In the Court of Appeal of Alberta

Citation: Orphan Well Association v Grant Thornton Limited, 2017 ABCA 124

Date: 20170424
Docket: 1601-0129-AC;
1601-0130-AC
Registry: Calgary

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#1601-0129-AC

Between:

Orphan Well Association

Appellant
(Applicant)

- and -

Grant Thornton Limited and Alberta Treasury Branches

Respondents
(Applicants/Respondents)

- and -

Alberta Energy Regulator

Respondent
(Respondent/Applicant)

- and -

Minister of Justice and Solicitor General of Alberta, Canadian Association of Petroleum Producers; Canadian Association of Insolvency and Restructuring Professionals; Attorney General for Saskatchewan; and Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Natural Gas Development and British Columbia Oil and Gas Commission

Intervenors
(Interested Parties)

#1601-0130-AC

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Alberta Energy Regulator

Appellant
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Intervenors
(Interested Parties)

The Court:

The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Frederica Schutz
The Honourable Madam Justice Sheilah Martin

Reasons for Judgment Reserved of the Honourable Mr. Justice Slatter
Concurred in by the Honourable Madam Justice Schutz

Dissenting Reasons for Judgment Reserved of the Honourable Madam Justice Martin

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Appeal from the Decision by
The Honourable Chief Justice N.C. Wittmann
Dated the 17th day of May, 2016
Filed the 19th day of May, 2016
(2016 ABQB 278, Docket: 1501 04793; BK01 094570)

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Reasons for Judgment Reserved of the Honourable Mr. Justice Slatter

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[1] These appeals concern the rights and obligations of a trustee in bankruptcy administering the estate of an insolvent oil and gas company which owns wells that are at the end of their life and must be abandoned and remediated. These appeals engage the interaction of federal legislation on insolvent debtors (the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3) and provincial legislation regulating the oil and gas industry, particularly with regard to environmental and public safety issues.

[2] Shortly put, Redwater Energy Corporation is an insolvent oil and gas company. It owns some oil wells that are valuable, and others that may potentially be declared "orphans" because the costs of environmental remediation required to abandon them exceed the value of those wells: see *infra*, para. 21. Redwater's trustee in bankruptcy wants to renounce or disclaim Redwater's interest in the orphan wells, but keep and sell the valuable wells to maximize the recovery of the secured creditor. The Alberta Energy Regulator says that this is not permissible, and a sufficient portion of the sale proceeds from the valuable wells must be set aside to meet the expected costs of remediating the orphan wells.

Background

[3] The background to these appeals includes (a) the particular circumstances of Redwater Energy Corporation, (b) the general regulation of the oil and gas industry in Alberta, (c) the role of the Orphan Well Association in the handling of "orphan wells", (d) the constitutional context and (e) the nature of mineral titles in Alberta.

Redwater Energy Corporation

[4] Redwater Energy Corporation was a publicly traded oil and gas company. It is a licensee under the jurisdiction of the Alberta Energy Regulator with respect to numerous properties. Redwater suffered financial setbacks and was unable to meet its financial obligations. Redwater's principal secured creditor, the Alberta Treasury Branches, commenced enforcement proceedings. On May 12, 2015 Grant Thornton was appointed Receiver for Redwater under the *Bankruptcy and Insolvency Act*.

[5] When advised of the receivership, the Alberta Energy Regulator summarized its position to the Receiver in a letter of May 14, 2015 (trial reasons, para. 19). Its position mirrored the ruling in ***PanAmericana de Bienes y Servicios S.A. v Northern Badger Oil & Gas Ltd.***, 1991 ABCA 181, 81 Alta LR (2d) 45, 117 AR 44, leave to appeal denied [1992] 1 SCR x, that it was not a "creditor", that environmental obligations were not claims provable in bankruptcy, and that accordingly the environmental obligations of Redwater were unaffected by the insolvency proceedings. Further, the Regulator noted that a receiver or trustee is defined as a "licensee" under the statutory regime.

The Regulator took the position that the Receiver was legally obliged to discharge Redwater's environmental obligations "prior to distributing any funds . . . to creditors, secured or otherwise". The Regulator warned that, in accordance with its usual policies, it would not approve any transfers of Redwater's oil and gas assets unless it was satisfied that both the transferor and transferee would be in a position to fulfil all environmental obligations.

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[6] On July 3, 2015 the Receiver advised the Alberta Energy Regulator that it would only be taking control of approximately 20 of the 127 Redwater properties licensed by the Regulator. The Receiver proposed to take control of Redwater's valuable properties, while renouncing or disclaiming the rest of the properties. The disclaimed properties had attached to them potentially onerous environmental obligations requiring the shutting-in of the wells, and remediation of the surface. The value of those wells was less than the potential environmental clean-up costs. The Regulator responded by issuing orders requiring the abandonment and remediation "for environmental and public safety reasons" of the assets that the Receiver had disclaimed.

[7] On October 28, 2015 a bankruptcy order was issued for Redwater, appointing Grant Thornton as Trustee in bankruptcy. On November 2, 2015 the Trustee disclaimed the assets it had previously renounced in its capacity as Receiver, and indicated that it did not intend to comply with the environmental remediation orders.

[8] The Alberta Energy Regulator and the Orphan Well Association brought applications for declarations that the disclaimer by the Receiver and Trustee of some of Redwater's assets was void. They also seek an order compelling compliance with the abandonment and remediation orders issued by the Regulator. The Trustee brought a cross-application for approval of the sale of some assets, and a ruling on the constitutionality of the Regulator's position.

[9] The chambers judge concluded that the claim of Redwater's secured creditor, the Alberta Treasury Branches, has priority over the obligation to reclaim the wells: ***Redwater Energy Corporation (Re)***, 2016 ABQB 278, 33 Alta LR (6th) 221. Two appeals were launched, one by the Orphan Well Association and one by the Alberta Energy Regulator. Four intervenors appeared in support of the appellants' arguments: the Minister of Justice and Solicitor General of Alberta, the Canadian Association of Petroleum Producers, the Attorney General for Saskatchewan, and Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Natural Gas Development and the British Columbia Oil and Gas Commission. The respondents are the Trustee in Bankruptcy, Grant Thornton Limited, and the secured creditor, Alberta Treasury Branches. The Canadian Association of Insolvency and Restructuring Professionals intervened in support of the respondents. The Government of Canada did not participate in the proceedings.

[10] The issues in these appeals are the priority of environmental claims, and whether a receiver or trustee in bankruptcy must satisfy the contingent liability inherent in the remediation of the worthless wells in priority to the claims of secured creditors. There are no material facts in dispute, and the questions of law raised by these appeals are reviewed for correctness.

