and binding upon the respondent and its consumers. The OEB was not a party to the instant proceeding and its orders were not before the court. Winkler J. noted that the setting of rates is a balancing exercise, with LPPs being one factor under consideration. Applying *Sprint Canada Inc. v. Bell Canada* (1997), 79 C.P.R. (3d) 31 (Ont. Gen. Div.), *Ontario Hydro v. Kelly* (1998), 39 O.R. (3d) 107 (Ont. Gen. Div.), and *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690 (Ont. Gen. Div.), Winkler J. found that the instant action, although framed as a private dispute between two contractual parties, was in reality an impermissible collateral attack on the validity of OEB orders. It would be inappropriate for the court to determine matters that fall squarely within the OEB's jurisdiction. Moreover, this Court's decision in *Garland #1* with respect to s. 347 provided the OEB with ample legal guidance to deal with the matter.

13 In case he was incorrect in that finding, Winkler J. went on to find that s. 18 of the OEBA provided a complete defence to the proposed action. He held that s. 18 was constitutionally valid because it did not interfere with Parliament's jurisdiction over interest and the criminal law or, to the extent that it did, the interference was incidental. Although the respondent did not strictly comply with the OEB order in that it waived LPPs for some customers, this did not preclude the respondent from relying on s. 18.

14 In case that finding was also mistaken, Winkler J. went on to consider whether the appellant's claim for restitution was valid. The parties had conceded that the appellant had suffered a deprivation, and Winkler J. was satisfied that the respondent had received a benefit. However, he found that the OEB's rate order constituted a valid juristic reason for the respondent's enrichment.

15 Having reached those conclusions, Winkler J. declined to make a preservation order, as requested by the appellant, allowed the respondent's motion for summary judgment and dismissed the appellant's action. By endorsement, he ordered costs against the appellant.

B. Ontario Court of Appeal (2001), 208 D.L.R. (4th) 494

16 McMurtry C.J.O., for the majority, found that Winkler J. was incorrect in finding that there had been an impermissible collateral attack on a decision of the OEB because the appellant was not challenging the merits or legality of the OEB order or attempting to raise a matter already dealt with by the OEB. Rather, the proposed class action was based on the principles of unjust enrichment and raised issues over which the OEB had no jurisdiction. As such, the courts had jurisdiction over the proposed class action.

17 McMurtry C.J.O. further found that s. 25 of the 1998 OEBA (the equivalent provision to s. 18 of the 1990 OEBA) did not provide grounds to dismiss the appellant's action. He did not agree that the respondent's failure to comply strictly with the OEB orders made s. 25 inapplicable. Instead, he found that, while s. 25 provides a defence to any proceedings insofar as the act or omission at issue is in accordance with the OEB order, legislative provisions restricting citizen's rights of action attract strict construction (*Berardinelli v. Ontario Housing Corp.* (1978), [1979] 1 S.C.R. 275 (S.C.C.)). The legislature could not reasonably be believed to have contemplated that an OEB order could mandate criminal conduct, and even wording as broad as that found in s. 25 could not provide a defence to an action for restitution arising from an OEB order authorizing criminal conduct. He noted that this decision was based on the principles of statutory interpretation, not on the federal paramountcy doctrine.

18 Section 15 of the *Criminal Code* did not provide the respondent with a defence either. It was of limited application and is largely irrelevant in modern times. As for the "regulated industries defence," it did not apply because the case law did not indicate that a company operating in a regulatory industry could act directly contrary to the *Criminal Code*.

19 Nonetheless, McMurty C.J.O. held that the appellant's unjust enrichment claim could not be made out. It had been conceded that the appellant suffered a deprivation, but McMurtry C.J.O. held that the appellant failed to establish the other two elements of the claim for unjust enrichment. While payment of money will normally be a benefit, McMurtry C.J.O. found that

the payment of the late penalties in this case did not confer a benefit on the respondent. Taking the "straightforward economic approach" to the first two elements of unjust enrichment, as recommended in *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), McMurtry C.J.O. noted that the OEB sets rates with a view to meeting the respondent's overall revenue requirements. If the revenue available from LPPs had been set lower, the other rates would have been set higher. Therefore, the receipt of the LPPs was not an enrichment capable of giving rise to a restitutionary claim.

20 In case that conclusion was wrong, McMurtry C.J.O. went on to find that there was a juristic reason for any presumed enrichment. Under this aspect of the test, moral and policy questions were open for consideration, and it was necessary to consider what was fair to both the plaintiff and the defendant. It was therefore necessary to consider the statutory regime within which the respondent operated. McMurtry C.J.O. noted that the respondent was required by statute to apply the LPPs; it had been ordered to collect them and they were taken into account when the OEB made its rate orders. He found that it would be contrary to the equities in this case to require the respondent to repay all the LPP charges collected since 1981. Such an order would affect all of the respondent's customers, including the vast majority who consistently pay on time.

21 The appellant argued that a preservation order was required even if his arguments on restitution were not successful because he could still be successful in arguing that the respondent could not enforce payment of the late penalties. As he had found no basis for ordering restitution, McMurtry C.J.O. saw no reason to make a preservation order. Moreover, the order requested would serve no practical purpose because it gave the respondent the right to spend the monies at stake. He dismissed the appeal and the appellant's action. In so doing, he agreed with the motions judge that the appellant's claims for declaratory and injunctive relief should not be granted.

22 As to costs, McMurtry C.J.O. found that there were several considerations that warranted overturning the order that the appellant pay the respondent's costs. First, the order required him to pay the costs of his successful appeal to the Supreme Court of Canada. Second, even though the respondent was ultimately successful, it failed on two of the defences it raised at the motions stage and three of the defences it raised at the Court of Appeal. Third, the proceedings raised novel issues. McMurtry C.J.O. found that each party should bear its own costs.

23 Borins J.A., writing in dissent, was of the opinion that the appeal should be allowed. He agreed with most of McMurtry C.J.O.'s reasons, but found that the plaintiff class was entitled to restitution. In his opinion, the motions judge's finding that the LPPs had enriched the respondent by causing it to have more money than it had before was supported by the evidence and the authorities. Absent material error, he held, it was not properly reviewable.

24 However, Borins J.A. found that the motions judge had erred in law in finding that there was a juristic reason for the enrichment. The motions judge had failed to consider the effect of the Supreme Court of Canada decision that the charges amount to interests at a criminal rate and that s. 347 of the *Criminal Code* prohibits the receipt of such interest. As a result of this decision, Borins J.A. felt that the rate orders ceased to have any legal effect and could not provide a juristic reason for the enrichment. A finding that the rate orders constituted a juristic reason for contravening s. 347 also allowed orders of a provincial regulatory authority to override federal criminal law and removed a substantial reason for compliance with s. 347. Thus, he held that allowing the respondent to retain the LPPs was contrary to the federal paramountcy doctrine.

25 According to Borins J.A., finding the OEB orders to constitute a juristic reason would also be contrary to the authorities which have applied s. 347 in the context of commercial obligations. This line of cases required consideration of when restitution should have been ordered and for what portion of the amount paid. Finally, it would allow the respondent to profit from its own wrongdoing.

26 Borins J.A. was not sympathetic to the respondent's claims that its change of position should allow it to keep the money it had collected in contravention of s. 347, even if it could have recovered the same amount of money on an altered rate structure. He also noted that, in his opinion, the issue of recoverability should have been considered in the context of the class action, not on the basis of the representative plaintiff's claim for $75. Borins J.A. would have allowed the appeal, set aside the judgment dismissing the appellant's claim, granted partial summary judgment, and dismissed the respondent's motion for summary judgment. The appellant would have been required to proceed to trial with respect to damages. He would also have

declared that the charging and receipt of LPPs by the respondent violates s. 347(1)(b) of the *Criminal Code* and that the LPPs need not be paid by the appellant, and would have ordered that the respondent repay the LPPs received from the appellant, as determined by the trial judge. He would also have ordered costs against the respondent.

27 It should be noted that on January 9, 2003, the Chief Justice stated the following constitutional question:

> Are s. 18 of the *Ontario Energy Board Act*, R.S.O. 1990, c. O-13, and s. 25 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, constitutionally inoperative by reason of the paramountcy of s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46?

As will be clear from the reasons below, I have found it unnecessary to answer the constitutional question.

IV. Issues

28

1. Does the appellant have a claim for restitution?

    (a) Was the respondent enriched?

    (b) Is there a juristic reason for the enrichment?

2. Can the respondent avail itself of any defence?

    (a) Does the change of position defence apply?

    (b) Does s. 18 (now s. 25) of the OEBA ("s. 18/25") shield the respondent from liability?

    (c) Is the appellant engaging in a collateral attack on the orders of the Board?

    (d) Does the "regulated industries" defence exonerate the respondent?

    (e) Does the *de facto* doctrine exonerate the respondent?

3. Other orders sought by the appellant

    (a) Should this Court make a preservation order?

    (b) Should this Court make a declaration that the LLPs need not be paid?

    (c) What order should this Court make as to costs?

V. Analysis

29 My analysis will proceed as follows. First, I will assess the appellant's claim in unjust enrichment. Second, I will determine whether the respondent can avail itself of any defences to the appellant's claim. Finally, I will address the other orders sought by the appellant.

A. Unjust Enrichment

30 As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant, (2) a corresponding deprivation of the plaintiff, and (3) an absence of juristic reason for the enrichment (*Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.), at p. 848; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 (S.C.C.), at p. 784). In this case, the parties are agreed that the second prong of the test has been satisfied. I will thus address the first and third prongs of the test in turn.

(a) Enrichment of the Defendant

31 In *Peel*, *supra*, at p. 790, McLachlin J. (as she then was) noted that the word "enrichment" connotes a tangible benefit which has been conferred on the defendant. This benefit, she writes, can be either a positive benefit, such as the payment of money, or a negative benefit, for example, sparing the defendant an expense which he or she would otherwise have incurred. In general, moral and policy arguments have not been considered under this head of the test. Rather, as McLachlin J. wrote in *Peter*, *supra*, at p. 990, "[t]his Court has consistently taken a straightforward economic approach to the first two elements of the test for unjust enrichment." Other considerations, she held, belong more appropriately under the third element - absence of juristic reason.

32 In this case, the transactions at issue are payments of money by late payers to the respondent. It seems to me that, as such, under the "straightforward economic approach" to the benefit analysis, this element is satisfied. Winkler J. followed this approach and was satisfied that the respondent had received a benefit. "Simply stated," he wrote at para. 95, "as a result of each LPP received by Consumers' Gas, the company has more money than it had previously and accordingly is enriched."

33 The majority of the Court of Appeal for Ontario disagreed. McMurtry C.J.O. found that while payment of money would normally be a benefit, it was not in this case. He claimed to be applying the "straightforward economic approach" as recommended in *Peter*, *supra*, but accepted the respondent's argument that because of the rate structure of the OEB, the respondent had not actually been enriched. Because LPPs were part of a scheme designed to recover the respondent's overall revenue, any increase in LPPs was offset by a corresponding decrease in regular rates. Thus, McMurty C.J.O. concluded, "[t]he enrichment that follows from the receipt of LPPs is passed on to all [Consumers' Gas] customers in the form of lower gas delivery rates" (para. 65). As a result, the real beneficiary of the scheme is not the respondent but is rather all of the respondent's customers.

34 In his dissent, Borins J.A. disagreed with this analysis. He would have held that, where there is payment of money, there is little controversy over whether or not a benefit was received and since a payment of money was received in this case, a benefit was conferred on the respondent.

35 The respondent submits that it is not enough that the plaintiff has made a payment; rather, it must also be shown that the defendant is "in possession of a benefit." It argues that McMurtry C.J.O. had correctly held that the benefit had effectively been passed on to the respondent's customers, so the respondent could not be said to have retained the benefit. The appellant, on the other hand, maintains that the "straightforward economic analysis" from *Peter*, *supra*, should be applied and any other moral or policy considerations should be considered at the juristic reason stage of the analysis.

36 I agree with the analysis of Borins J.A. on this point. The law on this question is relatively clear. Where money is transferred from plaintiff to defendant, there is an enrichment. Transfer of money so clearly confers a benefit that it is the main example used in the case law and by commentators of a transaction that meets the threshold for a benefit (see *Peel*, *supra*, at p. 790; *Sharwood & Co. v. Municipal Financial Corp.* (2001), 53 O.R. (3d) 470 (Ont. C.A.), at p. 478; Peter D. Maddaugh and John D. McCamus, *The Law of Restitution* (Aurora, Ont.: Butterworths, 1990), at p. 38; Lord Goff and Gareth Jones, *The Law of Restitution*, 6th ed. (London: Sweet & Maxwell, 2002), at p. 18). There simply is no doubt that Consumers' Gas received the monies represented by the LPPs and had that money available for use in the carrying on of its business. The availability of those funds constitutes a benefit to Consumers' Gas. We are not, at this stage, concerned with what happened to this benefit in the ongoing operation of the regulatory scheme.

37 While the respondent rightly points out that the language of "received and retained" has been used with respect to the benefit requirement (see, for example, *Peel*, *supra*, at p. 788), it does not make sense that it is a requirement that the benefit be retained permanently. The case law does, in fact, recognize that it might be unfair to award restitution in cases where the benefit was not retained, but it does so after the three steps for a claim in unjust enrichment have been made out by recognizing a "change of position" defence (see, for example, *Storthoaks (Rural Municipality) v. Mobil Oil Canada Ltd.* (1975), [1976] 2 S.C.R. 147 (S.C.C.); *RBC Dominion Securities Inc. v. Dawson* (1994), 111 D.L.R. (4th) 230 (Nfld. C.A.)). Professor Jacob S. Ziegel, in his comment on the Ontario Court of Appeal decision in this case, "Criminal Usury, Class Actions and Unjust

Enrichment in Canada" (2002), 18 *Journal of Contract Law* 121, at p. 126, suggests that McMurtry C.J.O.'s reliance on the regulatory framework of the LPP in finding that a benefit was not conferred "was really a change of position defence." I agree with this assessment. Whether recovery should be barred because the benefit was passed on to the respondent's other customers ought to be considered under the change of position defence.

(b) Absence of Juristic Reason

(i) General Principles

38 In his original formulation of the test for unjust enrichment in *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 (S.C.C.), at p. 455 (adopted in *Pettkus*, *supra*, at p. 844), Dickson J. (as he then was) held in his minority reasons that for an action in unjust enrichment to succeed:

> . . . the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason - such as a contract or disposition of law - for the enrichment.

39 Later formulations of the test by this Court have broadened the types of factors that can be considered in the context of the juristic reason analysis. In *Peter*, *supra*, at p. 990, McLachlin J. held that:

> It is at this stage that the court must consider whether the enrichment and detriment, morally neutral in themselves, are "unjust".
>
> . . . The test is flexible, and the factors to be considered may vary with the situation before the court.

40 The "juristic reason" aspect of the test for unjust enrichment has been the subject of much academic commentary and criticism. Much of the discussion arises out of the difference between the ways in which the cause of action of unjust enrichment is conceptualized in Canada and in England. While both Canadian and English causes of action require an enrichment of the defendant and a corresponding deprivation of the plaintiff, the Canadian cause of action requires that there be "an absence of juristic reason for the enrichment" while English courts require "that the enrichment be unjust" (see discussion in L.D. Smith, "The Mystery of 'Juristic Reason' " (2000), 12 S.C.L.R. (2d) 211, at pp. 212-213). It is not of great use to speculate on why Dickson J. in *Rathwell*, *supra*, expressed the third condition as absence of juristic reason but I believe that he may have wanted to ensure that the test for unjust enrichment was not purely subjective in order to be responsive to Martland J.'s criticism in his reasons that application of the doctrine of unjust enrichment contemplated by Dickson J. would require "immeasurable judicial discretion" (p. 473). The importance of avoiding a purely subjective standard was also stressed by McLachlin J. in her reasons in *Peel*, *supra*, at p. 802, in which she wrote that the application of the test for unjust enrichment should not be "case by case 'palm tree' justice."