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Regulation of the Oil and Gas Industry

[11] The Alberta oil and gas industry is regulated by the Alberta Energy Regulator, which is established under the *Responsible Energy Development Act*, SA 2012, c. R-17.3, and which derives its authority from the *Oil and Gas Conservation Act*, RSA 2000, c. O-6, and the *Pipeline Act*, RSA 2000, c. P-15. The Alberta Energy Regulator has wide ranging powers to regulate all aspects of the upstream oil and gas industry. The Regulator fulfils its mandate by issuing a separate licence for each oil and gas well or pipeline, and then by imposing on the licensee conditions which control all aspects of the operation, disposition and eventual shutting-in of the licensed property.

[12] When oil and gas wells are producing, they are very valuable assets. However, when they cease to be productive they quickly turn into significant liabilities. For public safety and environmental reasons, the Alberta Energy Regulator has specific "end-of-life" rules on how a spent well must be rendered environmentally safe by being shut-in and "abandoned". In general terms, the end-of-life obligations of the owner of the well are to cement-in various formations deep underground, to "cap" the well, and to restore the surface to its original condition: Alberta Energy Regulator *Directive 020: Well Abandonment*; *Environmental Protection and Enhancement Act*, RSA 2000, c. E-12, s. 137. Compliance with those requirements can be expensive.

[13] Many oil and gas licensees will have both producing assets and non-producing assets that are candidates for abandonment. One particular concern of the Alberta Energy Regulator is that the licensee not sell off all of its valuable assets, while keeping all of its non-producing assets, unless it will have sufficient resources (after payment of its debts) to fund the required abandonments. The Regulator might insist on the purchaser acquiring all of the assets (both producing and non-producing) and taking on all the end-of-life obligations, it may require the posting of security for the costs of abandonment, it may require that abandonment work be done before the transfer, or it may impose other conditions on the sale to the same effect.

[14] The Regulator's overall approach is not new. It has always regulated the environmental impact of the industry, and particularly the shutting-in of spent wells. The regulatory techniques have undoubtedly changed and become more sophisticated, but the overall objectives are unchanged. From a legal perspective, the Regulator has set its policies in accordance with the provincial legislation, as interpreted in cases like ***Northern Badger*** (discussed *infra*, para. 49), which up until the trial reasons in this case was thought by some to reflect the law.

[15] The Alberta Energy Regulator attempts to ensure the financial ability of licensees to meet their obligations with respect to abandoned wells. It calculates on a monthly basis a Licensee Liability Rating for all licensees: *Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process*, and *Directive 011: Licensee Liability Rating (LLR) Program: Updated Industry Parameters and Liability Costs*. The Licensee Liability Rating uses a formula which estimates the nominal value of the oil and gas assets of the company, and the estimated accumulated end-of-life obligations of the company. The result is the Liability Management

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Rating for the licensee. The values calculated by the formula have no direct relationship to the fair market value of the assets. A licensee is required to maintain a ratio of at least 1.0, meaning that it has at least as many notional assets as liabilities. The Alberta Energy Regulator will generally not approve the transfer of any licensed assets unless it is satisfied that the purchaser or the seller of the assets will continue to have the resources necessary to abandon any depleted wells.

[16] The trial reasons explain the process in greater detail at para. 28:

> 28 In her affidavit sworn on August 13, 2015, Patricia Johnston, Executive Vice President and General Counsel for the Regulator, explains that under the LLR program, "the AER conducts a liability assessment for each licensee, which is based on the estimated costs to suspend, abandon, reclaim and remediate the AER licensed properties of that licensee." She adds that "[b]ased on that assessment, the AER assigns a liability management ratio (LMR) to each licensee," which is the ratio of the licensee's eligible deemed assets as compared to its deemed liabilities. This is accomplished through the monthly calculation and on receipt of transfer applications to transfer existing AER licenses. As noted on a Liability Management Program Results report dated September 5, 2015, "the [LMR] provided for licensees reflect the results of a comparison of their deemed assets to their deemed liabilities for all Liability Management programs. This ratio is based on information reported to the AER and the calculation of deemed assets and deemed liabilities as specified in AER Directives": *Directive 006; Directive 024*: *Large Facility Liability Management Program (LFP)* ("*Directive 024*") and *Directive 075*: *Oilfield Waste Liability (OWL) Program* ("*Directive 075*"). If either party's post-transaction LMR is lower than 1.0, the AER will either deny the transfer application or will require additional security. If a licensee's deemed liabilities exceed its deemed assets in addition to any previous security posted, the AER will consider the security adjusted LMR to be below 1.0. The AER will require the licensee to either conduct abandonment of some or all of its AER licensed properties as a means of increasing its LMR above 1.0 or post security in the amount of the difference.

In Redwater's case, the Alberta Energy Regulator has advised that (in accordance with its standard policies) it will not permit the transfer of the producing wells unless the non-producing wells are sold with them, or security is posted to cover the anticipated environmental obligations.

[17] Problems obviously arise when the owner, or "licensee", of a well fails to discharge its obligations with respect to abandonment. The biggest risk arises with licensees that are so insolvent that they become subject to receivership and bankruptcy proceedings. The definitions of "licensee" in the *Oil and Gas Conservation Act* and the *Pipeline Act* include not only the original oil and gas company, but also any receiver or trustee in bankruptcy of that company. The

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obligation of such a receiver or trustee to deal with the assets of the bankrupt company, with regard to its obligation to remediate oil wells, underlies these appeals.

[18] As noted, the Receiver and Trustee purported to renounce or disclaim many of Redwater's assets, while realizing on the valuable assets. To illustrate the position of the parties, as of September 2015 Redwater's Licensee Management Rating was calculated as follows:

	Deemed Value ($Millions)	Deemed Liabilities ($Millions)	Net ($Millions)	Liability Rating
Producing Wells	$6.4	$2.248	$4.152	2.85
Non-producing Wells	$0.547	$5.252	($4.705)	0.30
Total	$6.947	$7.5	($0.553)	0.93

This chart demonstrates that, considered globally, Redwater's oil and gas assets had no net value under the Regulator's formula. Its anticipated environmental abandonment costs exceeded its asset value by $553,000.[1] On the other hand, if only Redwater's producing wells were considered, there was a significant amount of value available for its secured creditor. If the Trustee was able to sell off only the producing assets, it might recover about $4.152 million, even if the purchaser had to assume inchoate environmental liabilities of about $2.248 million.

[19] The Regulator calculated Redwater's Licensee Management Rating as 0.93 at the time of the receivership. The policy of the Regulator is that it will not insist on a ratio of 1.0 after a sale, but would be content if the present rating of 0.93 was maintained. The Regulator's position is that all of an insolvent company's oil and gas assets must first be devoted to its environmental obligations before any creditor can be paid. Thus, Redwater's secured creditor would not be entitled to any recovery after the insolvency given the value of the various assets and the inherent environmental liabilities that were outstanding. In effect, the inchoate environmental claims are given a super priority over even the claims of secured creditors, by means of the Regulator's control of the transfer of the underlying licences.