41 Perhaps as a result of these two formulations of this aspect of the test, Canadian courts and commentators are divided in their approach to juristic reason. As Borins J.A. notes in his dissent (at para. 105), while "some judges have taken the *Pettkus* formulation literally and have attempted to decide cases by finding a 'juristic reason' for a defendant's enrichment, others have decided cases by asking whether the plaintiff has a positive reason for demanding restitution." In his article, "The Mystery of 'Juristic Reason,' " *supra*, which was cited at length by Borins J.A., Professor Smith suggests that it is not clear whether the requirement of "absence of juristic reason" should be interpreted literally to require that plaintiffs show the absence of a reason for the defendant to keep the enrichment or, as in the English model, the plaintiff must show a reason for reversing the transfer of wealth. Other commentators have argued that in fact there is no difference beyond semantics between the Canadian and English tests (see, for example, M. McInnes, "Unjust Enrichment - Restitution - Absence of Juristic Reason: *Campbell v. Campbell*" (2000), 79 Can. Bar Rev. 459).

42 Professor Smith argues that, if there is in fact a distinct Canadian approach to juristic reason, it is problematic because it requires the plaintiff to prove a negative, namely, the absence of a juristic reason. Because it is nearly impossible to do this, he suggests that Canada would be better off adopting the British model, where the plaintiff must show a positive reason that it

would be unjust for the defendant to retain the enrichment. In my view, however, there is a distinctive Canadian approach to juristic reason which should be retained but can be construed in a manner that is responsive to Smith's criticism.

43 It should be recalled that the test for unjust enrichment is relatively new to Canadian jurisprudence. It requires flexibility for courts to expand the categories of juristic reasons as circumstances require and to deny recovery where to allow it would be inequitable. As McLachlin J. wrote in *Peel*, *supra*, at p. 788, the Court's approach to unjust enrichment, while informed by traditional categories of recovery, "is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice." But, at the same time, there must also be guidelines that offer trial judges and others some indication of what the boundaries of the cause of action are. The goal is to avoid guidelines that are so general and subjective that uniformity becomes unattainable.

44 The parties and commentators have pointed out that there is no specific authority that settles this question. But recalling that this is an equitable remedy that will necessarily involve discretion and questions of fairness, I believe that some redefinition and reformulation is required. Consequently, in my view, the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. By closing the list of categories that the plaintiff must canvass in order to show an absence of juristic reason, Smith's objection to the Canadian formulation of the test that it required proof of a negative is answered. The established categories that can constitute juristic reasons include a contract (*Pettkus*, *supra*), a disposition of law (*Pettkus*, *supra*), a donative intent (*Peter*, *supra*), and other valid common law, equitable or statutory obligations (*Peter*, *supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

45 The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a de facto burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.

46 As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstance of a case but which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and that further cases will add additional refinements and developments.

47 In my view, this approach to the juristic reason analysis is consistent with the general approach to unjust enrichment endorsed by McLachlin J. in *Peel*, *supra*, where she stated that courts must effect a balance between the traditional "category" approach, according to which a claim for restitution will succeed only if it falls within an established head of recovery, and the modern "principled" approach, according to which relief is determined with reference to broad principles. It is also, as discussed by Professor Smith, *supra*, generally consistent with the approach to unjust enrichment found in the civil law of Quebec (see, for example, arts. 1493 and 1494 of the *Civil Code of Quebec*, S.Q. 1991, c. 64).

(ii) Application

48 In this case, the only possible juristic reason from an established category that could be used to justify the enrichment is the existence of the OEB orders creating the LPPs under the "disposition of law" category. The OEB orders, however, do not constitute a juristic reason for the enrichment because they are rendered inoperative to the extent of their conflict with s. 347 of the *Criminal Code*. The plaintiff has thus made out a *prima facie* case for unjust enrichment.

49 Disposition of law is well established as a category of juristic reason. In *Rathwell*, *supra*, Dickson J. gave as examples of juristic reasons "a contract or disposition of law" (p. 455). In *Reference re Excise Tax Act (Canada)*, [1992] 2 S.C.R. 445 (S.C.C.) ("*GST Reference*"), Lamer C.J. held that a valid statute is a juristic reason barring recovery in unjust enrichment. This

was affirmed in *Peter*, *supra*, at p. 1018. Most recently, in *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737 (Ont. C.A.), the Ontario Court of Appeal held that the legislation which created the Chinese head tax provided a juristic reason which prevented recovery of the head tax in unjust enrichment. In the leading Canadian text, *The Law of Restitution*, *supra*, McCamus and Maddaugh discuss the phrase "disposition of law" from *Rathwell*, *supra*, stating, at p. 46:

> . . . it is perhaps self-evident that an unjust enrichment will not be established in any case where enrichment of the defendant at the plaintiff's expense is required by law.

It seems clear, then, that valid legislation can provide a juristic reason which bars recovery in restitution.

50 Consumers' Gas submits that the LPPs were authorized by the Board's rate orders, which qualify as a disposition of law. It seems to me that this submission is predicated on the validity and operability of this scheme. The scheme has been challenged by the appellant on the basis that it conflicts with s. 347 of the *Criminal Code* and, as a result of the doctrine of paramountcy, is consequently inoperative. In the *GST Reference*, *supra*, Lamer C.J. held that legislation provides a juristic reason "unless the statute itself is *ultra vires*" (p. 477). Given that legislation that would have been *ultra vires* the province cannot provide a juristic reason, the same principle should apply if the provincial legislation is inoperative by virtue of the paramountcy doctrine. This position is contemplated by Borins J.A. in his dissent when he writes, at para. 149:

> In my view, it would be wrong to say that the rate orders do not provide [Consumers' Gas] with a defence under s. 18 of the OEBA because they have been rendered inoperative by the doctrine of federal paramountcy, and then to breathe life into them for the purpose of finding that they constitute a juristic reason for [Consumers' Gas's] enrichment.

51 As a result, the question of whether the statutory framework can serve as a juristic reason depends on whether the provision is held to be inoperative. If the OEB orders are constitutionally valid and operative, they provide a juristic reason which bars recovery. Conversely, if the scheme is inoperative by virtue of a conflict with s. 347 of the *Criminal Code*, then a juristic reason is not present. In my view, the OEB rate orders are constitutionally inoperative to the extent of their conflict with s. 347 of the *Criminal Code*.

52 The OEB rate orders require the receipt of LPPs at what is often a criminal rate of interest. Such receipt is prohibited by s. 347 of the *Criminal Code*. Both the OEB rate orders and s. 347 of the *Criminal Code* are *intra vires* the level of government that enacted them. The rate orders are *intra vires* the province by virtue of s. 92(13) (property and civil rights) of the *Constitution Act, 1867*. Section 347 of the *Criminal Code is intra vires* the federal government by virtue of s. 91(19) (interest) and s. 91(27) (criminal law power).

53 It should be noted that the Board orders at issue did not require Consumers' Gas to collect the LPPs within a period of 38 days. One could then make the argument that this was not an express operational conflict. But to my mind this is somewhat artificial. I say this because at bottom it is a necessary implication of the OEB orders to require payment within this period. In that respect it should be treated as an express order for purposes of paramountcy analysis. Consequently, there is an express operational conflict between the rate orders and s. 347 of the *Criminal Code* in that it is impossible for Consumers' Gas to comply with both provisions. Where there is an actual operational conflict, it is well settled that the provincial law is inoperative to the extent of the conflict (*Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 (S.C.C.), at p. 191; *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961 (S.C.C.)). As a result, the Board orders are constitutionally inoperative. Because the Board orders are constitutionally inoperative, they do not provide a juristic reason. It therefore falls to Consumers' Gas to show that there was a juristic reason for the enrichment outside the established categories in order to rebut the *prima facie* case made out by the appellant.

54 The second stage of juristic reason analysis requires a consideration of reasonable expectations of the parties and public policy considerations.

55 When the reasonable expectations of the parties are considered, Consumers' Gas's submissions are at first blush compelling. Consumers' Gas submits, on the one hand, that late payers cannot have reasonably expected that there would be no penalty for failing to pay their bills on time and, on the other hand, that Consumers' Gas could reasonably have expected that the OEB would

not authorize an LPP scheme that violated the *Criminal Code*. Because Consumers' Gas is operating in a regulated environment, their reliance on OEB orders should be given some weight. An inability to rely on such orders would make it very difficult, if not impossible, to operate in this environment. At this point, it should be pointed out that the reasonable expectation of the parties regarding LPPs is achieved by restricting the LPPs to the limit prescribed by s. 347 of the *Criminal Code* and also would be consistent with this Court's decision in *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] 1 S.C.R. 249, 2004 SCC 7 (S.C.C.).

56 Consumers' Gas's reliance on the orders would not provide a defence if it was charged under s. 347 of the *Criminal Code* because they are inoperative to the extent of their conflict with s. 347. However, its reliance on the orders is relevant in the context of determining the reasonable expectations of the parties in this second stage of the juristic reason analysis.

57 Finally, the overriding public policy consideration in this case is the fact that the LPPs were collected in contravention of the *Criminal Code*. As a matter of public policy, a criminal should not be permitted to keep the proceeds of their crime (*Oldfield v. Transamerica Life Insurance Co. of Canada*, [2002] 1 S.C.R. 742, 2002 SCC 22 (S.C.C.), at para. 11; *New Solutions*, *supra*). Borins J.A. focused on this public policy consideration in his dissent. He held that, in light of this Court's decision in *Garland #1*, allowing Consumers' Gas to retain the LPPs collected in violation of s. 347 would let Consumers' Gas profit from a crime and benefit from its own wrongdoing.

58 In weighing these considerations, from 1981-1994, Consumers' Gas's reliance on the inoperative OEB orders provides a juristic reason for the enrichment. As the parties have argued, there are three possible dates from which to measure the unjust enrichment: 1981, when s. 347 of the *Criminal Code* was enacted, 1994, when this action was commenced, and 1998, when this Court held in *Garland #1* that the LPPs were limited by s. 347 of the *Criminal Code*. For the period between 1981 and 1994, when the current action was commenced, there is no suggestion that Consumers' Gas was aware that the LPPs violated s. 347 of the *Criminal Code*. This mitigates in favour of Consumers' Gas during this period. The reliance of Consumers' Gas on the OEB orders, in the absence of actual or constructive notice that the orders were inoperative is sufficient to provide a juristic reason for Consumers' Gas's enrichment during this first period.

59 However, in 1994 when this action was commenced, Consumers' Gas was put on notice of the serious possibility that it was violating the *Criminal Code* in charging the LPPs. This possibility became a reality when this Court held that the LLPs were in excess of the s. 347 limit. Consumers' Gas could have requested that the OEB alter its rate structure until the matter was adjudicated in order to ensure that it was not in violation of the *Criminal Code* or asked for contingency arrangements to be made. Its decision not to do this, as counsel for the appellant pointed out in oral submissions, was a "gamble." After the action was commenced and Consumers' Gas was put on notice that there was a serious possibility the LPPs violated the *Criminal Code*, it was no longer reasonable for Consumers' Gas to rely on the OEB rate orders to authorize the LPPs.

60 Moreover, once this Court held that LPPs were offside, for purposes of unjust enrichment, it is logical and fair to choose the date on which the action for redress commenced. Awarding restitution from 1981 would be unfair to the respondent since it was entitled to reasonably rely on the OEB orders until the commencement of this action in 1994. Awarding restitution from 1998 would be unfair to the appellant. This is because it would permit the respondent to retain LPPs collected in violation of s. 347 after 1994 when it was no longer reasonable for the respondent to have relied on the OEB orders and the respondent should be presumed to have known the LPPs violated the *Criminal Code*. Further, awarding restitution from 1998 would deviate from the general rule that monetary remedies like damages and interest are awarded as of the date of occurrence of the breach or as of the date of action rather than the date of judgment.

61 Awarding restitution from 1994 appropriately balances the respondent's reliance on the OEB orders from 1981-1994 with the appellant's expectation of recovery of monies that were charged in violation of the *Criminal Code* once the serious possibility that the OEB orders were inoperative had been raised. As a result, as of the date this action was commenced in 1994, it was no longer reasonable for Consumers' Gas to rely on the OEB orders to insulate them from liability in a civil action of this type for collecting LPPs in contravention of the *Criminal Code*. Thus, after the action was commenced in 1994, there was no longer a juristic reason for the enrichment of the respondent, so the appellant is entitled to restitution of the portion of monies paid to satisfy LPPs that exceeded an interest rate of 60 per cent, as defined in s. 347 of the *Criminal Code*.

B. Defences

62 Having held that the appellant's claim for unjust enrichment is made out for LPPs paid after 1994, it remains to be determined whether the respondent can avail itself of any defences raised. It is only necessary to consider the defences for the period after 1994, when the elements of unjust enrichment are made out, and thus I will not consider whether the defences would have applied if there had been unjust enrichment before 1994. I will address each defence in turn.

(a) Change of Position Defence

63 Even where the elements of unjust enrichment are made out, the remedy of restitution will be denied where an innocent defendant demonstrates that it has materially changed its position as a result of an enrichment such that it would be inequitable to require the benefit to be returned (*Storthoaks*, *supra*). In this case, the respondent says that any "benefit" it received from the unlawful charges was passed on to other customers in the form of lower gas delivery rates. Having "passed on" the benefit, it says, it should not be required to disgorge the amount of the benefit (a second time) to overcharged customers, such as the appellant. The issue here, however, is not the ultimate destination within the regulatory system of an amount of money equivalent to the unlawful overcharges, nor is this case concerned with the net impact of these overcharges on the respondent's financial position. The issue is whether, as between the overcharging respondent and the overcharged appellant, the passing of the benefit on to other customers excuses the respondent of having overcharged the appellant.

64 The appellant submits that the defence of change of position is not available to a defendant who is a wrongdoer and that, since the respondent in this case was enriched by its own criminal misconduct, it should not be permitted to avail itself of the defence. I agree. The rationale for the change of position defence appears to flow from considerations of equity. G.H.L. Fridman writes that "[o]ne situation which would appear to render it inequitable for the defendant to be required to disgorge a benefit received from the plaintiff in the absence of any wrongdoing on the part of the defendant would be if he has changed his position for the worse as a result of the receipt of the money in question" (*Restitution*, 2nd ed. (Toronto: Carswell, 1992), at p. 458). In the leading British case on the defence, *Gorman v. Karpnale Ltd.* (1991), [1992] 4 All E.R. 512 (U.K. H.L.), Lord Goff stated (at p. 533):

> [I]t is right that we should ask ourselves: why do we feel that it would be unjust to allow restitution in cases such as these [where the defendant has changed his or her position]? The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution.

65 If the change of position defence is intended to prevent injustice from occurring, the whole of the plaintiff's and defendant's conduct during the course of the transaction should be open to scrutiny in order to determine which party has a better claim. Where a defendant has obtained the enrichment through some wrongdoing of his own, he cannot then assert that it would be unjust to return the enrichment to the plaintiff. In this case, the respondent cannot avail itself of this defence because the LPPs were obtained in contravention of the *Criminal Code* and, as a result, it cannot be unjust for the respondent to have to return them.

66 Thus, the change of position defence does not help the respondent in this case. Even assuming that the respondent would have met the other requirements set out in *Storthoaks*, *supra*, the respondent cannot avail itself of the defence because it is not an "innocent" defendant given that the benefit was received as a result of a *Criminal Code* violation. It is not necessary, as a result, to discuss change of position in a comprehensive manner and I leave a fuller development of the other elements of this defence to future cases.

(b) Section 18/25 of the Ontario Energy Board Act

67 The respondent raises a statutory defence found formerly in s. 18 and presently in s. 25 of the 1998 OEBA. The former and the present sections are identical and read:

> An order of the Board is a good and sufficient defence to any proceeding brought or taken against any person in so far as the act or omission that is the subject of the proceeding is in accordance with the order.

I agree with McMurty C.J.O. that this defence should be read down so as to exclude protection from civil liability damage arising out of *Criminal Code* violations. As a result, the defence does not apply in this case and we do not have to consider the constitutionality of the section.

68 McMurtry C.J.O. was correct in his holding that legislative provisions purporting to restrict a citizen's rights of action should attract strict construction (*Berardinelli*, *supra*). In this case, I again agree with McMurtry C.J.O. that the legislature could not reasonably be believed to have contemplated that an OEB order could mandate criminal conduct, despite the broad wording of the section. Section 18/25 thus cannot provide a defence to an action for restitution arising from an OEB order authorizing criminal conduct. As a consequence, like McMurtry C.J.O., I find the argument on s. 18/25 to be unpersuasive.

69 Because I find that it could not have been the intention of the legislature to bar civil claims stemming from acts that offend the *Criminal Code*, on a strict construction, s. 18/25 cannot protect Consumers' Gas from these types of claims. If the provincial legislature had wanted to eliminate the possibility of such actions, it should have done so explicitly in the provision. In the absence of such explicit provision, s. 18/25 must be read so as to exclude from its protection civil actions arising from violations of the *Criminal Code* and thus does not provide a defence for the respondent in this case.

(c) Exclusive Jurisdiction and Collateral Attack

70 McMurtry C.J.O. was also correct in his holding that the OEB does not have exclusive jurisdiction over this dispute. While the dispute does involve rate orders, at its heart it is a private law matter under the competence of civil courts and, consequently, the Board does not have jurisdiction to order the remedy sought by the appellant.

71 In addition, McMurtry C.J.O. is correct in holding that this action does not constitute an impermissible collateral attack on the OEB's order. The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 (S.C.C.); Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Markham, Ont.: Butterworths, 2000), at pp. 369-370). Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review). In *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), at p. 599, this Court described the rule against collateral attack as follows:

> It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally - and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Based on a plain reading of this rule, the doctrine of collateral attack does not apply in this case because here the specific object of the appellant's action is not to invalidate or render inoperative the Board's orders, but rather to recover money that was illegally collected by the respondent as a result of Board orders. Consequently, the collateral attack doctrine does not apply.

72 Moreover, the appellant's case lacks other hallmarks of collateral attack. As McMurtry C.J.O. points out at para. 30 of his reasons, the collateral attack cases all involve a party, bound by an order, seeking to avoid the effect of that order by challenging its validity in the wrong forum. In this case, the appellant is not bound by the Board's orders; therefore, the rationale behind the rule is not invoked. The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice" (*R. v. Litchfield*, [1993] 4 S.C.R. 333 (S.C.C.), at p. 349). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it.

73 In this case, the appellant is not the object of the orders and thus there can be no concern that he is seeking to avoid the orders by bringing this action. As a result, a threat to the integrity of the system does not exist because the appellant is not legally bound to follow the orders. Thus, this action does not appear, in fact, to be a collateral attack on the Board's orders.

(d) The Regulated Industries Defence

74 The respondent submits that it can avail itself of the "regulated industries defence" to bar recovery in restitution because an act authorized by a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state and, as a result, the collection of LPPs pursuant to orders issued by the OEB cannot be considered to be contrary to the public interest and thus cannot be contrary to s. 347 of the *Criminal Code*.

75 Winkler J. held that the underlying purpose of the defence, regulation of monopolistic industries in order to ensure "just and reasonable" rates for consumers, would be served in the circumstances and, as a result, the defence would normally apply. However, because of the statutory language of s. 347, Winkler J. determined that the defence was not permitted in this case. He wrote, at para. 34, "[t]he defendant can point to no case which allows the defence unless the federal statute in question uses the word 'unduly' or the phrase 'in the public interest.' " Absent such recognition in the statute of "public interest," he held, no leeway for provincial exceptions exist.

76 I agree with the approach of Winkler J. The principle underlying the application of the defence is delineated in *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.), at p. 356:

> When 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.

Estey J. reached this conclusion after canvassing the cases in which the regulated industries defence had been applied. Those cases all involved conflict between federal competition law and a provincial regulatory scheme, but the application of the defence in those cases had to do with the particular wording of the statutes in question. While I cannot see a principled reason why the defence should not be broadened to apply to cases outside the area of competition law, its application should flow from the above enunciated principle.

77 Winkler J. was correct in concluding that, in order for the regulated industries defence to be available to the respondent, Parliament needed to have indicated, either expressly or by necessary implication, that s. 347 of the *Criminal Code* granted leeway to those acting pursuant to a valid provincial regulatory scheme. If there were any such indication, I would say that it should be interpreted, in keeping with the above principle, not to interfere with the provincial regulatory scheme. But s. 347 does not contain the required indication for exempting a provincial scheme.

78 This view is further supported by this Court's decision in *R. v. Jorgensen*, [1995] 4 S.C.R. 55 (S.C.C.). In that case, the accused was charged with "'knowingly' selling obscene material 'without lawful justification or excuse' " (para. 44). The accused argued that the Ontario Film Review Board had approved the videotapes; therefore, it had a lawful justification or excuse. This Court considered whether approval by a provincial body could displace a criminal charge. Sopinka J., for the majority, held that in order to exempt acts taken pursuant to a provincial regulatory body from the reach of the criminal law, Parliament must unequivocally express this intention in the legislative provision in issue (at para. 118):

> While Parliament has the authority to introduce dispensation or exemption from criminal law in determining what is and what is not criminal, and may do so by authorizing a provincial body or official acting under provincial legislation to issue licences and the like, an intent to do so must be made plain.

79 The question of whether the regulated industries defence can apply to the respondent is actually a question of whether s. 347 of the *Criminal Code* can support the notion that a valid provincial regulatory scheme cannot be contrary to the public interest or an offence against the state. In the previous cases involving the regulated industries defence, the language of "the

public interest" and "unduly" limiting competition has always been present. The absence of such language from s. 347 of the *Criminal Code* precludes the application of this defence in this case.

(e) De Facto Doctrine

80 Consumers' Gas submits that because it was acting pursuant to a disposition of law that was valid at the time - the Board orders - they should be exempt from liability by virtue of the *de facto* doctrine. This argument cannot succeed. Consumers' Gas is not a government official acting under colour of authority. While the respondent points to the Board orders as justification for its actions, this does not bring the respondent into the purview of the *de facto* doctrine because the case law does not support extending the doctrine's application beyond the acts of government officials. The underlying purpose of the doctrine is to preserve law and order and the authority of the government. These interests are not at stake in the instant litigation. As a result, Consumers' Gas cannot rely on the *de facto* doctrine to resist the plaintiff's claim.

81 Furthermore, the *de facto* doctrine attaches to government and its officials in order to protect and maintain the rule of law and the authority of government. An extension of the doctrine to a private corporation that is simply regulated by a government authority is not supported by the case law and, in my view, does not further the underlying purpose of the doctrine. In *Reference re Language Rights Under s. 23 of Manitoba Act, 1870 & s. 133 of Constitution Act, 1867*, [1985] 1 S.C.R. 721 (S.C.C.), this Court held, at p. 756, that:

> There is only one true condition precedent to the application of the doctrine: the *de facto* officer must occupy his or her office under colour of authority.

It cannot be said that Consumers' Gas was a *de facto* officer acting under colour of authority when it charged LPPs to customers. Consumers' Gas is a private corporation acting in a regulatory context, not an officer vested with some sort of authority. When charging LPPs, Consumers' Gas is engaging in commerce, not issuing a permit or passing a by-law.

82 In rejecting the application of the *de facto* doctrine here, I am cognizant of the passage in *Reference re Language Rights*, at p. 757, cited by the intervener Toronto Hydro and which, at first glance, appears to imply that the *de facto* doctrine might apply to private corporations:

> . . . the *de facto* doctrine will save those rights, obligations and other effects which have arisen out of actions performed pursuant to invalid Acts of the Manitoba Legislature by public *and private bodies corporate*, courts, judges, persons exercising statutory powers and public officials. [Emphasis added.]

83 While this passage appears to indicate that "private bodies corporate" are protected by the doctrine, it must be read in the context of the entire judgment. Earlier, at p. 755, the Court referred to the writings of Judge A. Constantineau in *The De Facto Doctrine* (1910), at pp. 3-4. The following excerpt from that passage is relevant:

> The de facto doctrine is a rule or principle of law which . . . *recognizes the existence of*, and protects from collateral attack, public or *private bodies corporate*, which, *though irregularly or illegally organized*, yet, under color of law, openly exercise the powers and functions of regularly created bodies . . . [Emphasis added.]

In this passage, I think it is clear that the Court's reference to "private bodies corporate" is limited to issues affecting the creation of the corporation, for example, where a corporation was incorporated under an invalid statute. It does not suggest that the acts of the corporation are shielded from liability by virtue of the *de facto* doctrine.

84 This view finds further support in the following passage from the judgment (at p. 755):

> That the foundation of the principle is the more fundamental principle of the rule of law is clearly stated by Constantineau in the following passage (at pp. 5-6):
>
> > Again, the doctrine is necessary to maintain the supremacy of the law and to preserve peace and order in the community at large, since any other rule would lead to such uncertainty and confusion, as to break up the order and quiet of

> all civil administration. Indeed, if any individual or body of individuals were permitted, at his or their pleasure, to challenge the authority of and refuse obedience to the government of the state and the numerous functionaries through whom it exercises its various powers, or refuse to recognize municipal bodies and their officers, on the ground of irregular existence or defective titles insubordination and disorder of the worst kind would be encouraged, which might at any time culminate in anarchy.

The underlying purpose of the doctrine is to preserve law and order and the authority of the government. These interests are not at stake in the instant litigation. In sum, I find no merit in Consumers' Gas's argument that the *de facto* doctrine shields it from liability and, as a result, this doctrine should not be a bar to the appellant's recovery.

C. Other Orders Requested

(a) Preservation Order

85 The appellant, Garland, requests an "*Amax-type*" preservation order on the basis that the LPPs continue to be collected at a criminal rate during the pendency of this action, and these payments would never have been made but for the delays inherent in litigation (*Amax Potash Ltd. v. Saskatchewan* (1976), [1977] 2 S.C.R. 576 (S.C.C.)). In my view, however, a preservation order is not appropriate in this case. Consumers' Gas has now ceased to collect the LPPs at a criminal rate. As a result, if a preservation order were made, there would be no future LPPs to which it could attach. Even with respect to the LPPs paid between 1994 and the present, to which such an order could attach, a preservation order should not be granted for three further reasons: (1) such an order would serve no practical purpose, (2) the appellant has not satisfied the criteria in the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and (3) *Amax Potash Ltd.* can be distinguished from this case.

86 First, the appellant has not alleged that Consumers' Gas is an impecunious defendant or that there is any other reason to believe that Consumers' Gas would not satisfy a judgment against it. Even if there were some reason to believe that Consumers' Gas would not satisfy such a judgment, an *Amax Potash Ltd.*-type order allows the defendant to spend the monies being held in the ordinary course of business - no actual fund would be created. So the only thing that a preservation order would achieve would be to prevent Consumers' Gas from spending the money earned from the LPPs in a non-ordinary manner (for example, such as moving it off-shore), which the appellant has not alleged is likely to occur absent the order.

87 Second, the respondent submits that by seeking a preservation order the appellant is attempting to avoid R. 45.02 of the Ontario *Rules of Civil Procedure*, the only source of jurisdiction in Ontario to make a preservation order. The *Rules of Civil Procedure* apply to class proceedings and do not permit such an order in these circumstances. Rule 45.02 provides that, "Where the right of a party to a *specific fund* is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just" (emphasis added). The respondent submits that the appellant is not in fact claiming a specific fund here. In the absence of submissions by the appellant on this issue, I am of the view that the appellant has not satisfied the criteria set out in the Ontario *Rules of Civil Procedure* and that this Court could refuse to grant the order requested on this basis.

88 Finally, the appellant's use of *Amax Potash Ltd.*, *supra*, as authority for the type of order sought is without merit. The appellant has cited the judgment very selectively. The portion of the judgment the appellant cites in his written submissions reads in full (at p. 598):

> Apart from the Rules this Court has the discretion to make an order as requested by appellants directing the Province of Saskatchewan to hold, as stakeholder, such sums as are paid by the appellants pursuant to the impugned legislation but with the right to use such sums in the interim for Provincial purposes, and with the obligation to repay them with interest in the event the legislation is ultimately held to be *ultra vires*. *Such an order, however, would be novel, in giving the stakeholder the right to spend the moneys at stake, and I cannot see that it would serve any practical purpose*. [Emphasis added.]

The Court in *Amax* went on to refuse to make the order. So while the appellant is right that the Court in *Amax* failed to reject the hypothetical possibility of making such an order in the future, it seems to me that in this case, as in *Amax*, such an order would serve no practical purpose. For these reasons, I find there is no basis for making a preservation order in this case.

(b) Declaration that the LPPs Need Not Be Paid

89 The appellant also seeks a declaration that the LPPs need not be paid. Given that the respondent asserts that the LPP is no longer charged at a criminal rate, issuing such a declaration would serve no practical purpose and, as a result, such a declaration should not be made.

(c) Costs

90 The appellant is entitled to his costs throughout. This should be understood to mean that, regardless of the outcome of any future litigation, the appellant is entitled to his costs in the proceedings leading up to and including *Garland #1* and this appeal. In addition, in oral submissions counsel for the Law Foundation of Ontario made the point that in order to reduce costs in future class actions, "litigation by instalments," as occurred in this case, should be avoided. I agree. On this issue, I endorse the comments of McMurty C.J.O., at para. 76 of his reasons:

> In this context, I note the protracted history of these proceedings cast some doubt on the wisdom of hearing a case in instalments, as was done here. Before employing an instalment approach, it should be considered whether there is potential for such a procedure to result in multiple rounds of proceedings through various levels of court. Such an eventuality is to be avoided where possible, as it does little service to the parties or to the efficient administration of justice.

VI. Disposition

91 For the foregoing reasons, I would allow the appeal with costs throughout, set aside the judgment of the Ontario Court of Appeal, and substitute therefor an order that Consumers' Gas repay LPPs collected from the appellant in excess of the interest limit stipulated in s. 347 after the action was commenced in 1994 in an amount to be determined by the trial judge.

Appeal allowed.

Pourvoi accueilli.

Footnotes

* On June 2, 2004, the court issued a corrigendum correcting text; the change has been incorporated herein.

1997 CarswellAlta 1182, [1997] A.J. No. 860, 214 A.R. 380, 6 C.B.R. (4th) 188

TAB 10

1997 CarswellAlta 1182
Alberta Court of Queen's Bench

Bassano Growers Ltd. v. Price Waterhouse Ltd.

1997 CarswellAlta 1182, [1997] A.J. No. 860, 214 A.R. 380, 6 C.B.R. (4th) 188

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, Chapter B-3, (as Amended) and Regulations Thereunder

Bassano Growers Ltd., Calvin Kanomata, Lukey Farms Ltd., Hutterian Brethren Church of Fairview (Fairview Colony), M. Tsukishima & Sons Farms Ltd., Nakamura Farms Ltd., Sonny Nakashima Farms Ltd., Okuma & Tashiro Farms Ltd., S.L.M. Spud Farms Ltd. S-Scan Farms Ltd., Tri-T Farms Ltd., Setoguchi Farms Ltd., Torsius Tater Farms Ltd. and Potato Growers of Alberta, Applicants and Price Waterhouse Limited, Respondent

Medhurst J.

Judgment: September 4, 1997 *
Docket: Calgary 9701-06942

Proceedings: affirmed (1998), 216 A.R. 328 (Alta. C.A.)

Counsel: *Loran V. Halyn*, for the Applicants.
Frank R. Dearlove and *Bennett Jones Verchere*, for the Respondent.
Douglas S. Nishimura, for Alberta Treasury Branches.