[20] If the calculations are correct, and the true cost of remediating the non-producing wells exceeds the value of all the assets, there would be no net value in Redwater's estate. If the remediation costs do enjoy a super priority, there would be no point to the Alberta Treasury Branches retaining and paying an insolvency professional to wind up the Redwater estate. The prudent lender in the circumstances would simply walk away from its loans, and all of the wells would truly become "orphaned". Further, if lenders (even secured lenders) are faced with this kind

[1] The Receiver calculated the actual deficit as being much more than that. It estimated that the non-producing wells have no value, and the abandonment costs likely exceed the estimates.

of contingent risk, the amount of financing available to the oil and gas industry can only decline substantially.

The Orphan Well Association

[21] A well at the end of its life that is not controlled by a corporation that is financially able to shut it in and remediate the surface will be designated an "orphan well" by the Alberta Energy Regulator: *Oil and Gas Conservation Act*, s. 70. Section 70(2) of the *Act* gives the Regulator the authority to "designate wells . . . for the purposes of this Part". Section 70(1)(a) allows use of the "orphan fund":

> (a) to pay for suspension costs, abandonment costs and related reclamation costs in respect of orphan wells, facilities, facility sites and well sites . . .

Section 70(2)(b) authorizes the Regulator to deem working interest participants to be "defaulting" in a number of circumstances including where, in the opinion of the Regulator, the participant "does not exist, cannot be located or does not have the financial means to contribute" to remediation costs. The "orphan" concept is carried through the regulatory system, and is further explained in the *Licensee Liability Rating Directive 006*:

> 7.1 Orphan Site
>
> A well, facility, or pipeline in the LLR program is eligible to be declared an orphan when the licensee of that licence becomes insolvent or defunct. Once it determines a well, facility, or pipeline meets the criteria outlined in section 70(2) of the *Oil and Gas Conservation Act*, the AER will designate it as an orphan. The well, facility, or pipeline will then be considered to be an orphan for all aspects of this program: suspension, abandonment, remediation, and reclamation.

Designation as an orphan is usually only done after any insolvency process is completed, when and if it becomes apparent that there is no one capable of properly abandoning the well.

[22] The Orphan Well Association is a non-profit organization operating under authority delegated by the Alberta Energy Regulator: *Orphan Fund Delegated Administration Regulation*, AR 45/2001. Its board includes representatives of various oil and gas stakeholders. It is funded by an orphan fund levy imposed and controlled by the Alberta Energy Regulator, security deposits that licensees have been required to post, and some limited government funding. The Alberta Energy Regulator presently holds more than $290 million in security for compliance with end-of-life obligations.

[23] The Orphan Well Association strives to abandon and reclaim wells that have been designated as "orphans" by the Alberta Energy Regulator, but the number of orphan wells has seen a dramatic increase in recent years. As of September 2015 the Orphan Well Association had 695

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wells that needed to be abandoned and 503 sites that needed to be reclaimed. The Association does not presently have sufficient resources to reclaim all the identified orphan wells, but hopes to complete the work over the next 10 to 12 years. The Association has appealed the chambers decision as it predicts that decision will result in increasing numbers of orphan wells.

The Constitutional Context

[24] All the parties and intervenors agree:

(a) The *Bankruptcy and Insolvency Act* is valid federal legislation;

(b) The *Oil and Gas Conservation Act* and the *Pipeline Act* are valid provincial legislation; and

(c) In case of conflict, the federal legislation prevails.

The paramountcy doctrine will be engaged if (i) there is an operational conflict between the federal and the provincial legislation because it is impossible to comply with both laws, or (ii) if the provincial legislation fundamentally frustrates the objectives of the federal legislation: ***Alberta (Attorney General) v Moloney***, 2015 SCC 51 at para. 18, [2015] 3 SCR 327; ***407 ETR Concession Co. v Canada (Superintendent of Bankruptcy)***, 2015 SCC 52, [2015] 3 SCR 397. Under the principle of cooperative federalism the court will first attempt to interpret and apply the two provisions in harmony with each other, and only if that fails will paramountcy be invoked.

[25] To be specific, no party disputed the ability of the Alberta Energy Regulator to regulate and license all aspects of the upstream oil and gas industry. That includes managing environmental and end-of-life issues, for example by maintaining Liability Management Ratings and requiring security for end-of-life obligations where deemed appropriate. The Regulator can control the transfer of AER licences and licensed properties. The applicable provincial legislation is all validly enacted within the Province's constitutional jurisdiction. The result of the trial reasons is not that the Alberta Energy Regulator cannot regulate end-of-life obligations, it just means that the Regulator must not wait until an event of insolvency before doing so.

[26] The priorities of the various claims are to be decided under the *Bankruptcy and Insolvency Act*: ***Newfoundland and Labrador v AbitibiBowater Inc.***, 2012 SCC 67 at paras. 18-9, [2012] 3 SCR 443. If that outcome is consistent with the outcome under the provincial legislation, there is no constitutional issue. If the outcome under the provincial legislation is inconsistent with the outcome under the *BIA*, then it is conceded that the latter prevails. If the *BIA* says that one obligation is to be satisfied in priority, and the provincial legislation says that a different obligation must be discharged, there is an operational conflict. The provinces cannot intentionally or unintentionally reorder the priority of claims in bankruptcy: ***Husky Oil Operations Ltd. v Minister of National Revenue***, [1995] 3 SCR 453.

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[27] Both subsections 14.06(2) and (4) of the *BIA* (discussed *infra*, paras. 53ff) expressly provide that they operate "notwithstanding anything in any federal or provincial law". With respect to other federal statutes, this is an interpretive aid that confirms the primacy of the *BIA* in case of conflict. This proviso performs the same interpretive function with respect to inconsistent provincial legislation. Its validity in that respect derives from the paramountcy doctrine.

[28] As the Attorney General for Saskatchewan points out, analogous federal environmental obligations can arise under the *National Energy Board Act*, RSC 1985, c. N-7, s. 48(1.1). If those federal obligations were present on bankruptcy, the trustee would be in the same position of having to decide whether those obligations enjoyed a super priority in the bankruptcy process. There would potentially be a conflict between two valid federal statutes, which conflict would have to be resolved without resort to the paramountcy doctrine. In that event the specific provisions of the *BIA* would prevail, because they state that they apply "notwithstanding anything in any federal or provincial law". Thus, determining that the provincial obligations at issue in these appeals do not create a super priority would not generate an anomalous result as argued. The possible existence of these federal obligations does, however, confirm that the constitutional issues in these appeals are only complementary to the primary statutory interpretation issue.