Subject: Insolvency; Estates and Trusts
Related Abridgment Classifications
Bankruptcy and insolvency
VIII Property of bankrupt
VIII.5 Trust property
VIII.5.a General principles
Headnote
Bankruptcy --- Property of bankrupt — Trust property — General
Corporation was in business of buying produce from farmers and selling it to wholesalers — Corporation went into bankruptcy owing money to farmers — Farmers applied for payment of money owed to them on grounds that it constituted trust property exempt from seizure by trustee in bankruptcy pursuant to s. 67(1)(a) of Bankruptcy and Insolvency Act — Application dismissed — Fact that money was deemed trust money by s. 31 of Marketing of Agricultural Products Act was not sufficient by itself to create trust for purposes of Bankruptcy and Insolvency Act — Trust for purposes of s. 67(1)(a) could be imposed on money owed to farmers only if general principles of trust law were met — Required certainty of subject matter was not present because corporation had mixed its own funds with those owed to farmers — Certainty of intention was missing — Constructive trust could not be imposed in that there is no unjust enrichment where deprivation of funds arises from bankruptcy — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67(1)(a) — Marketing of Agricultural Products Act, S.A. 1987, c. M-5.1, s. 31.
Trusts and trustees --- Express trust — Creation — Three certainties — General
Corporation was in business of buying produce from farmers and selling it to wholesalers — Corporation went into bankruptcy owing money to farmers — Farmers applied for payment of money owed to them on grounds that it constituted trust property exempt from seizure by trustee in bankruptcy pursuant to s. 67(1)(a) of Bankruptcy and Insolvency Act — Application dismissed — Fact that money was deemed trust money by s. 31 of Marketing of Agricultural Products Act was not sufficient by itself to create trust for purposes of Bankruptcy and Insolvency Act — Trust for purposes of s. 67(1)(a) could be imposed on money owed to farmers only if general principles of trust law were met — Required certainty of subject matter was missing because

corporation had mixed its own funds with those owed to farmers — Certainty of intention to create trust was missing — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67(1)(a) — Marketing of Agricultural Products Act, S.A. 1987, c. M-5.1, s. 31.

Trusts and trustees --- Constructive trust — General principles

Corporation was in business of buying produce from farmers and selling it to wholesalers — Corporation went into bankruptcy owing money to farmers — Farmers applied for payment of money owed to them on grounds that it constituted trust property exempt from seizure pursuant to s. 67(1)(a) of Bankruptcy and Insolvency Act — Application dismissed — Fact that money was deemed trust money by s. 31 of Marketing of Agricultural Products Act was not sufficient by itself to create trust for purposes of Bankruptcy and Insolvency Act — Trust for purposes of s. 67(1)(a) could be imposed on money owed to farmers only if general principles of trust law were met — Constructive trust could not be imposed in that there is no unjust enrichment where deprivation of funds arises from bankruptcy — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 67(1)(a) — Marketing of Agricultural Products Act, S.A. 1987, c. M-5.1, s. 31.

Table of Authorities

Cases considered by *Medhurst J.*:

Barnabe v. Touhey (1995), 10 E.T.R. (2d) 68, 37 C.B.R. (3d) 73, 26 O.R. (3d) 477 (Ont. C.A.) — considered

Becker v. Pettkus, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165 (S.C.C.) — referred to

British Columbia v. Henfrey Samson Belair Ltd., 75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 34 E.T.R. 1, [1989] 5 W.W.R. 577, 59 D.L.R. (4th) 726, 97 N.R. 61, 38 B.C.L.R. (2d) 145, 2 T.C.T. 4263, [1989] 1 T.S.T. 2164 (S.C.C.) — applied

British Columbia v. National Bank of Canada (1994), 99 B.C.L.R. (2d) 358, [1995] 2 W.W.R. 305, 119 D.L.R. (4th) 669, 30 C.B.R. (3d) 215, 6 E.T.R. (2d) 109, 52 B.C.A.C. 180, 86 W.A.C. 180, 2 G.T.C. 7348 (B.C. C.A.) — considered

Duraco Window Industries (Sask.) Ltd. v. Factory Window & Door Ltd. (Trustee of), [1995] 9 W.W.R. 498, 34 C.B.R. (3d) 196, 23 C.L.R. (2d) 239, *(*sub nom. *Factory Window & Door Ltd. (Bankrupt), Re)* 135 Sask. R. 235 (Sask. Q.B.) — considered

Husky Oil Operations Ltd. v. Minister of National Revenue, [1995] 10 W.W.R. 161, 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, 188 N.R. 1, 24 C.L.R. (2d) 131 (S.C.C.) — applied

John M.M. Troup Ltd. v. Royal Bank, [1962] S.C.R. 487, 3 C.B.R. (N.S.) 224, 34 D.L.R. (2d) 556 (S.C.C.) — considered

Points of Call Holidays Ltd., Re (1991), 5 C.B.R. (3d) 299, 41 E.T.R. 56, 54 B.C.L.R. (2d) 384 (B.C. S.C.) — considered

Robinson, Little & Co. (Trustee of) v. Saskatchewan (Minister of Labour) (1989), [1990] 1 W.W.R. 354, 76 C.B.R. (N.S.) 193, 63 D.L.R. (4th) 392, 80 Sask. R. 9 (Sask. C.A.) — considered

Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3

s. 47(a) — referred to

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

Generally — referred to

s. 67(1)(a) [renumbered 1992, c. 27, s. 33] — considered

s. 81.1 [en. 1992, c. 27, s. 38(1)] — pursuant to

s. 136(1) — referred to

Builders' Lien Act, S.S. 1984-85-86, c. B-7.1

Generally — referred to

Labour Standards Act, R.S.S. 1978, c. L-1

Generally — referred to

Marketing of Agricultural Products Act, S.A. 1987, c. M-5.1

Generally — referred to

s. 1(b) "board" — referred to

s. 31 — considered

Tobacco Tax Act, R.S.B.C. 1979, c. 404
Generally — referred to
Travel Agents Act, R.S.B.C. 1979, c. 409
Generally — referred to
Workers' Compensation Act, 1979, S.S. 1979, c. W-17.1
Generally — referred to

Regulations considered:

Marketing of Agricultural Products Act, S.A. 1987, c. M-5.1
Potato Marketing Licensing Regulation, Alta. Reg. 262/88

s. 12

APPLICATION for payment of money owed to applicants by bankrupt on grounds that it was trust money exempt from seizure by trustee in bankruptcy pursuant to s. 67(1)(a) of *Bankruptcy and Insolvency Act*.

***Medhurst J.*:**

1 The issue to be determined in this application is whether a "deemed" trust pursuant to s. 31 of the *Marketing of Agricultural Products Act*, S.A. 1987, c. M-5.1 ("*MAPA*") is a trust for the purposes of s. 67(1)(a) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") which exempts trust property from the divisible and distributable assets of a bankrupt. If it is not, the Applicants ask the court to consider whether the facts of the case support the existence of trust at common law, or alternatively, whether the Applicants are entitled to the benefits of a constructive trust. Finally, if a statutory, constructive, or common law trust are found, the applicants ask for the determination of the amount belonging to each of them.

Facts

2 Diamond S Produce Ltd. ("Diamond S") purchased produce, largely potatoes, from the Applicants, packaged and processed them and sold them to wholesalers. Alberta Fresh is a division of Diamond S. which was petitioned into bankruptcy on March 3, 1997. The Respondent, Price Waterhouse Limited (the "Trustee") was appointed by the Court as both a Trustee in Bankruptcy and Receiver and Manager of Diamond S. The Applicants filed a Proof of Claim in the Bankruptcy as trust claims. The Trustee paid those portions of the claims which referred to produce delivered in the 15-day period prior to Bankruptcy, in accordance with s. 81.1 of the *BIA*. The Trustee disallowed the Applicant's claims for payment with respect to produce delivered before that time. It is the funds owing for this produce which is the subject of their claim.

3 There are two categories of applicants. The first encompasses the producers of the agricultural products delivered and sold to Diamond S either through its "Alberta Fresh" division located at Calgary, Alberta or through its operation located at Taber, Alberta. The second category is the Potato Growers of Alberta (the PGA) being a "board" within the meaning of MAPA and regulations thereunder.

4 Diamond S processed and marketed the produce supplied to it by the producers. With respect to the produce supplied by the Applicants to the Alberta Fresh division of Diamond S in Calgary the transactions were recorded in the Diamond S books as accounts payable and accounts receivable. While the principals of Diamond S claimed that the records of the company enabled it to determine which payments received from third parties corresponded to a particular applicants produce the Trustee was not able to locate any such records. With respect to all other applicants (excluding PGA) Diamond S recorded produce received from a producer in a sub-ledger in its accounts receivable system. When the produce was sold a slip was prepared indicating which producer had supplied the produce along with the weight, price and charges to be deducted. The purchaser was then invoiced for the sale.

5 The PGA is a board established by *MAPA* to provide for the promotion, control and regulation of the marketing of potatoes in Alberta. Pursuant to s. 12 of *The Potato Marketing Licensing Regulation*, Alta. Reg. 262/88, the PGA is empowered to levy service charges in respect of every sale of potatoes in the Province of Alberta. Diamond S deducted the applicable service charges from payments to the producers and remitted the funds to the PGA. Thus, at times the Diamond S's general operating

bank account contained "deemed" trust funds for the PGA, "deemed" trust funds for the Producers and general operating funds belonging to Diamond S. This account was used to pay all company expenses as well as payments to the PGA and its producers.

6 From the period of January 1, 1996 to March 3, 1997, the month-end balance of Producer payable (the total amounts Diamond S owed to the Producers) exceeded the month-end balance of Diamond S's bank account for 14 of 15 months. No attempt was made by Diamond S to segregate funds received for the sale of the potatoes nor did it maintain sufficient funds in its account to approximate the amounts owed to the Applicants.

7 The Alberta Treasury Branches ("ATB") holds a perfected security interest over all of Diamond S's receivables, pursuant to its August 22, 1991 Financing Statement which perfected a security interest in all of Diamond S's present and after-acquired personal property. The security gives ATB priority over Diamond S' receivables.

Issues

1. Are the Applicants the beneficiaries of a deemed trust pursuant to s. 31 of the *MAPA*?

2. Is a statutory or deemed trust created by s. 31 of the *MAPA* a trust within the meaning of s. 67(1)(a) of the *BIA*?

3. Alternatively, do the facts support the existence of a common law trust for the benefit of the Applicants or any of them?

4. Alternatively, are the applicants or any of them

   (a) entitled to the benefit of a constructive trust, and

   (b) is a constructive trust a trust within the meaning of trust in s. 67(1)(a) of the BIA?

5. If the answer to 2, 3, or 4 is yes, are the Applicants entitled to

   (a) receive money impressed with the statutory, common law or constructive trust in priority to other creditors of Diamond S, and

   (b) in what amount?

Are the Applicants the beneficiaries of a deemed trust pursuant to s. 31 of the MAPA?

8 Section 31 of the MAPA states:

> 31 Where a person has the possession or control over funds that are:
>
> (a) owing to a producer for a regulated product sold to the person by the producer,
>
> (b) owing to a board or commission, or
>
> (c) payable to a board or commission on behalf of a producer, that person holds those funds in trust for the producer, board or commission, as the case may be, and the producer, board or commission may collect those funds by legal action or otherwise.

The Trustee does not dispute that all the Applicants fall within the purview of s. 31 of the *MAPA* and the relevant regulations thereunder and that s. 31 applies to the facts before the Court. Thus, the Court finds that the Applicants are the beneficiaries of a deemed trust pursuant to s. 31.

Is a deemed trust created by the operation of a provincial statute a trust within the meaning of s. 67(a) of the BIA?

9 Section 67(a) of the *BIA* states:

> 67(1) The property of a bankrupt divisible among his creditors shall not comprise
>
> (a) property held by the bankrupt in trust for any other person,

This provision of the *BIA* has been considered by the Supreme Court of Canada in *British Columbia v. Henfrey Samson Belair Ltd.* (1989), 75 C.B.R. (N.S.) 1, 59 D.L.R. (4th) 726 (S.C.C.) [hereinafter *Henfrey*], all cites to the C.B.R. In *Henfrey*, the court considered a situation similar to the facts before this Court. There, a bankrupt was obliged by a provincial statute to collect sales tax for the provincial government which were deemed to be held in trust for the province. At the date of bankruptcy, the bankrupt held sales tax which it had not yet remitted to the government. MacLachlin, J. held, that Parliament, by enacting s. 67(1)(a) of the *BIA* [then s. 47(a)], intended to "permit removal of property which can be specifically identified as not belonging to the bankrupt *under general principles of trust law* from the distribution scheme established by the Bankruptcy Act." *Henfrey*, *supra* at 17, emphasis added.

10 Thus, "trusts" for the purposes of s. 67(1)(a) of the *BIA* only encompass trusts which arise under general principles of law. To apply s. 67(1)(a) to trusts which do not have the characteristics of trusts under general principles of law, but which are "deemed" to be trusts under provincial legislation would be to "permit the provinces to create their own priorities under the Bankruptcy Act and to invite a differential scheme of distribution on bankruptcy from province to province" *Henfrey*, *supra* at 19.

11 The decision in *Henfrey* has been consistently applied to defeat a variety of provincial deemed trusts in bankruptcy situations. See *Robinson, Little & Co. (Trustee of) v. Saskatchewan (Minister of Labour)* (1989), 76 C.B.R. (N.S.) 193 (Sask. C.A.) [hereinafter *Robinson*] in which a trust deemed by the *Labour Standards Act*, R.S.S. 1978. c. L-1 was held to be inoperative for the purposes of s. 67(1)(a) of the *BIA* and *British Columbia v. National Bank of Canada* (1994), 30 C.B.R. (3d) 215 (B.C. C.A.) [hereinafter *National Bank*] in which a trust deemed by the *Tobacco Tax Act*, R.S.B.C. 1979, c. 404 suffered the same fate. See also *Duraco Window Industries (Sask.) Ltd. v. Factory Window & Door Ltd. (Trustee of)* (1995), 34 C.B.R. (3d) 196 (Sask. Q.B.) which considered a trust deemed by the *Builders' Lien Act*, S.S. 1984-85-86, c. B-7.1 and *Points of Call Holidays Ltd., Re* (1991), 5 C.B.R. (3d) 299 (B.C. S.C.) where a trust was established by the *Travel Agents Act*, R.S.B.C. 1979, c. 409.

12 The Supreme Court visited the issue once again in *Husky Oil Operations Ltd. v. Minister of National Revenue* (1995), 35 C.B.R. (3d) 1 (S.C.C.) [hereinafter *Husky Oil*]. While this case involved statutory provisions allowing set-off, the effect of enforcing the provincial statute (the *Workers' Compensation Act, 1979*, 1979, S.S. c. W-17.1) would have been to give the WCB a priority which it would not have received in a distribution pursuant to the *BIA*. Gonthier, J., writing for a five to four majority, held that while the provincial legislation was validly enacted, it was inapplicable "upon the occurrence of bankruptcy, because it was then that, if it had been applicable, it would have had the effect of conflicting with the scheme of distribution of the *Bankruptcy Act*." *Husky Oil*, *supra* at 30. This reasoning answers the Applicant's assertion that because they as group are not parties who would otherwise have priority pursuant to s. 136(1) of the *BIA*, there is no conflict between the operation of s. 31 of the *MAPA* and the *BIA*. The operation of s. 31 would have exactly the effect of upsetting the order of priority set out in the *BIA*, raising the interest of the Applicants from one of unsecured creditors to that of trust beneficiaries whose claim is first in priority as against even secured creditors.

13 The Applicants also argued that *Henfrey* should be confined to cases where the beneficiary of the deemed trust was the Crown and that in cases where the beneficiary is a private citizen the deemed trust should withstand bankruptcy. However, a common sense reading of MacLachlin, J.'s reasons does not bear such an interpretation. Trusts for the purposes of s. 67(1)(a) of the *BIA* have been defined to be those arising under "general principles of trust law," *Henfrey*, *supra* at 17. There is no qualification with regard to whomever is the beneficiary of such a trust properly constituted. Nor has there been any subsequent qualifications made by other courts applying the principles set forth in *Henfrey*. In *Re: Point of Call Holidays Ltd.*, *supra* at 304, Esson, C.J.S.C. stated:

> Although the trust which was at issue in *Henfrey* was one arising from an obligation to the Crown, the rule is not confined to such trusts but applies to all statutory trusts.