Mineral Property in Alberta

[29] Privately owned land in Alberta is physically divided and the title to it established under the Torrens system. Typically the title to the surface and the title to the minerals are separated. Most surface titles in Alberta are subject to the proviso: "Excepting thereout all mines and minerals". There is then, for each parcel, a separate mineral title showing the owner of the mineral rights.

[30] About 10% of the mineral titles in Alberta are held privately, mostly through titles that originally vested in the Hudson's Bay Company or the national railroads: ***Bearspaw Petroleum Ltd. (Re)***, [2007] AEUBD No. 24 at para. 5. The vast majority of mineral rights are held by the Crown. Oil and gas companies could therefore hold the rights to the minerals in fee simple, or by lease from the fee simple owner, but more commonly they are exploited under an agreement with the Crown. The outcome of this appeal does not change depending on whether the mineral titles are publically or privately owned. The mineral rights themselves may be stratified, with different parties having rights to different underground formations. There are also a number of "farm out" and "working interest" arrangements whereby several parties can have common interests in the minerals.

[31] In Alberta, ownership of the minerals does not include the right to occupy the surface for the purpose of exploiting the minerals: *Surface Rights Act*, RSA 2000, c. S-24, s. 12. Thus, anyone seeking to extract minerals must have a) rights to the minerals, and b) a right to occupy the surface. Surface rights are obtained either by negotiating a lease with the surface owner (for example, the farmer owning the surface) or by obtaining an order from the Surface Rights Board. The right to occupy the surface usually terminates when the well is abandoned and reclaimed.

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[32] Rights to exploit oil and gas in Alberta, short of a fee simple ownership interest, may be described in various ways: leases, licences, "agreements" under the *Mines and Minerals Act*, RSA 2000, c. M-17, "working interest" arrangements, *profits à prendre*, etc. At common law a "licence" or a contract are usually not interests in land, because they generally do not bind subsequent owners of the property. In Alberta, however, what are sometimes described as "agreements" or "licences" to extract minerals are in the nature of *profits à prendre*, and are properly regarded as interests in land: see *Law of Property Act*, RSA 2000, c. L-7, s. 79; *Mines and Minerals Act*, secs. 1(1)(a), 80(1)(b); ***Alberta Energy Co. v Goodwell Petroleum Corp. Ltd.***, 2003 ABCA 277 at para. 63, 22 Alta LR (4th) 4, 339 AR 201; ***Saulnier v Royal Bank of Canada***, 2008 SCC 58 at para. 28, [2008] 3 SCR 166; ***British Columbia v Tener***, [1985] 1 SCR 533 at p. 541.

[33] Redwater owned a number of *profits à prendre* relating to oil and gas deposits in Alberta. The *BIA* contains a very wide definition of "property", including ". . . land and every description of property, whether real or personal . . . and every description of estate, interest and profit, present or future, vested or contingent . . ." in property. This definition clearly includes *profits à prendre*. While there is no separate definition of "real property", it too should be given an expansive meaning where it is used, especially in s. 14.06(4) which refers to "any interest in any real property." It follows that, for bankruptcy purposes, Redwater's interests in oil and gas deposits should be regarded as interests in real property, and Redwater should be treated as an owner of those real property interests.

[34] The word "licence" has several meanings in the context of this appeal. It can mean an agreement giving a proprietary right in minerals or a right to exploit or extract the minerals in land. It can also mean a regulatory licence required to engage in a particular activity. Care must be taken when referring to "licences" in the analysis.

[35] Regulatory licences themselves fall into different categories. There are what might be called "permissive" licences, such as the driver's licence at issue in ***Alberta (Attorney General) v Moloney***. Such a licence allows a person to drive, but does not give any proprietary rights in the automobile or the highways. They are sometimes described as mere privileges. Regulatory licences are permissive, but are also tools used to regulate how the permitted activity must be undertaken.

[36] There are also what might be called "quota" licences such as the fishing licence at issue in ***Saulnier***. The fishing licence gave "a good deal more than merely permission to do that which would otherwise be unlawful" (at para. 43). It also gave the licence holder a proprietary right in any wild fish caught, and so was "a licence coupled with a proprietary interest" (at para. 22). While the ***Saulnier*** fishing licence did not guarantee a fishing quota or that fish would be caught, without such a licence no quota or catch was possible. As a result, the licence in ***Saulnier*** had proprietary characteristics. Another example of a licence with proprietary characteristics is a taxi licence in a municipality which limits the number of licences available.

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[37] Oil and gas proprietary mineral rights cannot be exploited without a licence from the Alberta Energy Regulator, but that does not mean the value of the assets rests in the AER licence as opposed to the mineral deposit. It does not mean, as the Orphan Well Association argues, that the value is in the AER licence because mineral deposits only have value "to the extent that the mines and minerals can be exploited". To illustrate, a person can own a car, but cannot drive it without a driver's licence. That is a permissive licence, because it gives permission to use the asset. Assume that someone buys a car for $30,000, and has it delivered to his or her driveway. One week later the purchaser acquires a driver's licence, and a licence plate for the vehicle (cost, $84). Under the appellants' argument, the car has no value for the week that it sits on the driveway, because it cannot be "exploited" without the licence plate. It would also appear to follow that, once the licence plate is acquired, the licence plate is worth $30,000, not the car. The car, however, has an economic value, and one would not say that value rests in the licence, as opposed to the vehicle itself, just because the owner cannot drive it without the licence. Even if the owner cannot drive, the car can be sold for full value to someone who can drive, or a licence can be acquired for a modest cost. Likewise, a company can own mineral (oil and gas) rights which have value. The oil and gas rights cannot be exploited without a licence from the Alberta Energy Regulator, but that does not mean the value of the asset rests in the AER licence as opposed to the mineral deposit.

[38] The licences issued by the Alberta Energy Regulator are permissive in nature. Without an AER licence, one is not legally allowed to exploit oil and gas properties, but having an AER licence gives no right to exploit mineral resources unless the holder also has proprietary rights in the minerals themselves. Unlike the licence in ***Saulnier***, an AER licence does not give the oil company the right to "wild oil" that it does not already own. Oil and gas properties can only effectively be transferred to another person eligible to hold an AER licence, but the AER licence itself has no proprietary value. It follows that by attempting to extract value on a transfer of the AER licences, the Regulator is in effect transferring the proprietary value in the bankrupt estate from the underlying real property assets to the AER licences.

[39] Mr. Saulnier had a fishing boat, fishing gear, and a licence with proprietary aspects. They all had value. It could not be said that the boat was valueless, because it could not be used without a licence. Mr. Saulnier could have sold the boat for its fair value, and kept the licence with its separate value. He could have sold the boat to one person, and sold the licence to someone else. While the particular type of fishing licence involved in ***Saulnier*** had independent value, it could not be said that the entire value of the enterprise rested in the licence.