This position is also well supported by academic commentators. See L.W. Houlden & C.H. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 3rd ed., vol. 1 (Toronto: Carswell, looseleaf) at 3-32; S. Fay Sully, "The Effect of Bankruptcy on Trusts, Part II" (1993) 8 Nat. C/D Rev. 2 at 9; and R. Moen, "The Proposed Amendments to the Bankruptcy Act: Effect on Rights of the Crown, in *Bankruptcy and Insolvency* (Toronto: The Canadian Institute, 1992) at 28.

14 Cory, J. delivered a dissenting opinion in *Henfrey* in which he stated that the Supreme Court had held in *John M.M. Troup Ltd. v. Royal Bank*, [1962] S.C.R. 487 (S.C.C.) at 494 that "a province may, to further and protect a principle of social policy, create a statutory trust" and that "this type of legislation is common to a wide range of statutes that may benefit employees, purchasers of insurance, payers of health and insurance and many others who lack the organization or bargaining power to establish a trust for themselves." *Henfrey*, *supra* at 9. While acknowledging that such deemed trusts may serve a laudable purpose generally, there are competing and compelling practical policy reasons why the deemed trust must give way if it conflicts with the order of priority set out in the *BIA*. MacLachlin, J stated in *Henfrey* at 19:

> The difficulties of extending s 47(a) [now s. 67(1)(a)] to cases where no specific property impressed with a trust can be identified are formidable and defy fairness and common sense. For example, if the claim for taxes equalled or exceeded the funds in the hands of the trustee in bankruptcy, the trustee would not recover the costs incurred to realize the funds. Indeed, the trustee might be in breach of the Act by expending funds to realize the bankrupt's assets. Other difficulties would arise in the case of more than one claimant to the trust property. The spectre is raised of a person who has a valid trust claim under the general principles of trust law to a specific piece of property, finding himself in competition with the Crown claiming a statutory trust in that and all other property. Could the Crown's general claim pre-empt the property interest of the claimant under trust law? Or would the claimant under trust law prevail? To admit of such a possibility would be to run counter to the clear intention of Parliament in enacting the Bankruptcy Act of setting up a clear and orderly scheme for the distribution of the bankrupt's assets.

These practical difficulties would ensue regardless of whether the beneficiary were the Crown or private individuals like the Applicants in the present case. In conclusion, a statutory or deemed trust is not a trust for the purposes of s. 67(1)(a) of the *BIA*, unless it also conforms to the essential characteristics of a trust at common law.

Do the facts support the existence of a common law trust?

15 In order to constitute a trust under general principles of law, the "trust" must possess three essential attributes: certainty of intention, certainty of subject matter, and certainty of objects. If any of these attributes are missing the Court will not find a trust. Certainty of intention will exist where the transferor of the property intended to create a trust. For certainty of subject matter to exist, the property which is subject to the trust must be clearly identifiable. Certainty of objects exists where the intended beneficiaries of the trust are ascertainable. See D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984) at 108-27.

16 In *Henfrey*, the Court found there was no common law trust, since the bankrupt had commingled the collected tax funds with its own funds. MacLachlin, J stated at 19-20:

> At the moment of the collection of the tax, there is a deemed statutory trust. At that moment the trust property is identifiable and the trust meets the requirements for a trust under the principles of trust law. The difficulty in this, as in most cases, is that the trust property soon ceases to become identifiable. The tax money is mingled with other property in the hands of the merchant and converted to other property so that it cannot be traced. At this point it is no longer a trust under general principles of law.

The situation described by MacLachlin, J. is analogous to the situation in the case at bar. The problem essentially is an uncertainty of subject matter.

17 The subject matter of the alleged trust before the Court is money, not potatoes. The Applicants do not seek a return of the potatoes, but rather the funds owed to them for supplying the potatoes to Diamond S. Thus, the fact that Diamond S could

in some cases determine what amount was paid for a particular Producer's potatoes is irrelevant in determining certainty of subject matter. Of greater import is the manner in which Diamond S received payments from the third party purchasers of the produce. Diamond S, upon receiving payment, deposited those funds into a single operating bank account mingling deemed trust money with their own operating cash. Further, this account ran a negative balance for 14 out of 15 months from January 1996 to March 1997. Clearly any money that was the subject of a deemed trust when it was collected was effectively converted to other property in the hands of Diamond S. This finding is supported by the Saskatchewan Court of Appeal's decision in *Robinson*, *supra* at 198 where is was held that where funds that were not kept separate and apart from the bankrupt's general operational funds, the inference was "inescapable that the moneys were mingled with other money in the hands of the trustee and converted to other property so they could not be traced." On the facts before the Court, there is no certainty of subject matter upon which a trust might be impressed.

18 The Applicants argue that the language of s. 31 of the *MAPA* is sufficient to create certainty of intention, subject matter and objects and that once the trust is deemed it has the essential characteristics of a common law trust. The Court cannot accept this reasoning. As Hollinrake, J.A. wrote for the British Columbia Court of Appeal in *National Bank*, *supra* at 232:

> With respect, I do not think the Crown can rely on the statute to create the facts necessary to establish a trust under general principles of trust law. I think that would be contrary to the underlying principle in *Henfrey Samson*. That principle being that the province cannot legislate to, in effect, create its own priorities contrary to those in the *Bankruptcy Act*. If a province cannot deem a trust in order to accomplish this I cannot see how it can by legislation create facts through that legislation to accomplish the same end.

Absent the statute, there is no evidence to support a certainty of intention to create a trust. Neither is there certainty of subject matter. There is no common law trust on the facts of the case at bar.

Are the Applicants, or any of them, entitled to the benefit of a constructive trust?

19 Before a constructive trust can be imposed, unjust enrichment must be established, see *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.). An unjust enrichment occurs where there has been an enrichment, a corresponding deprivation, and no juristic reason to allow the enrichment and deprivation. The Applicants argue that Diamond S was unjustly enriched by virtue of the fact that the funds were retained by it upon bankruptcy. But this reasoning cannot hold in a bankruptcy situation where the assets of the bankrupt are being distributed pursuant to the *BIA*. The British Columbia Court of Appeal was asked to find a constructive trust in *National Bank*, *supra* where taxes collected under a deemed trust had not been segregated from the tax collector's own funds. The Court found at 238-40 that there could be no unjust enrichment in such cases. In bankruptcy situations, the creditors who benefit from the failure of a s. 67(1)(a) trust claim are not "enriched," but merely recover what they are owed, and any deprivation experienced by the unsuccessful trust claimants results from the bankruptcy. In other words, the operation of the *BIA* is a juristic reason which precludes the possibility of awarding a constructive trust remedy, *National Bank*, *supra* at 238.

20 Secondly, even constructive trusts require some certainty of subject matter upon which the trust can be impressed. In *Barnabe v. Touhey* (1995), 37 C.B.R. (3d) 73 (Ont. C.A.) at 74 the court considered the constructive trust remedy in the bankruptcy context. The Court held that to establish unjust enrichment "there must be some specific property which is the subject of the enrichment, that property must have been retained by the person holding it in deprivation of the party claiming the trust, and there must be no juristic reason for the retention." The Court rejected the claimant's argument because there was no specific identifiable property which was the subject of the trust. Similarly, in the case at bar there is an uncertainty of subject matter which arose upon the commingling and conversion of the deemed trust moneys by Diamond S. No constructive trust arises on the facts before the Court.

Is a constructive trust a trust for the purposes of s. 67(1)(a) of the BIA?

21 Because no constructive trust arises, it is unnecessary to decide whether a constructive trust is a trust for the purposes of the *BIA*.

Conclusion:

22 A statutory trust under s. 31 of MAPA in this case is not a trust for the purposes of s. 67(1)(a) of the BIA. The Court has found no common law trust or constructive trust on the facts before it. It is therefore unnecessary to consider any issues of tracing or in what amounts money is owed to the Applicants. The Trustee has already paid the valid claims of the Applicants under the *BIA*.

The appeal of the decision of the Trustee is denied and the Respondent shall have costs of the application.

Application dismissed.

Footnotes

* Affirmed (1998), 6 C.B.R. (4th) 199 (Alta. C.A.).

TAB 11

Most Negative Treatment: Distinguished
Most Recent Distinguished: Thomas, Re | 2001 ABQB 771, 2001 CarswellAlta 1353, [2001] A.J. No. 1192, 41 E.T.R. (2d) 142, [2002] A.W.L.D. 2, 108 A.C.W.S. (3d) 227, 28 C.B.R. (4th) 314, 301 A.R. 373 | (Alta. Q.B., Sep 10, 2001)

2000 BCCA 458
British Columbia Court of Appeal

Ellingsen, Re

2000 CarswellBC 1684, 2000 BCCA 458, [2000] B.C.W.L.D. 1190, [2000] B.C.J. No. 1682, 142 B.C.A.C. 26, 190 D.L.R. (4th) 47, 19 C.B.R. (4th) 166, 1 P.P.S.A.C. (3d) 307, 233 W.A.C. 26, 7 B.L.R. (3d) 12, 98 A.C.W.S. (3d) 1120

KPMG, Trustee in Bankruptcy of the Estate of the Bankrupt, Greg Allan Ellingsen, Applicant (Respondent) and Hallmark Ford Sales Ltd., Respondent (Appellant)

McEachern C.J.B.C., Lambert, Donald JJ.A.

Heard: March 8, 2000
Judgment: August 18, 2000
Docket: Vancouver CA023765

Proceedings: **Proceedings: reversing (1997), 50 C.B.R. (3d) 50 (B.C.S.C.)**

Counsel: *J.J. Casey*, for Appellant.
S.A. Wilson, for Respondent.

Subject: Insolvency; Corporate and Commercial; Estates and Trusts
Related Abridgment Classifications
Bankruptcy and insolvency
VIII Property of bankrupt
VIII.5 Trust property
VIII.5.b Trust arising in sale of goods context
Bankruptcy and insolvency
VIII Property of bankrupt
VIII.9 Property in sale of goods context
VIII.9.a Passing of title to goods
Estates and trusts
II Trusts
II.3 Constructive trust
II.3.a Elements of constructive trust
Headnote
Bankruptcy --- Property of bankrupt — Property in sale of goods context — Passing of title to goods
Vendor transferred title in truck to bankrupt and gave possession, in expectation that purchaser would obtain financing to complete transaction — Bankrupt failed to obtain financing and made assignment in bankruptcy — Subsequent to assignment in bankruptcy, vendor registered personal property security interest in truck — Trustee in bankruptcy brought motion for order declaring that truck was vested in trustee free and clear of any claims by vendor, which was successful — Vendor's appeal allowed — Trial judge erred in failing to find remedial constructive trust in vendor's favour — Bankrupt held only bare legal ownership in truck, since transfer in title was understood to be conditional on completing transaction — Imposition of constructive trust was necessary to prevent unjust enrichment.
Bankruptcy --- Property of bankrupt — Trust property — Trust arising in sale of goods context

Vendor transferred title in truck to bankrupt and gave possession, in expectation that bankrupt would obtain financing to complete transaction — Bankrupt failed to obtain financing and made assignment in bankruptcy — Subsequent to assignment in bankruptcy, vendor registered personal property security interest in truck — Trustee in bankruptcy brought motion for order declaring that truck was vested in trustee free and clear of any claims by vendor, which was successful — Vendor's appeal allowed — Trial judge erred in failing to find remedial constructive trust in vendor's favour — Bankrupt held only bare legal ownership in truck, since transfer in title was understood to be conditional on completing transaction — Imposition of constructive trust was necessary to prevent unjust enrichment.

Trusts and trustees --- Constructive trust — General principles

Vendor transferred title in truck to bankrupt and gave possession, in expectation that bankrupt would obtain financing to complete transaction — Bankrupt failed to obtain financing and made assignment in bankruptcy — Subsequent to assignment in bankruptcy, vendor registered personal property security interest in truck — Trustee in bankruptcy brought motion for order declaring that truck was vested in trustee free and clear of any claims by vendor, which was successful — Vendor's appeal allowed — Trial judge erred in failing to find remedial constructive trust in vendor's favour — Bankrupt held only bare legal ownership in truck, since transfer in title was understood to be conditional on completing transaction — Imposition of constructive trust was necessary to prevent unjust enrichment.

The bankrupt bought a truck from the vendor, then learned that the vendor had misrepresented the vehicle's accident history. The bankrupt entered into an agreement to buy another truck, with the purchase price to be paid by means of a trade-in of the first vehicle, and the balance to be financed through a bank. When it became apparent that there would be a delay in arranging financing, the vendor agreed to give the bankrupt possession of the truck so that he could begin to use it immediately in logging operations up north. The vendor transferred ownership to the bankrupt, in the expectation that financing would be completed through one of two banks. The vendor obtained the bankrupt's signature on a purchase agreement, two conditional sales agreements and various other documents, which it planned to execute upon completion of financing. The purchase agreement was stated to be "subject to credit approval". The vendor did not register a security interest against the truck in the Personal Property Registry. The bankrupt made an assignment in bankruptcy. The trustee in bankruptcy advised the vendor that it had no claim on the truck, since no financing statement had been registered in the Personal Property Registry. The vendor subsequently filed a financing statement.

The trustee brought a motion for an order declaring that the truck was vested in the trustee free and clear of any claim by the vendor, and requiring that the vendor discharge the registration filed against the truck after the assignment in bankruptcy. The motion was granted on the basis that the transaction was a sale. The vendor brought an appeal.

Held: The appeal was allowed.

Per Donald J.A.: The evidence did not support the finding that the transaction was a sale and that the vendor retained a security interest in the truck after releasing possession. The transaction was subject to financing by a third party which never materialized. Thus, the condition precedent not having been fulfilled, there was never an enforceable instrument on which the vendor could sue the bankrupt for the purchase price. The fact that ownership registration was transferred to the bankrupt merely facilitated the acquisition of insurance and moved the transaction along, but did not complete it, nor did it indicate that the vendor waived the condition precedent.

The evidence disclosed facts sufficient to meet the requirements of the test for finding a remedial constructive trust. The bankrupt was enriched through receiving possession and legal ownership of the truck; the enrichment occurred at the expense of the vendor; and there was no juristic reason for the enrichment. The trust arose at the point at which it became obvious the bankrupt would not be able to provide the $5,000 required to pay out the lien on the first truck. This occurred prior to the bankrupt's assignment in bankruptcy, so that s. 67(1)(a) of the *Bankruptcy and Insolvency Act* applied to exclude the truck from "property held by a bankrupt divisible among his creditors". The vendor's beneficial interest in the truck also constituted an "interest given by a rule of law" within the meaning of s. 4(a) of the *Personal Property Security Act*, so that it was excluded from the operation of s. 20(b)(i) of the Act. While an implied or resulting trust may secure payment or performance of an obligation, and thus require registration in order to be effective against a trustee in bankruptcy, this is not the case with a constructive trust, the purpose of which is to prevent an unjust outcome.

To apply the doctrine of the remedial constructive trust did not, in the circumstances, do violence to the purposes of the *Personal Property Security Act*. It was, however, necessary, in assessing the propriety of the remedy in a commercial situation, to consider

the interests of other creditors. In the case at bar, the vendor did not stand on the same footing as the general creditors, and the remedy did not unfairly deprive the general creditors of an asset to which they had any reasonable entitlement.

Per Lambert J.A. (concurring): Concerns about the integrity of the *Personal Property Security Act* were not warranted in the circumstances of the case at bar. Section 2(1)(a) of the Act gives effect to the general equitable principle that it is the substance, rather than the form, of a transaction which determines whether it creates a security interest. The parties never intended the transaction to create a security interest in favour of the vendor. Rather, the contemplated transaction was a sale, conditional on financing through a third party, which was never completed. The facts which gave rise to the right to an equitable remedy — the right to restitution and the unjust enrichment — originated in the failure of the contract to arise at all, and not from non-performance or breach, and thus arose entirely independently of the Act.