[40] Redwater had *profits à prendre* and AER permissive licences. It could have sold the *profits à prendre* to anyone else for their fair value. Redwater could have surrendered the AER permissive licences, or attempted to transfer the licences with the *profits à prendre*. There is, however, no evidence that the AER licences have any intrinsic value themselves, much less that all of the value of the oil and gas deposits rests in the licence. The effect of the Alberta Energy Regulator's policies is to transfer the value from the assets to the AER licences by imposing conditions on the transfers of the permissive licences. Those policies also have the effect of transferring the asserted

value from the AER licences on the producing wells to the AER licences on the non-producing wells. The imposition of those conditions does not, however, make the AER licences "property."

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[41] In summary, a "licence" or "agreement" giving a proprietary right to exploit minerals in Alberta is both "property" and "real property". A permissive AER licence is neither "property" nor "real property". The economic value, at least for bankruptcy purposes, rests in the mines and minerals property itself, and not in the AER licence.

The Bankruptcy Regime

[42] The central issue in these appeals is the priority and treatment of environmental liabilities on bankruptcy, and the primary source of law on the issue is the federal *Bankruptcy and Insolvency Act*. The leading case is ***Newfoundland and Labrador v AbitibiBowater Inc***. For the purposes of these appeals, the scheme of the *BIA* can be summed up as follows:

(a) the purposes of the *BIA*, in general terms, are:

(i) to provide for the orderly liquidation and winding up of the insolvent debtor, at the minimum expense (the "single proceeding" model): ***AbitibiBowater*** at para. 21. All competing proceedings are stayed by the bankruptcy;

(ii) to distribute the realizable assets fairly among the creditors, having regard to the legal priority of various types of debts; and

(iii) to provide the bankrupt with a "fresh start", free of the burden of crushing debt.

(b) the primary tool of the *BIA* is the "trustee in bankruptcy" who takes charge of the assets and liquidation on behalf of the creditors, under the supervision of the court.

(c) a central concept in the bankruptcy regime is "claims provable in bankruptcy" (s. 121), which are the ones encompassed by the "single proceeding" model.

(d) the priority of distribution is set out in s. 136, and is essentially:

(i) secured creditors (ss. 71, 75, 136(1)): "subject to the rights of secured creditors");

(ii) administrative costs (s. 136(1)(b));

(iii) various "preferred creditors" listed in s. 136;

(iv) unsecured creditors, sharing rateably if there are insufficient funds.

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(e) notwithstanding the objective of giving the debtor a fresh start, there are a number of debts listed in s. 178 that, for public policy reasons, survive bankruptcy.

[43] When an individual is discharged from bankruptcy, he or she will obtain the "fresh start" which is one of the objectives of the regime. That "fresh start" is subject to some limits. The discharged bankrupt is still responsible for those debts that have survived bankruptcy. In addition, any claims or obligations "not provable in bankruptcy" are not dealt with in the bankruptcy, and continue. Thus, any regulatory or environmental obligations that are not provable in bankruptcy will continue to bind the bankrupt.

[44] The "fresh start", however, is only true with bankrupt entities that continue to exist. Corporations are not discharged from bankruptcy. After a bankrupt corporation is liquidated it is usually wound up or struck off and ceases to exist. Any regulatory or environmental obligations that were not provable in bankruptcy may exist in theory, but there is no entity against which they could be enforced. The burden of those obligations essentially falls on society at large, which often means the government. In the circumstances under consideration in these appeals, some of those "at large" obligations are taken up by the Orphan Well Association, using the funds that have been set aside for that purpose. But if the end-of-life obligations exceed the capacity of the Orphan Well Association, the residual environmental obligations will still fall on society at large.

[45] A court order appointing a receiver will generally give the receiver the power to take possession and control of all of the assets. All of the assets of a bankrupt automatically vest in the trustee, "subject to the rights of secured creditors": s. 71. The effect of s. 71 is to a) automatically vest the assets in the trustee without further documentation, b) terminate the ability of the bankrupt to deal with the property, and c) allow for the transfer of the assets of the bankrupt estate from one trustee to another. The vesting provision does not provide that a trustee has no ability to disclaim assets that have no realizable value.

[46] The appellants note that the original receivership order granted the Receiver control of all of Redwater's assets. They argue that the attempt to renounce the non-producing assets is inconsistent with the order. To be able to renounce assets, however, the receiver or trustee must first have control of them. If the receivership order had not given the Receiver control of the non-producing assets, there would be nothing to renounce. Section 14.06(4) assumes that the trustee will have control of the assets (either by court order or by operation of the *BIA*) prior to renouncing them. The form of the original receivership order is of no consequence. It is also of no consequence that Grant Thornton disclaimed the assets twice: once in its capacity as receiver, and again as trustee after the assets re-vested under s. 71.

[47] It is commonplace for trustees and receivers to disclaim or "abandon" assets. Whether they formally abandon the assets, or merely leave them unrealized at the end of the bankruptcy process makes little difference. A trustee must transfer unrealized assets to the bankrupt at the end of the process: s. 40. If a trustee decides that an oil and gas well has no net realizable value, either because it is depleted or because it has attached to it liabilities in excess of its value, the trustee can

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effectively ignore the asset. As discussed *infra*, paras. 57, 63 the *BIA* recognizes the ability of a trustee to abandon assets that are subject to environmental obligations.

[48] Section 20 of the *BIA* provides that a trustee may, with the permission of the inspectors, divest any estate or interest in real property, and that the registrar of land titles must accept such a disclaimer. The title will revert back into the name of the bankrupt. The appellants argue that this is the only provision that allows a trustee to disclaim property, but it merely confirms that the disclaimer must be accepted by the registrar for registration. In any event, as discussed *supra*, paras. 31-3, interests in oil and gas properties are properly regarded as real property, and would fall within the section.

Environmental Claims in Bankruptcy

[49] These appeals are concerned with the treatment of environmental liabilities on bankruptcy, which are specifically dealt with in the *BIA*. It is, however, appropriate to first examine the law as it existed prior to 1997, particularly the 1991 decision in ***PanAmericana v Northern Badger***. The Regulator's policies at the date of Redwater's insolvency derived from the decision in ***Northern Badger***.

[50] Northern Badger owned partial working interests in 11 producing wells, and 20 wells in a non-producing condition. In May, 1987 it was placed in receivership by its secured creditor, PanAmericana. Northern Badger was placed into bankruptcy effective as of July 7, 1987. On July 20, 1987 the Energy Resources Conservation Board (the predecessor to the Alberta Energy Regulator) wrote to Northern Badger requiring an undertaking that the wells would be operated, and eventually abandoned, in accordance with the applicable regulations. The receiver replied that 21 of the wells had been transferred to other parties, and that it was striving to transfer all of the assets and liabilities.

[51] The receiver was eventually able to sell the remaining Northern Badger assets for $1.85 million. The sale, however, allowed the purchaser to exclude any wells that had inherent abandonment costs greater than the value of the well. The Court approved the sale, but neither it or the Board had been told about the back-out clause. The purchaser subsequently returned 7 wells, which carried abandonment obligations of about $200,000, back to the receiver, which in turn proposed to turn them over to the trustee in bankruptcy. In 1989 the Board discovered what had happened, and issued an order requiring the preparation of abandonment programs for the 7 wells.

[52] The issue then arose as to whether the receiver could pay the net sale proceeds to the secured creditor, or whether it had to devote sufficient funds to cover Northern Badger's share of the abandonment costs of the 7 wells. A chambers judge concluded that the claim of the secured creditor had priority over the claim of the Board, but the Court of Appeal reversed. The Court held:

(a) The Board's order did not create a "claim provable in bankruptcy". While Northern Badger had a reclamation liability "inchoate from the day the wells were drilled", there

was nothing owed to the Board so as to make it a "creditor". A public authority enforcing public law is not a "creditor" of the person owing the public duty;

(b) The statutory obligation to abandon spent wells was part of the general law of Alberta, binding on all licensees, but this duty is owed to the public at large. Enforcement of that duty does not involve the recovery of money, and is merely enforcement of the general law;

(c) The issue was not therefore whether the Board as a "creditor" had priority over the other creditors, but rather whether the receiver, which had operated the wells, had a duty to abandon them;

(d) While the Board had never granted an operating licence to the receiver, the receiver had by court order stepped into the shoes of Northern Badger, had operated the wells for three years, and as an officer of the court was under an obligation to discharge Northern Badger's public duty to abandon the wells. The back-out clause in the sale contract had been deliberately inserted to impermissibly sidestep this obligation;

(e) The provincial legislative scheme did not conflict with federal insolvency legislation, because the provincial statute was legislation of general application relating to the regulation of the oil and gas industry, and while there might be incidental effects on the priority provisions of the *Bankruptcy Act*, there was no direct conflict in operation.

The effect of ***Northern Badger*** was to make receivers responsible for discharging environmental obligations of the insolvent company, and to place the costs of remedying environmental damage ahead of the claims of even secured creditors. The Legislature of Alberta subsequently amended the legislation to include receivers and trustees in bankruptcy in the definitions of "licensee", thus confirming the interpretation in ***Northern Badger***.

[53] Amendments first introduced into the *BIA* in 1997 deal with environmental claims in some detail:

> No trustee is bound to act
>
> 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.

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Application

(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.

. . .

Liability in respect of environmental matters

(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.

Reports, etc., still required

(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.

Non-liability re certain orders

(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,

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(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.

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.

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.

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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 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.

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.

[54] The effects of s. 14.06 can be summarized:

(a) a trustee in bankruptcy is not <u>personally</u> liable for

(i) pre-bankruptcy environmental "conditions" or damage (s. 14.06(2)(a)),

(ii) post-bankruptcy environmental "conditions" or damage, absent specified misconduct ("gross negligence or wilful misconduct") (s. 14.06(2)(b)),

(iii) compliance with post-bankruptcy "orders", "notwithstanding anything in any federal or provincial law", so long as the trustee abandons or releases any interest in the "real property" that is "affected by the condition or damage" within the time specified (s. 14.06(4)(a)),

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but, a trustee is bound to comply with environmental reporting duties (s. 14.06(3)),

(b) notwithstanding the general definition of provable claims in subsection 121(1), a claim for the costs of remedying any environmental condition is provable in bankruptcy whether the condition arose before or after the bankruptcy (s. 14.06(8)). This provision is of general application and is not tied to "personal liability" of trustees,

(c) the bankrupt estate remains liable for environmental damage, and must comply with environmental reporting duties, and

(i) remediation costs for abandoned property do not rank in priority as "costs of administration" (s. 14.06(6)),

(ii) claims by Canada or a province for "remedying any environmental condition or environmental damage" are a secured charge on the real property or any "contiguous" property "related to the activity" that caused the environmental damage (s. 14.06(7)), and

(iii) the deemed secured charge ranks prior to any other claim or security against the property (s. 14.06(7)(b)).

The environmental sections of the *BIA* are provisions of general application, in force all across Canada, applicable to all types of assets. The general wording used has to be interpreted and applied having regard to the particular circumstances. Oil and gas properties have certain unusual features which require a contextual application of these provisions.

[55] For example, s. 14.06(7) grants a security interest to a government that remediates property. That section does not create any generalized priority or super priority for existing or contingent environmental liabilities; it only comes into play where a government has actually remediated specific contaminated property. While that section operates through the use of a limited and focused super priority, it is based on the restitutionary principle that a party that discharges the obligation of another is entitled to be compensated for its efforts by the original obligee and its successors in title. It simply recognizes a type of subrogated claim, and is not a part of any broader "statutory compromise". If a government ends up having to incur the expense of remediating property, the previous defaulting owner or its secured creditor cannot insist on getting back the restored land without refunding those costs to the government. For example, if a government remediates a site (say an industrial site, or an open pit mine) resulting in a parcel of land with some value (say a clean industrial site, or perhaps only pasture or parkland) the

government has a security interest in that site. If the defaulting owner wants to get that parcel back, it has to pay the remediation costs.

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[56] Section 14.06(7) will rarely, if ever, have any practical application to oil and gas wells. If a government (directly, or through an agency like the Orphan Well Association) remediates an abandoned well, there is usually nothing of value left. The oil well itself is cemented-in at various underground formations, and becomes nothing more than a plugged hole in the ground. The well is shut-in at the surface, and the surface remediated. At that point the surface rights terminate, and there is no property interest of value left. Thus, the security interest created by s. 14.06(7) is of no real value, subject to two possible exceptions. It is possible that in the future someone might drill a new well, parallel to the shut-in well, and again seek to exploit the oil and gas deposit. This assumes, however, that the deposit has not been depleted, but that it has insufficient present economic value to be marketable by the trustee, assumptions that have no air of reality to them. The second possible exception is that the security interest created by s. 14.06(7) also attaches to "contiguous" properties with value.[2]

[57] For the purposes of these appeals, there are some other consequences of s. 14.06 worth highlighting:

(a) Absent the specified forms of misconduct in s. 14.06(2)(b), the trustee or receiver is not personally liable for environmental liabilities, meaning that the obligation to remedy that type of damage is limited to the assets available in the bankrupt estate itself;

(b) The amendments to the provincial legislation to include receivers and trustees in the definition of "licensee" have no ultimate effect on the outcome of these appeals, because s. 14.06 states that the *BIA* provisions apply "notwithstanding any provincial law." Trustees do not have to "step into the regulatory shoes" of the bankrupt, and do not have to take assets with "warts";