Registration of ownership of the truck in favour of the bankrupt could not confer true ownership where true ownership did not exist in fact. At the point that the bankrupt advised the vendor that it could re-take possession of the truck, he ceased to have anything beyond a mere possessory interest. The trial judge therefore erred in assuming that the purchaser had acquired any form of title in the truck by reason of the ownership registration.

The remedial constructive trust was available in the commercial context. The "injustice" of an enrichment in such a context must be measured against the standard of good commercial conscience, and therefore requires that the interests of third parties be considered. There was no evidence that any third party was misled or prejudiced by the fact that no security interest was registered against the truck.

Per McEachern C.J.B.C. (dissenting): The purchase agreement between the vendor and the bankrupt created a security interest in favour of the vendor. The bankrupt purchased the truck by turning in his old truck, assuring the vendor that his bank would finance the bankrupt if the dealer's financing resources were unsuccessful, by signing a purchase agreement, by accepting registration of the truck in his name and by taking possession of the truck. While the agreement to purchase was stated to be "subject to credit approval", the vendor waived this clause when it transferred title to the bankrupt and the bankrupt waived it when he retained the truck without arranging financing. The vendor took a chance that the purchase price would be paid by or on behalf of the bankrupt and neglected to perfect its security interest by the appropriate filing.

Even if it is appropriate to introduce the constructive trust as a remedy in the context of commercial transactions, the *Personal Property Security Act* furnished good juristic reason for any enrichment there may have been in the case at bar.

Table of Authorities

Cases considered by *Donald J.A.*:

Barnabe v. Touhey (1995), 10 E.T.R. (2d) 68, 37 C.B.R. (3d) 73, 26 O.R. (3d) 477 (Ont. C.A.) — considered

Peter v. Beblow, [1993] 3 W.W.R. 337, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, 150 N.R. 1, 48 E.T.R. 1, 77 B.C.L.R. (2d) 1, 44 R.F.L. (3d) 329, [1993] R.D.F. 369 (S.C.C.) — applied

Rawluk v. Rawluk, 23 R.F.L. (3d) 337, [1990] 1 S.C.R. 70, 65 D.L.R. (4th) 161, 36 E.T.R. 1, 103 N.R. 321, 71 O.R. (2d) 480, 38 O.A.C. 81 (S.C.C.) — considered

Skybridge Holidays Inc., Re (1999), (sub nom. *Skybridge Holidays Inc. (Bankrupt), Re)* 121 B.C.A.C. 16, (sub nom. *Skybridge Holidays Inc. (Bankrupt), Re)* 198 W.A.C. 16, 173 D.L.R. (4th) 333, 11 C.B.R. (4th) 130, 15 P.P.S.A.C. (2d) 24, 48 B.L.R. (2d) 159, 68 B.C.L.R. (3d) 209 (B.C. C.A.) — considered

Cases considered by *McEachern C.J.B.C.* (dissenting):

Peter v. Beblow, [1993] 3 W.W.R. 337, 23 B.C.A.C. 81, 39 W.A.C. 81, 101 D.L.R. (4th) 621, [1993] 1 S.C.R. 980, 150 N.R. 1, 48 E.T.R. 1, 77 B.C.L.R. (2d) 1, 44 R.F.L. (3d) 329, [1993] R.D.F. 369 (S.C.C.) — considered

Cases considered by *Lambert J.A.* (concurring):

Atlas Cabinets & Furniture Ltd. v. National Trust Co. (1990), 38 C.L.R. 106, 45 B.C.L.R. (2d) 99, 68 D.L.R. (4th) 161, 37 E.T.R. 16 (B.C. C.A.) — considered

Becker v. Pettkus, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165 (S.C.C.) — considered

Larocque v. Lutz (1979), [1980] 2 W.W.R. 97, 16 B.C.L.R. 348 (B.C. S.C.) — considered

Larocque v. Lutz, 27 B.C.L.R. 357, [1981] 4 W.W.R. 504 (B.C. C.A.) — considered

Muschinski v. Dodds (1984), 62 A.L.R. 429, 160 C.L.R. 583, 60 A.L.J.R. 52 (Australia H.C.) — considered

Peters v. Shoreview Enterprises Ltd. (July 3, 1987), Doc. Victoria 86/0011 (B.C. S.C.) — considered

Singh v. McRae, [1971] 5 W.W.R. 544, 21 D.L.R. (3d) 634 (B.C. S.C.) — considered

Soulos v. Korkontzilas, 212 N.R. 1, 9 R.P.R. (3d) 1, 46 C.B.R. (3d) 1, 32 O.R. (3d) 716 (headnote only), 146 D.L.R. (4th) 214, 100 O.A.C. 241, 17 E.T.R. (2d) 89, [1997] 2 S.C.R. 217 (S.C.C.) — considered

Statutes considered by *Donald J.A.*:

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

s. 67(1)(a) [renumbered 1992, c. 27, s. 33] — considered

Personal Property Security Act, R.S.B.C. 1996, c. 359

Generally — considered

s. 1 "security interest" (a) — considered

s. 2(1) — considered

s. 2(1)(b) — considered

s. 20(b)(i) — considered

s. 4(a) — considered

Statutes considered by *McEachern C.J.B.C.* (dissenting):

Personal Property Security Act, R.S.B.C. 1996, c. 359

Generally — considered

s. 2(1)(a) — considered

s. 4 — considered

Statutes considered by *Lambert J.A.* (concurring):

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

s. 34(1) — pursuant to

s. 67(1)(a) [renumbered 1992, c. 27, s. 33] — pursuant to

Motor Vehicle Act, R.S.B.C. 1996, c. 318

Generally — referred to

Personal Property Security Act, R.S.B.C. 1996, c. 359

Generally — considered

s. 2(1)(a) — considered

s. 4(a) — considered

APPEAL by vendor from judgment reported at (1997), 50 C.B.R. (3d) 50 (B.C. S.C.), granting motion by trustee in bankruptcy for declaration that truck formed part of property of bankrupt purchaser divisible among creditors.

***Donald J.A.*:**

1 Hallmark Ford Sales Ltd. agreed to sell a truck to Greg Allan Ellingsen and let him take the truck to his logging operations without paying for it. Hallmark transferred ownership to Ellingsen on the expectation that the deal would be financed by a bank. Ellingsen would cover the balance by a trade-in.

2 Various delays occurred in the financing arrangements. Three months after taking the truck Ellingsen went into bankruptcy. The Trustee now has the truck (or its sale proceeds) and asserts that it is an asset forming part of the general estate of the bankrupt.

3 The Trustee brought a motion in the Supreme Court of British Columbia in bankruptcy for an order that the truck is vested in the Trustee free and clear of any claims by Hallmark and for an order that Hallmark discharge a registration against the truck in the Personal Property Registry. The latter refers to a registration filed in desperation by Hallmark after the bankruptcy occurred.

4 On 29 September 1997 the motion was granted on the terms sought by the Trustee. Hallmark appeals from this decision on several grounds, including the contention that the chambers judge erred in failing to find a remedial constructive trust in its favour. As I would allow the appeal on that ground, I do not propose to discuss the other grounds of appeal. In my judgment, a constructive trust is necessary to prevent an unjust enrichment.

5 The deal in question took place on 2 January 1997 at Hallmark's lot in Surrey. Hallmark agreed to take back a used truck it had earlier sold to Ellingsen under an incorrect declaration that the truck had not been in an accident involving more than $2,000 damage. In arranging the sale of the new truck Hallmark ascribed a trade-in value to the old truck as though it had not been previously damaged. To complete the purchase Ellingsen needed financing to pay out the outstanding balance of approximately $27,500 due under a conditional sales contract in favour of the Bank of Nova Scotia and to cover the balance of the purchase price of the new truck, $12,105.11.

6 Ellingsen completed the required credit application, and advised Johann Halldorson, the salesman, that if the credit application was not approved, his own bank in Penticton, the Bank of Nova Scotia, would be willing to finance the deal. He said he needed to conclude the transaction quickly as he had to return to work up north in the bush. The credit application was left with Randy Jenks, the business manager of Hallmark.

7 Jenks attempted to obtain financing on behalf of Ellingsen for the transaction. He initially called the Bank of Nova Scotia and determined the amount required to pay out the conditional sales contract and then called the Hongkong Bank to seek credit approval for the required amount of $39,641.10. He also spoke to the manager of Ellingsen's bank in Penticton, who indicated that he was prepared to work with Hallmark on the deal, but he wanted to see Ellingsen and receive the deal information first.

8 Approximately three hours later that same day, Ellingsen returned to the dealership and was told by Jenks that financing had not yet been obtained. Ellingsen put pressure on Hallmark to complete the transaction as he was eager to leave for his job in the north. Jenks deposes that as a result of the pressure and based on the expectation that approval of financing would be forthcoming, he agreed to permit the delivery of the new truck to Ellingsen and to transfer the new truck into his name. Before doing so, Jenks had Ellingsen sign a Motor Vehicle Purchase Agreement dated 2 January, 1997; a Hongkong Bank Conditional Sales Agreement bearing the same date; a blank Scotia Bank Buyer's Statement and two blank Scotia Bank Conditional Sales Agreements; a blank Motor Vehicle Purchase Agreement; and a blank Credit Application for the Hongkong Bank of Canada. He also had Ellingsen sign a transfer form transferring the old truck to Hallmark which Jenks intended to process upon completion of the financing for the new truck. Jenks asked Ellingsen to sign the above noted documents in blank in case they were needed as part of the financing package. Hallmark executed the transfer but none of the other documents.

9 Jenks then arranged for Ellingsen's insurance and Ellingsen left the dealership with the new truck. Jenks claims that the sale was conditional upon the financing being obtained, and says that although he never expressed to Ellingsen what would happen if the financing was not obtained, it was clear that the transaction was subject to the obtaining of financing. He maintains that it was always understood that Hallmark had not agreed to finance the transaction and that it was obvious that in the event financing approval was not obtained, Ellingsen would be required to return the new truck.

10 The Motor Vehicle Purchase Agreement dated 2 January, 1997 signed by Ellingsen stipulated that the transaction was "subject to credit approval". Under "Purchaser Declarations" it said:

> Purchaser understands that this agreement does not become binding on the parties hereto until accepted and executed by a duly authorized official of the Dealer. Salespersons do not have this authority. Deposits, partial payments and down payments are non-refundable.

11 Ellingsen denies that it was ever expressed to him that the sale was conditional, and agrees that the issue of what would happen if the financing was declined was never discussed, as he had not anticipated there would be a problem.

12 On 8 January 1997 the Hongkong Bank advised Hallmark that it would finance the transaction provided Ellingsen made a downpayment of $5,000. Jenks called Ellingsen and told him about the approval subject to a downpayment, and

Ellingsen advised that he could not make that payment until he arrived from his work up north. Jenks responded that this would be acceptable, and that he needed Ellingsen to sign a new Hongkong Bank Conditional Sales Agreement showing the downpayment. Ellingsen agreed to sign and return the document on receipt. Jenks sent the documents out, and when he did not receive them back, he made numerous unsuccessful attempts to reach Ellingsen.

13 On 15 March 1997 Ellingsen called Hallmark to ask that it "pay out the lien" on the old truck, and if it did not, Hallmark would have to come and get the new truck. Halldorson told Ellingsen that Jenks needed the contract, referring to the $5,000 downpayment, signed and returned. Approximately one week later, Ellingsen spoke to Jenks, who informed him again that Hallmark could not pay out the lien on the old truck until the financing contract was signed and returned, and that the old truck had been sitting on Hallmark's lot since January and that Hallmark could not process the transfer until the financing on the new truck had been concluded. Ellingsen told Jenks, as he had told Halldorson earlier, that he would return from the bush in April and he would deal with the paperwork then.

14 On 11 April 1997 Jenks received a call from an employee of the Bank of Nova Scotia about payment of the lien on the old truck. Jenks informed her that he could not pay out the amount owed until he had received the financing documentation on the new truck, and that if he had not received it within two weeks, he was going to try to find the new truck and bring it back to Hallmark. On the same day, Ellingsen filed an assignment into bankruptcy. After the bankruptcy, the Bank of Nova Scotia seized the old truck from the Hallmark lot pursuant to its conditional sales contract which had been registered at the Personal Property Registry.

15 Shortly after the assignment into bankruptcy, a representative of the Trustee advised Hallmark that Hallmark had no claim on the new truck as a Financing Statement under the *Personal Property Security Act* had not been filed. Without obtaining legal advice, Hallmark then filed a financing statement in the Personal Property Registry.

16 In the court below Hallmark framed its argument on the law of trust in the manner described by the chambers judge:

> [11] Hallmark's position is that there was never a concluded sale of the new truck to Ellingsen, and that beneficial ownership of the new truck did not ever pass. Hallmark says that Ellingsen held only bare legal title, and was a trustee of the beneficial interest in the new truck in favour of Hallmark. Hallmark further says that there was no security interest which existed and could be registered in this case given the nature of the transaction, and consequently, the PPSA has no application. Finally, Hallmark says that the trustee has no interest in the new truck, given the express provisions of the BIA [*Bankruptcy and Insolvency Act*], and particularly s. 67 of the same, which provides that the property of the bankrupt shall not comprise property held by a bankrupt in trust for another.

17 The chambers judge concluded that the transaction was a sale rather than a creation of a trust. She held that the unpaid sales price gave rise to a security interest which could have been registered and had it been registered it would have protected Hallmark from the bankruptcy. Her reasoning went as follows:

> [12] I cannot accept that the nature of the transaction between Hallmark and Ellingsen in January of 1997 was the creation of a trust. On the facts, Ellingsen must have considered that he had purchased, and that he owned, the new truck, even though the purchase price had not as of yet been paid. It is inconceivable that, as Hallmark now argues, Ellingsen could have driven the new truck in his work up north for more than three months, and then simply returned the new truck to Hallmark, or that he could have resisted an action by Hallmark for the purchase price of the new truck, on the basis that no deal had been made between the parties.
>
> [13] Further, Hallmark did not conduct itself in a way that would be consistent with a trust relationship, with mere legal title to the new truck having passed. Hallmark was aware, within weeks of the transaction, that there was a problem with financing. Hallmark made no effort to obtain possession of the truck, or to even demand return of the truck. The only interest Hallmark had at that time was to receive payment for the truck from someone, whether it be Ellingsen, or a finance company, or a combination of the two.

> [14] I have concluded, on these facts, that the nature of the transaction was a sale, with payment anticipated and agreed by the parties to be made shortly after the transfer of title and possession. The transaction created what was in substance a security interest, as that term is defined in s. 1 and s. 2 of the PPSA, on the part of Hallmark, which Hallmark could, and given what happened should, have registered in the Personal Property Registry. Given that Hallmark did not register, and thereby perfect, its security interest prior to the date of bankruptcy, I find that the new truck forms part of the bankrupt's estate, and is available for distribution to the estate's creditors.

18 With respect, I do not think the evidence reasonably supports the finding that this was a sale and that Hallmark retained a security interest after it released the truck. The deal was subject to financing by a third party which never materialized. There was no enforceable instrument on which Hallmark could sue Ellingsen for the purchase price. As Hallmark did not sign the Motor Vehicle Purchase Agreement it was never brought into effect. Ellingsen did not agree to pay cash for the new truck and at no time did Hallmark agree to finance the deal itself. The documents make it plain that credit was to be approved by a lending institution.

19 Hallmark imprudently transferred ownership registration to Ellingsen and therein lies the problem. On the surface the transfer implies that a concluded contract of purchase and sale took place and that the relationship between the parties was one of debtor and creditor. But on a full appreciation of all the circumstances I think the only reasonable conclusion is that the proposed sale never occurred because a condition precedent, the proposed financing, was not fulfilled. The transfer facilitated acquisition of insurance and moved the transaction along but it did not complete it.

20 The Trustee argues that if the term "subject to credit approval" was a condition precedent Hallmark waived it by transferring ownership registration. With respect, I do not think that conforms to the fact that the financing continued to be a problem after the transfer. I note, in particular, that the Hongkong Bank was not prepared to finance the deal as written and insisted that Ellingsen put $5,000 down.