(c) A trustee can abandon or renounce assets encumbered with environmental obligations, in this case the *profits à prendre* in the oil and gas deposits, not the surface or underlying mineral titles in which the bankrupt estate has no other interest;

(d) Environmental claims, whether contingent or "inchoate from the day the wells were drilled", are now provable in bankruptcy under s. 14.06(8) if sufficiently expressed in monetary terms: ***AbitibiBowater*** at para. 26. The already wide definition of "provable claims" in s. 121 is clarified and expanded with respect to environmental obligations. The decision in ***AbitibiBowater***, which dealt with claims against the insolvent estate,

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[2] The record does not disclose whether any "contiguous" properties are in issue in this case. The argument that "contiguous" means "all assets of the same type" seems implausible. In any event this issue was not fully argued in these appeals, and need not be discussed further.

not just the monitor, demonstrates that s. 14.06(8) is of general application, and not just about the personal liability of trustees and receivers. For example, any claim for environmental damage asserted by the owner of the surface title would clearly be a claim provable in bankruptcy;

(e) The amendments do not change the basic priority regime in bankruptcy described *supra*, para. 42(d). The order of payment of claims in bankruptcy under s. 136 is still "subject to the rights of secured parties". Parliament did not (as it could have) provide that provable claims are to be paid "subject to environmental claims, and next subject to the rights of secured creditors": ***AbitibiBowater*** at para. 33.

(f) Section 14.06(7) does not create any generalized super priority, nor does it purport to disrupt the normal priority of claims. Indeed, if environmental claims do enjoy a general super priority as argued by the appellants, s. 14.07 would appear to be of little practical effect other than to attach "contiguous" assets;

(g) Specifically, if anyone (such as the Orphan Well Association) did spend funds on remediating a disclaimed oil well, under s. 14.06(6) those costs are not part of the administration costs in the bankruptcy, and so would not achieve the priority given to those costs: see *supra*, para. 42(d). This subsection would not be needed at all if environmental claims had a super priority over even secured claims, because in that event they would rank prior to administrative costs as well. It was argued that s. 14.06(6) only applies to "claims", and (it would appear to follow) not remediation costs incurred by the trustee itself. It is unlikely that a trustee would be permitted to spend estate funds on remediating a well it had disclaimed, as that would amount to dispersing the estate other than in accordance with the priorities established by law.[3] But if the trustee incurred expenses on remediation of abandoned wells, why would they be given a higher priority (as administration costs) than the same expenses when incurred by a third party (which, on this argument, appear to be ordinary unsecured claims)?

Section 14.06 does not except environmental claims out of the general bankruptcy regime; on the contrary, it tries to incorporate them within that regime. While these provisions should be regarded as a "complete code", in the sense that they provide the only exceptions to the general bankruptcy regime applicable to environmental claims, they are not a "stand-alone code". They assume that the general bankruptcy regime applies to environmental claims, except for the particular rules found in s. 14.06 itself.

[3] If a trustee spent such funds to avoid engaging in "gross negligence or wilful misconduct" the question would arise whether those are costs of administration, an issue that need not be decided in these reasons.

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[58] The provisions respecting environmental claims on bankruptcy were examined in ***AbitibiBowater***. Abitibi conducted mining, logging and pulp and paper operations on five sites in Newfoundland until it became insolvent. It applied for bankruptcy protection in the United States, and a stay in Canada under the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36. The case is not, strictly speaking, about s. 14.06 of the *BIA*, but the key provisions in the two statutes are the same.

[59] The Province cancelled Abitibi's operational rights, expropriated three of the five Abitibi sites, and issued orders requiring remediation of all five sites. The issue was whether the stay issued in the *CCAA* proceedings extended to that type of order. The Supreme Court confirmed that not all regulatory orders are sufficiently quantified to qualify as "provable claims" in insolvency proceedings.

[60] If the environmental obligation is framed in monetary terms, it will qualify as a provable claim: ***AbitibiBowater*** at paras. 2, 30. If it is not framed in monetary terms, it must be examined to see whether it will "ripen into a financial liability", having regard to the "factual matrix and the applicable statutory framework" (at paras. 3, 31). There is a three part test (at para. 26):

(a) There must be a debt, liability or obligation to a creditor. When a regulatory body exercises its enforcement powers against a debtor, it is a "creditor" in insolvency proceedings (at para. 27);

(b) The debt, liability or obligation must be incurred at the relevant time in relation to the insolvency. For environmental claims, this can be before or after the insolvency proceedings have commenced (*CCAA*, s. 11.8(9); *BIA*, s. 14.06(8)); and

(c) It must be possible to attach a monetary value to the debt, liability or obligation. The claim may be contingent, as long as it is not too remote or speculative to be included with the other claims. That depends on whether there is "sufficient certainty" that the regulatory body will ultimately perform remediation and crystallize the claim (at para. 36). In assessing the certainty of the claim, the court can examine the entire factual context, including whether the debtor is in control of the property, whether it has the means to comply with the order, whether there are other parties responsible for the remediation, as well as the effect that compliance with the order would have on the insolvency process.

The Supreme Court held that the test had been met in ***AbitibiBowater***, and that the environmental orders were "provable claims" caught by the stay under the *CCAA*.

[61] ***AbitibiBowater*** confirms some general principles about the treatment of environmental claims on insolvency. Firstly, environmental claims do not have any higher or special priority: ***AbitibiBowater*** at para. 19. Section 14.06 does not create any generalized super priority, nor does it purport to disrupt the normal priority of claims. The order of payment of claims in bankruptcy

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under s. 136 is still "subject to the rights of secured parties". "If Parliament had intended that the debtor always satisfy all remediation costs, it would have granted the Crown a priority with respect to the totality of the debtor's assets": ***AbitibiBowater*** at para. 33.

[62] Secondly, bankruptcy does not absolve the bankrupt corporation of its environmental obligations: ***AbitibiBowater*** at para. 40. Neither s. 14.06 nor the reasons of the chambers judge "mandate the release of liability of the estate for complying with regulatory orders", as the Orphan Well Association argues. Those obligations continue, although the corporation will likely be without the means to satisfy them. The trustee is not personally liable for environmental obligations, but that does not mean that the bankrupt debtor's estate is not liable. Environmental claims that are not provable in bankruptcy under the ***AbitibiBowater*** test will not be affected by the bankruptcy.[4]

[63] ***AbitibiBowater*** at para. 47 confirms that ***Northern Badger*** cannot survive the 1997 amendments to the *BIA*. For example:

(a) Section 14.06(8) provides that a claim arising from environmental damage can be a claim provable in bankruptcy, and that a regulator can be a "creditor": ***AbitibiBowater*** at paras. 26-7. The findings that environmental claims are not provable in bankruptcy, and that regulators are not creditors, were central to the analysis in ***Northern Badger***.