21 The Trustee further argues that the Motor Vehicle Purchase Agreement and the Hongkong Bank Conditional Sales Agreement are structured so that the financing obligation is primarily between the seller and the purchaser with the bank taking the paper as assignee. This is said to establish a debtor-creditor relationship independent of the bank's involvement. While it is true that the full cost of borrowing and the payment schedule are set out in the sales agreement and that the conditional sales agreement is between the seller and purchaser with the bank as assignee, the fact remains that neither agreement was executed. They were not executed because financing was not concluded and so we return to the position that Ellingsen had a truck that he had no right to keep when he was unable to meet the conditions of financing.

22 The more difficult area for analysis in this case is the relationship between the *Personal Property Security Act (PPSA)* and the law of remedial constructive trusts. Hallmark's case for a constructive trust can be broken down this way:

> 1. The contract of sale was ineffective through non-fulfillment of a condition precedent.
>
> 2. Hallmark is entitled to a proprietary remedy (return of the truck), on meeting three conditions:
>
> (a) no transaction effective to vest property rights has taken place;
>
> (b) it must be possible to trace the property;
>
> (c) against the actual holder of the property it is unjust that the claimant not be allowed to re-take it: G.H.L. Fridman and J.G. McLeod, *Restitution* (Toronto: Carswell, 1982) at 568-9.
>
> 3. Hallmark meets all three conditions: the contract was ineffective because no financing was arranged; the truck was still in Ellingsen's possession at time of bankruptcy; and Hallmark did not extend credit to Ellingsen. Not having extended credit, Hallmark occupies a different position from that of the general creditors of the bankrupt estate who did extend credit. The creditors would unfairly enjoy a windfall if the truck formed part of the assets available to them: P.D. Maddaugh and J.D. McCamus *The Law of Restitution* (Aurora: Canada Law Book, 1990) at 137.

4. Section 67(1)(a) of the *Bankruptcy and Insolvency Act (BIA)* provides that the property of the bankrupt should not comprise property held by a bankrupt in trust for another:

> 67. (1) The property of a bankrupt divisible among his creditors shall not comprise
>
> (a) property held by the bankrupt in trust for any other person.

5. A trust in the form of a constructive trust should be imposed to prevent an unjust enrichment with the order taking effect just prior to the bankruptcy so that s. 67(1)(a) of the *BIA* is engaged.

6. Since the trust is constructed as a remedy by the court on the doctrine of unjust enrichment it falls within an exclusion provided in s. 4(a) of the *PPSA* as an "interest given by a rule of law". Section 4(a) of the *PPSA* reads:

> Except as otherwise provided in this Act, this Act does not apply to the following:
>
> (a) a lien, charge or other interest given by a rule of law or by an enactment unless the enactment contains an express provision that this Act applies; [Emphasis added]

23 Hallmark must find an exclusion from the *PPSA* because if its interest was "a security interest" within the meaning of the *PPSA* (such interest can include a "trust" if the trust secures payment or performance of an obligation: (s. 2(1)(b)), then unless the interest is perfected by registration it is not effective against the trustee in bankruptcy: s. 20(b)(*i*). Section 2(1) of the *PPSA* reads:

> **2** (1) Subject to section 4, this Act applies
>
> (a) to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, and
>
> (b) without limiting paragraph (a), to a chattel mortgage, a conditional sale, a floating charge, a pledge, a trust indenture, a trust receipt, an assignment, a consignment, a lease, a trust, and a transfer of chattel paper if they secure payment or performance of an obligation. [Emphasis added]

Section 20(b)(*i*) reads:

> **20** A security interest
>
> (b) in collateral is not effective against
>
> (i) a trustee in bankruptcy if the security interest is unperfected at the date of the bankruptcy, or ...

24 "Security Interest" is defined in s. 1 of the *PPSA* as:

> "**security interest**" means
>
> (a) an interest in goods, chattel paper, a security, a document of title, an instrument, money or an intangible that secures payment or performance of an obligation, but does not include the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading or its equivalent to the order of the seller or to the order of an agent of the seller, unless the parties have otherwise evidenced an intention to create or provide for a security interest in the goods, and ... [Emphasis added]

25 The Trustee submits that this transaction comes within the *PPSA* and that the interest held by Hallmark is an unperfected interest and thereby ineffective against the Trustee under s. 20(b)(*i*). The argument is founded on two conditions on the reverse

side of the Motor Vehicle Purchase Agreement which are said to reserve rights to Hallmark in the event of a default by the purchaser. They are conditions 3(a) and 7(a):

> 3. If any cheque or other bill of exchange tendered as payment of any amount due as set out on the reverse side hereof is dishonoured, such cheque or bill of exchange shall be deemed not to be payment and shall be null and void and of no effect. If any such dishonoured cheque or bill of exchange forms all or part of the amount due by the Purchaser to the Dealer, then:
>
> > (a) the Purchaser agrees that the Dealer shall have immediate possession of the motor vehicle as if the Dealer had never parted with possession and the Dealer may exercise all rights to possession;
>
> . . . . .
>
> 7. Subject to paragraph 3 of this Agreement, if the Purchaser defaults in the payment of any amount due hereby or defaults in the performance or observance of any other matter or thing required to be observed or performed by the Purchaser or if any proceeding is commenced by or against the Purchaser under any bankruptcy or insolvency laws, then
>
> > (a) the entire amount due by the Purchaser to the Dealer shall become immediately due and payable at the option of the Dealer.

26 The difficulty with this argument is that it is premised on a concluded contract which is absent here. Hallmark's right to recover the truck does not arise, and could not arise, on the conditions quoted above; Hallmark's remedy lies outside the document and is found in the power of the court to provide a restitutionary remedy.

27 The Trustee submits, in the alternative, that any equitable interest supporting a trust in the circumstances amounts to a security interest for the purposes of the *PPSA*, in the sense that that interest only existed as a method for securing payment of the truck.

28 I think this argument goes to the kind of trust, implied or resulting, for which Hallmark argued below and which formed part of Hallmark's alternative submissions before us. As I apprehend the position, an implied or resulting trust arises from an understanding that Ellingsen would hold the truck in trust for Hallmark until financing was completed. But I am not concerned with these other trusts having been persuaded that the appropriate remedy is the constructive trust. I do not know how it could be said that a constructive trust secures a payment or the performance of an obligation; rather its purpose is to prevent an unjust outcome. The chambers judge inquired whether the behaviour of the parties "was consistent with a trust relationship". That can only refer to an implied or a resulting trust and is not relevant to the question whether a constructive trust should be imposed.

29 The final point raised by the Trustee in relation to the *PPSA* is that s. 20(b)(*i*) provides a "juristic reason" for the deprivation of Hallmark and the corresponding enrichment of the general creditors of the estate. This refers to the classic three-part formula for determining unjust enrichment. McLachlin J. (now C.J.C.) put it this way in *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), at 987:

> The basic notions are simple enough. An action for unjust enrichment arises when three elements are satisfied: (1) an enrichment; (2) a corresponding deprivation; and (3) the absence of a juristic reason for the enrichment. These proven, the action is established and the right to claim relief made out.

30 If Hallmark's interest is a security interest the consequences of not registering the interest are prescribed by s. 20(b)(*i*) of the *PPSA*. The collateral goes into the general estate by operation of statute and hence a juristic reason exists for the enrichment. It is necessary to repeat, in order to deal with this point, that in my opinion Hallmark's interest was not a security interest within the meaning of the *Act*. There was nothing to register. The truck was not collateral to any enforceable contract. The substance of the transaction, not its form, must determine whether a security interest was created: see *Re Skybridge Holidays Inc.* (1999), 173 D.L.R. (4th) 333, 68 B.C.L.R. (3d) 209 (B.C. C.A.). It follows that s. 20(b)(*i*) does not provide a juristic reason in answer to a claim of unjust enrichment.

31 Is this an appropriate case for a remedial constructive trust? Two issues arise for discussion. First, why should equity intervene in a commercial transaction where Hallmark could have protected itself contractually? Second, is it appropriate to use a constructive trust to alter the priorities amongst creditors in a bankruptcy?

32 On the first question, it is useful to refer to an article by D.M. Paciocco: "The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors" (1989) 68 Canadian Bar Review 315. Professor Paciocco distinguishes between the application of the constructive trust in family and commercial settings, arguing that the courts should be cautious in ordering specific relief in commercial cases. The constructive trust was adopted in the matrimonial context as a means of explaining the specific relief that courts were already awarding under the awkward resulting trust analysis. There is no parallel in the commercial context. Unlike in the spousal context, in commercial contexts parties are expected to protect their interests contractually. In addition, there are the further considerations of security of title as tied to efficiency of commerce and the protection of third parties from undisclosed charges. He concludes at 351:

> In commercial cases proprietary relief will not be warranted where the plaintiff parted with the property or money which represents the defendant's enrichment, while accepting the role of a general creditor. This will occur where there is a valid contract between the parties which accounts for the defendant's enrichment, or a contract which has been avoided where the condition which rendered the contract ineffective does not vitiate the voluntariness of the plaintiff's decision to assume the role of a general creditor...

33 In her majority reasons in *Peter v. Beblow*, McLachlin J. refused to distinguish between family and commercial cases. She said at 996-97:

> I doubt the wisdom of dividing unjust enrichment cases into two categories — commercial and family — for the purpose of determining whether a constructive trust lies. ... In short, the concern for clarity and doctrinal integrity with which this court has long been preoccupied in this area mandates that the basic principles governing the rights and remedies for unjust enrichment remain the same for all cases.

34 The more specific answer to the learned commentator's proposition as quoted above is that in the present case Hallmark never intended to grant credit to Ellingsen and so there is no justification for placing Hallmark in a class of general creditors.

35 As I have said, Hallmark was imprudent in allowing the truck to leave the lot as it did, but it accepted the risk in the interest of good customer relations that it may have to take back a used truck if financing fell through, and in that event it would not be able to recover the depreciation. Ellingsen induced Hallmark to believe that he would be able to meet the Bank's cash requirements for the loan and so Hallmark waited the three months before bankruptcy occurred. Ellingsen knew he had no right to keep the truck and said as much to Jenks, the business manager of Hallmark, when he suggested during the telephone conversation of 15 March 1997 that Hallmark would have to pick up the truck.

36 On the second question, that dealing with the priority of creditors, I wish to refer to the Ontario Court of Appeal decision in *Barnabe v. Touhey* (1995), 26 O.R. (3d) 477 (Ont. C.A.), which reversed a ruling that a court may impose a constructive trust for the very purpose of securing priority for some claimants over other creditors. At 479 the Court said:

> While a constructive trust, if appropriately established, could have the *effect* of the beneficiary of the trust receiving payment out of funds which would otherwise become part of the estate of a bankrupt divisible among his creditors, a constructive trust, otherwise unavailable, cannot be imposed for that *purpose*. This would amount to imposing what may be a fair result as between the constructive trustee and beneficiary, to the unfair detriment of all other creditors of the bankrupt.

37 The Court of Appeal went on to determine that there was no unjust enrichment on the facts of the case so the above remarks are probably *obiter dicta*. Nevertheless, the case serves as a useful caution that in weighing the equities other creditors may have to be considered. In my judgment, for the reasons I have given, Hallmark does not stand on the same footing as the general creditors and as a result I do not think the remedy I would impose unfairly deprives other creditors of an asset to which they have any reasonable entitlement.

38 I turn to consider the issue of timing: can the constructive trust be imposed prior to the bankruptcy? In order for the remedy to have any practical effect, it must be imposed before the bankruptcy, otherwise s. 67(1)(a) of the *BIA* could not operate. Support for the proposed timing can be found in *Rawluk v. Rawluk*, [1990] 1 S.C.R. 70 (S.C.C.), at 91:

> It is important in this respect to keep in mind that a property interest arising under a constructive trust can be recognized as having come into existence not when the trust is judicially declared but from the time when the unjust enrichment first arose. As Professors Oosterhoff and Gillese state, "the date at which a constructive trust arises...is now generally accepted to be the date upon which a duty to make restitution occurs" (Oosterhoff and Gillese, *A.H. Oosterhoff: Text, Commentary and Cases on Trusts* (3rd ed. 1987), at p. 579). Professor Scott has stated in *Law of Trusts, op. cit.*, at pp. 323-4, that:
>
> > The beneficial interest in the property is from the beginning in the person who has been wronged. The constructive trust arises from the situation in which he is entitled to the remedy of restitution, and it arises as soon as that situation is created. ... It would seem that there is no foundation whatever for the notion that a constructive trust does not arise until it is decreed by a court. It arises when the duty to make restitution arises, not when that duty is subsequently enforced.

39 McLachlin J., in giving the minority judgment, agreed at 103 that the property interest, if conferred, may extend back to the point when it arose.

> That property interest, it appears, may be taken as extending back to the date when the trust was "earned" or perfected. In *Hussey v. Palmer*, in a passage referred to by Dickson J. in *Rathwell v. Rathwell*...Lord Denning postulated that the interest may arise at the time of declaration or from the outset, as the case may require. Scott views the trust as being in force from the outset, with a discretion in the court as to whether it should be enforced: Scott op. cit., §462.2. Another American scholar regards it as coming into existence only on an order being made, but having retrospective operation: Bogert, The Law of Trusts and Trustees, (2nd ed. 1979), §472.

40 Hallmark was entitled to the return of the truck when it became certain that the condition precedent could not be fulfilled. This point would have been reached, at the latest, when it became obvious that Ellingsen was stalling Hallmark for time without any real prospect of being able to put $5,000 down on the truck. In these circumstances it would be appropriate to make the order for a remedial constructive trust effective on and after 15 March 1997 when Ellingsen told Hallmark that it would have to come and get the new truck. Accordingly, the remedial constructive trust would have been in effect on the date of Ellingsen's assignment in bankruptcy on 11 April 1997.

41 For these reasons I would allow the appeal and impose a constructive trust on the truck in favour of Hallmark with effect from 15 March 1997. I understand that by agreement the truck has been sold and the proceeds held by the Trustee pending the decision on this appeal. The restitutionary remedy I intend will be satisfied by payment of those proceeds plus costs.

***McEachern C.J.B.C.* (dissenting):**

42 I have read the Reasons for Judgment of Mr. Justice Donald on this appeal. I regret that I am unable to agree with the conclusions he has reached. I am, however, content to accept the careful statement of the facts that he has prepared and I need not repeat what he has said in that regard.

43 In my judgment, Mr. Ellingsen purchased the new truck from Hallmark by turning in his old truck, by assuring Hallmark that his bank would finance the purchase if the dealer's financing resources were not fruitful, by signing a Motor Vehicle Purchase Agreement setting out conditions of sale, by accepting registration of the new truck in his name and by taking possession of the new truck.

44 The Purchase Agreement signed by Mr. Ellingsen provided that the purchase balance would be payable "...in 60 equal monthly installments of $709.05 commencing on the 18 day of Feb. '97 with a final balance of $709.05 to be paid on the 18 day of Jan. 2002..." (clause 8).

45 It is true this Agreement to Purchase, a printed form, stated "SUBJECT TO CREDIT APPROVAL". The Agreement, however, also provided remedies for the repossession of the truck in the event of non-payment, and Hallmark was at all times the unpaid vendor of the truck. Pending the completion of financing, the obligation of Mr. Ellingsen was to carry out the terms of the agreement. It is unthinkable that Mr. Ellingsen could retain the truck without completing the financing or that Hallmark would be without remedies. Either under the Agreement or at common law, Hallmark was entitled to be paid or to have the truck back. Hallmark, at least, waived the subject clause when it transferred title to Mr. Ellingsen. Mr. Ellingsen, in turn, must be taken to have waived the clause when he retained the truck without arranging the financing. However one analyzes this transaction, mutual obligations arose as soon as Mr. Ellingsen took possession of the truck.

46 Accordingly, I have no doubt that this Purchase Agreement, or the mutual obligations undertaken by the parties, created a security interest in favour of Hallmark as defined in the *Personal Property Security Act*, R.S.B.C. 1996, c. 359 (the *Act*). In fact, Hallmark registered it as such after Mr. Ellingsen had filed for bankruptcy and declared the new truck as a part of his estate at the time of his assignment in bankruptcy.

47 Mr. Casey, in his able argument, conceded that he had to rely upon a trust analysis in order to escape the consequences of the *Act*. Mr. Justice Donald has undertaken such an analysis and concludes that there was no completed sale, and that it would be an unjust enrichment to the estate if Hallmark were deprived of its property interest in the new truck. He relies in part on the classic definition of a constructive trust furnished by McLachlin J. (now C.J.C.) in *Peter v. Beblow*, [1993] 1 S.C.R. 980 (S.C.C.), at 987:

> ...An action for unjust enrichment arises when three elements are satisfied: (1) an enrichment, (2) a corresponding deprivation, and (3) the absence of a juristic reason for the enrichment. These proven, the action is established and the right to claim relief made out.

48 With respect, there are good juristic reasons for this enrichment (if such it is) in the provisions of the *Act*, which is intended to provide the certainty that is so necessary in the commercial law. It is probably unnecessary to point out that the assertion of a constructive trust based on unjust enrichment could become commonplace, with unfortunate commercial consequences, if such a remedy is made available upon a failure to make the necessary filings under the *Act*.

49 Assuming for the moment that there was no completed purchase agreement in this case, which I do not accept, it becomes necessary to analyze further the position of Hallmark to see whether its then rights would prevail against a trustee in bankruptcy. This requires a closer examination of the *Act*.

50 As already mentioned, there is no doubt Mr. Ellingsen agreed to purchase the truck and pay for it by trading in his old truck and by financing the balance at his own bank if necessary. On this basis, he took possession (and title) to the truck. There was no thought or discussion of a trust.

51 What happened, obviously, was that Hallmark took a chance that the purchase price would be paid by or on behalf of Mr. Ellingsen, and Hallmark neglected to perfect its security interest by the appropriate filing until after the bankruptcy of Ellingsen.

52 This is precisely the kind of case the Legislature had in mind when it enacted the *Act*.

53 A "security interest" under the *Act* means "an interest in goods ... that secures payment or performance of an obligation..." At the very least, this transaction, even if characterized as a failed Purchase Agreement, entitled Hallmark to a return of the vehicle or to a debt and a corresponding obligation on Mr. Ellingsen to return the truck or pay for it. I need say no more about debt because such a debt would not prevail over a trustee in bankruptcy. If Hallmark's entitlement was to a return of the vehicle, that interest could only be protected by an appropriate filing under the *Act*.

54 This is because, subject to section 4, the *Act* applies:

> ...to every transaction that in substance creates a security interest, without regard to its form... (section 2(1)(a)). (Emphasis added.)

55 Under this definition the obligation to return the truck creates a security interest in Hallmark.

56 Turning to s. 4, the *Act* does not apply to interests "given by a rule of law" which could include a constructive trust, although I have serious reservations about the introduction of such concepts into consumer transactions. However, I have already concluded that there are strong juristic reasons militating against the recognition of an unjust enrichment or a constructive trust in the circumstances of this case.

57 For these reasons, whether or not the Purchase Agreement was a completed agreement, Hallmark must fail in its attempt to establish an unregistered interest in this vehicle that survives a bankruptcy. I would dismiss this appeal.

Lambert J.A. **(concurring):**

58 I have had the advantage of reading, in draft form, the reasons of Mr. Justice Donald and the reasons of Chief Justice McEachern. I agree with Mr. Justice Donald. But Chief Justice McEachern has expressed concerns about the integrity of the *Personal Property Security Act* and about the potential frustration of the legislative intention underlying that Act. Accordingly, I consider that I should indicate why I do not share those concerns in the circumstances of this case. To the extent that I repeat what has been said by Mr. Justice Donald, I do so only to emphasize that in my opinion the integrity of the *Personal Property Security Act* remains unimpaired by the decision in this case.

The Scholarly Writing

59 I have been much assisted in my consideration of this appeal by the insights contained in David M. Paciocco, *The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors* (1989), 68 Can.Bar Rev. 315; Leonard Rotman, *Deconstructing the Constructive Trust* (1999), 37 (1) Alberta Law Review 133; and Robert Chambers, *Constructive Trusts in Canada* (1999), 37 (1) Alberta Law Review 173. That is by no means a complete list of the scholarly writing about the principles relevant to this appeal.

The Substance of the Transaction

60 Section 2(1)(a) of the *Personal Property Security Act* affirms that the Act applies to every transaction that in substance creates a security interest, without regard to its form. That provision gives statutory force to the long-standing principle of equity that equity looks to the substance of events and not to their superficial appearance.

61 In this case the contemplated transaction was never completed. The contemplated transaction was that Ellingsen would trade in the truck which had been sold to him by Hallmark under a misrepresentation and would purchase in its place a second truck for a higher price which would be financed either by the H.S.B.C. Bank or, if that financing did not go into place, by the Bank of Nova Scotia, Penticton Branch. It was never contemplated that Hallmark would finance the purchase. The contemplated financing security was to be in place before the transaction was complete. But because Ellingsen had bought the first truck under a misrepresentation, and because he needed a truck in his work, he was given possession of the truck, and of documents which made him the registered owner, before the financing was in place.

62 In my opinion, the financing being in place was a condition precedent to the completion of the contract of purchase and sale of the second truck. That condition was never fulfilled. The registration of Ellingsen or his company as owner of the second truck is merely some evidence of ownership but it is not conclusive of true substantive ownership. The registration carries with it the consequence of being regarded as owner under the *Motor Vehicle Act* but it does not confer true ownership if ownership does not exist in fact. See *Larocque v. Lutz* (1979), 16 B.C.L.R. 348 (B.C. S.C.), at 351 (per Ruttan, J.) affirmed on this point and others, (1981), 27 B.C.L.R. 357 (B.C. C.A.), at 366; *Singh v. McRae*, [1971] 5 W.W.R. 544 (B.C. S.C.); and *Peters v. Shoreview Enterprises Ltd.* (July 3, 1987), Doc. Victoria 86/0011 (B.C. S.C.) at p.9. Since the condition precedent to Ellingsen's acquisition of ownership of the second truck was never fulfilled and never waived, it is my opinion that Ellingsen never acquired ownership of the truck or of a proprietary interest in the truck.

63 It seems to me to follow that the truck should not form any part of Ellingsen's estate in bankruptcy. Ellingsen had no interest at all in the truck after he told Hallmark that Hallmark could come and retake possession of the truck. At that time he abandoned any interest he may have had in the truck arising from his right to fulfil the condition precedent by completing the financing. So at that point the truck was owned entirely by Hallmark and Ellingsen only had simple possession.

64 This point was not the focus of the argument at trial or on appeal, where it was assumed, as I understand the arguments, that Ellingsen had acquired some form of title. The argument was about whether that form of title was held as trustee for Hallmark. But when I consider the substance of the transaction between Ellingsen and Hallmark, as I am required to do both for the purposes of the *Personal Property Security Act* and for the purposes of determining the application of equitable principles, it is the substance which I have just described which ought to govern the application of the statute and the creation of the equities. However, the fact that Ellingsen's interest was mere possession does not prevent the imposition of a remedial constructive trust, either as against Ellingsen himself or against his trustee in bankruptcy. See *Paciocco* at p.329, and the authorities cited in footnote 75.

Unjust Enrichment in Commercial Cases

65 It was said in *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.), at 848, and repeated often since, that what is required to establish an unjust enrichment is:

> (1) An enrichment,
>
> (2) a corresponding deprivation, and
>
> (3) the absence of a juristic reason for the enrichment.

But like most simple legal tests it must be applied thoughtfully and not mechanically, particularly with respect to whether there is a juristic reason for the enrichment which is said to have taken the enrichment out of the category of being "unjust". The juristic reason may be legal or equitable or both. But it must be measured in accordance with the principles of equity which underlie the remedies of restitution and the remedial constructive trust. So the "injustice" of an enrichment must be measured by the standard of "good conscience" and, in a commercial case, the "good conscience" must be good commercial conscience.

66 With respect to the requirement of "good commercial conscience", I refer to the majority judgment of four judges of this Court in *Atlas Cabinets & Furniture Ltd. v. National Trust Co.* (1990), 45 B.C.L.R. (2d) 99 (B.C. C.A.), particularly at pp. 109-112. At p.109, in relation to the three tests for unjust enrichment set out in *Becker v. Pettkus*, this was said:

> In the context of a domestic relationship those three circumstances are likely to be simpler to apply than in the context of a commercial relationship, where the essence of the relationship is the enrichment of the participants, perhaps at the expense of each other, all in the name of fair and honest business dealing. In a domestic relationship, equality of the parties to the relationship should normally be the standard of fairness. But, in a business relationship, honest dealing, not equal dealing, should set the standard of fairness. That is not to say that the three factors enumerated in ***Pettkus v. Becker*** are not equally applicable in commercial cases. They were referred to and treated as applicable in the majority reasons, on this point, of Chief Justice Dickson in ***Hunter v. Syncrude***, at p.471. But it is important to understand what is meant by "enrichment", by "deprivation" and by "juristic reason" in the context of a commercial relationship where ordinary and extraordinary flows of funds are part of the reality and purpose of the relationship. To my mind the key to the correct interpretation and application of the decisions of the Supreme Court of Canada on this subject to a commercial relationship is to focus on the "unjust" element of "unjust enrichment".
>
> . . . . .
>
> In my opinion the concept of the injustice of the enrichment as being against sound commercial conscience must continue to guide the application of the three tests in ***Pettkus v. Becker*** when they are applied to a commercial relationship.

67 In my opinion that passage continues to set out the applicable principles with respect to unjust enrichment in a commercial relationship.

The Remedial Constructive Trust in Commercial Cases

68 The leading case on the application of a remedial constructive trust in a commercial case is *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217 (S.C.C.) where the judgment of a majority of five judges in a seven judge division was given by Madam Justice McLachlin. The case was a commercial case. After reviewing the authorities, Madam Justice McLachlin said this, at p.236, para.34:

> It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.

69 While it is not necessary for the purposes of this case to add anything to the passage I have quoted, I think that these passages from the judgment of Mr. Justice Deane in the High Court of Australia in *Muschinski v. Dodds* (1984), 60 A.L.J.R. 52 (Australia H.C.), at p.65 indicate an important feature of the limits of the remedial constructive trust:

> The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles: ....
>
> Viewed as a remedy, the function of the constructive trust is not to render superfluous, but to reflect and enforce, the principles of the law of equity.

70 It is not necessary for the purposes of this case to decide whether the remedial constructive trust arises when the right to restitution arises, or when the enrichment occurs, or when the juristic reason for the enrichment fails, on the one hand, or whether it arises when declared by the court but with true retroactive effect (not merely retrospective effect) to the date when the right to restitution arose, or when the enrichment occurred, or the juristic reason for the enrichment failed, on the other hand. In this case, as in most cases, the result would be the same, which is probably why the point, as far as I know, must still be regarded as unsettled.

The Remedial Constructive Trust in This Case

71 The principles applicable to this case are contained in the passage I have just quoted from the reasons of Madam Justice McLachlin in *Soulos v. Korkontzilas*. A remedial constructive trust will be imposed only if it is required in order to do justice between the parties in circumstances where good commercial conscience determines that the enrichment has been unjust. But a remedial constructive trust is a discretionary remedy. It will not be imposed where an alternative, simpler remedy is available and effective. And it will not be imposed without taking into account the interests of others who may be affected by the granting of the remedy. In this case that would include other creditors of the bankrupt, (both secured creditors and general creditors, since the trust may defeat both), and any relevant third parties.

72 For the reasons that I have given in describing the substance of the transaction, it is not, in my opinion, in accordance with sound commercial conscience as between Ellingsen and Hallmark to permit Ellingsen to be regarded as retaining a proprietary interest in the second truck over and above his continuing equitable interest, if any, in the first truck.

73 I turn to the secured creditors and general creditors of the bankrupt. They are set out in the Statement of Affairs which was filed. Except for the bank account of $1,200 and furniture valued at $1,420, both of which were pledged as security, one to

the Bank of Nova Scotia and the other to Trans Canada Credit Corporation, the only asset of the estate was said to be the second truck. If the second truck is made subject to a remedial constructive trust then the two secured creditors, if they have claims over and above their security, and all of the general creditors, will receive no recovery on their claims. But there is absolutely nothing in this matter to indicate that the creditors are anything other than ordinary household creditors or ordinary small trade creditors, or to indicate that they advanced credit on the basis that Ellingsen had an unencumbered proprietary interest in the second truck. There is no indication in the material that any third party was misled or prejudiced by an assumption that since no security interest was registered against the second truck, it must be available to meet the demands of Ellingsen's creditors.

74 In those circumstances, the relationship between Ellingsen and Hallmark invites the imposition of a remedial constructive trust, and there is nothing in the evidence with respect to secured creditors, general creditors or third parties which would make the imposition of a remedial constructive trust improper or contrary to good commercial conscience.

The Integrity of the Personal Property Security Act

75 If the *Personal Property Security Act* applied, it would not be prevented from operation by the fact that there was no legally effective document creating a security interest in the collateral represented by the second truck, because no such document is necessary to the registration of a financing statement to perfect a security interest in collateral.

76 And if the *Personal Property Security Act* applied, it would not be prevented from operating by the fact that the interest of Ellingsen was possessory only until such time as the condition precedent was fulfilled, since an interest in possession by a non-owner may be sufficient to support the registration of a financing statement to record a security interest by the owner in the collateral.

77 Furthermore, the *Personal Property Security Act* may never have applied because the interest of Hallmark in the second truck was not an interest "that secures payment of the performance of an obligation" within the meaning of the definition of "security interests" in the Act, with the result that, there being no security interest in collateral, the Act would have no application. But it is not necessary for me to decide that point and I prefer not to do so until a case arises where it is essential to the decision.

78 The reason why that point need not be decided is that by the declaration of a remedial constructive trust such as is proposed in this case that trust would become effective at the time when Hallmark was told by Ellingsen on 15 March to come and collect the truck. At that point Ellingsen's possession of the truck unjustly enriched him without any continuing juristic reason and Hallmark became entitled to restitution.

79 The *Personal Property Security Act* provides explicitly, in s.4(a), that the Act does not apply to an interest given by a rule of law. The remedial constructive trust that came into being on 15 March, either directly at the time, or retroactively to that time by the declaration of this Court, is an interest given by a rule of law and so is excluded from the operation of the Act.

80 The integrity of the *Personal Property Security Act* is maintained because this is not a case of a simple failure to register a financing statement in a timely way. The two elements which protect the integrity of the Act, though imposing a remedial constructive trust in this case, are, first, that the acts of the parties and not the failure to register created the right to restitution and the unjust enrichment, both of which came into being entirely independently of the Act, and both of which came into being through a failure of a contract to arise at all and not from non-performance of a contract or from a breach of contract, and, second, that no one has been shown to have been prejudiced by an absence of registration, neither a secured creditor, nor a general creditor, nor a third party, all of whom must have taken their credit risks without any assumption that the second truck was unencumbered. There is no evidence of any party relying on the absence of registration to extend credit. If there had been such prejudice or any such reliance, then such prejudice or reliance might well have affected the question of whether a remedial constructive trust ought to be declared and, if so, on the terms and extent of the remedial constructive trust.

Conclusion and Disposition

81 I agree with Mr. Justice Donald. For the reasons I have given in supplement to the reasons of Mr. Justice Donald, I would respond to the motion for directions under s-s.34(1) of the *Bankruptcy and Insolvency Act* by declaring that the Truck referred

to in the Notice of Motion was held by Ellingsen as a constructive trustee for the benefit of Hallmark on and after 15 March, 1997 and came into the possession of KPMG as Trustee in Bankruptcy of Mr. Ellingsen subject to that constructive trust. It follows, in accordance with s.67(1)(a) of the *Bankruptcy and Insolvency Act* that the truck was not the property of the bankrupt at the date of bankruptcy and that the funds arising from its disposition must be paid over to Hallmark.

Appeal allowed.