(b) Section 14.06(4) confirms that a receiver or trustee can "abandon" property burdened with environmental liabilities, notwithstanding that all assets of the bankrupt vest in the trustee under s. 71. This effectively reverses the finding in ***Northern Badger*** that the receiver in that case could not take the benefits of some wells, while abandoning the public duty to remediate other wells. Section 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. Even if it does create the right to abandon, and even if abandonment is limited to "real property", interests in oil and gas properties are interests in real property (*supra*, paras. 32-3). It is the physical oil and gas assets that become contaminated, not the paper AER licences. It is the physical assets that are renounced by the trustee, not the AER licences. In any event, the trustee can merely disregard assets incapable of realization and must turn them back to the bankrupt under s. 40, making the point moot.

(c) Under the amended *BIA*, the environmental liabilities rest on the bankrupt estate. Section 14.06(6) provides that remediation costs of abandoned properties do not rank as costs of administration. Thus it must be implied that if the trustee should incur costs in remediating abandoned properties, those costs cannot be paid prior to the other listed preferred claims, or the claims of secured creditors. The result in ***Northern Badger*** is

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[4] One example of an environmental claim that would survive the bankruptcy is the inchoate environmental obligations that are inherent in the 20 Redwater producing wells that the Trustee proposes to sell. See *supra*, para. 18.

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inconsistent with this outcome: ***Harbert Distressed Investment Fund, L.P. v General Chemical Canada Ltd.***, 2007 ONCA 600 at paras. 45-6, 35 CBR (5th) 163.

(d) ***Northern Badger*** only examined the applicability of the paramountcy doctrine based on "direct operational conflict", whereas the law now confirms that paramountcy also arises when the provincial legislation frustrates the purpose of the federal legislation: ***Moloney***, ***407 ETR.*** To the extent that the provincial legislation requires a trustee to give priority to environmental claims, it is inoperative.

Northern Badger categorized environmental claims as not being "provable in bankruptcy", and so outside the bankruptcy process. Section 14.06(8) and ***AbitibiBowater*** now confirm that some environmental claims are provable in bankruptcy, in particular when they meet the three part test in ***AbitibiBowater***. For claims that do not meet the ***AbitibiBowater*** test, ***Northern Badger*** may still apply. Whether the claims at issue in these appeals are provable in bankruptcy must be determined under the tests in s. 14.06 and ***AbitibiBowater***, and ***Northern Badger*** is of limited assistance.

[64] The decision in ***AbitibiBowater*** cannot be distinguished on the basis that remediation and abandonment obligations attaching to oil and gas assets are anticipated in advance, "inherent in the nature of the properties", or a part of the overall permission (represented by the AER licence) to extract the resource. The same thing could be said about the environmental obligations in ***AbitibiBowater***. The need to close down and remediate the mine (especially its tailing ponds) and pulp and paper mills involved in that appeal would also have been known and anticipated the first day the mine was opened and the pulp and paper mills commenced operations. Any regulatory authority granted to operate those facilities would have been given on the premise that, at the right time, proper remediation would occur. These future obligations of the debtor become claims provable in bankruptcy when they arise, so long as they are reduced to a monetary claim and meet the other conditions set out in ***AbitibiBowater***.

[65] The appellants argue that s. 14.06 only deals with the personal liability of trustees and receivers. They argue that the section merely means that the Trustee has no further environmental obligations once the assets of the Redwater estate are exhausted. However, they argue, until the assets of the estate are exhausted, the Trustee is obliged to discharge all of Redwater's environmental obligations. The appellants essentially argue that "personal liability" of the Trustee is a condition precedent to the operation of these provisions.

[66] The appellants rely extensively on debates in the House of Commons Standing Committee on Industry as recorded in *Hansard*. They argue that these debates demonstrate that the primary purpose of the *BIA* amendments was to deal with the personal liability of trustees. The extracts from *Hansard* quoted by the various parties reveal, however, that many topics other than personal liability of trustees were discussed by the Committee.

[67] Debates in Parliament can be helpful in determining the pith and substance of legislation, in identifying the mischief addressed, and in determining the overall purpose of the legislation:

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NAV Canada v Wilmington Trust Co., 2006 SCC 24 at para. 57, [2006] 1 SCR 865. Absent some clear ambiguity, they are of limited assistance in interpreting the precise wording of the legislation: ***Professional Institute of the Public Service of Canada v Canada (Attorney General)***, 2012 SCC 71 at para. 95, [2012] 3 SCR 660. That is particularly so when the comments are not those of the responsible Minister: ***A.Y.S.A. Amateur Youth Soccer Association v Canada (Revenue Agency)***, 2007 SCC 42 at para. 12, [2007] 3 SCR 217; ***R. v Lavigne***, 2006 SCC 10 at para. 41, [2006] 1 SCR 392. In any event, the debates recorded in Hansard cannot prevail over the plain wording of the legislation as it is eventually enacted, and as it has been interpreted in decisions like ***AbitibiBowater***.

[68] Section 14.06(4) does not limit the power of the trustee to renounce or disclaim properties to those circumstances where it might be exposed to personal liability. Further, there is nothing in ***AbitibiBowater*** to suggest any such limit on the operation of the section; as noted, ***AbitibiBowater*** dealt with claims against the insolvent estate, not just the personal liability of the monitor. The section does not appear to create a right to disclaim assets, but assumes that the right exists. Both s. 14.06(4)(b) and 14.06(5) contemplate the trustee considering the "economic viability" of the assets, which obviously goes well beyond the trustee's personal liability.

[69] Section 14.06(2) provides the general rule that trustees are not liable for environmental conditions except those arising from gross negligence or wilful misconduct. A trustee has no ability to disclaim liability for that level of misconduct. The argument that potential personal liability of the trustee is a precondition to the operation of s. 14.06(4) implies that by "disclaiming" under that subsection the trustee is disclaiming a level of liability lower than for misconduct, but that level of personal liability has already been eliminated by s. 14.06(2). To be meaningful, s. 14.06(4) must be dealing with more than personal liability of trustees.

[70] In any event, the absence of a power to "disclaim" assets does not change the outcome; as noted, the trustee can simply ignore valueless assets in the estate and turn them back to the bankrupt at the end of the insolvency process (*supra*, paras. 47, 63(b)). The trustee has no personal liability, the estate's liability to meet its environmental obligations continues, but there are no assets left to discharge those obligations.

[71] The appellants also argue that s. 14.06(4) depends on an "order" being made. In context, the word "order" should be given a wide meaning. That term is not limited to orders directing that remedial work be done, but would include an order or directive permitting the transfer of assets of a bankrupt company only if sufficient funds are earmarked to cover remediation obligations. Ordering that the work be done is the same thing as ordering that money be set aside to do the work. The Alberta Energy Regulator has clearly stated its position that it will not permit transfer of the valuable Redwater assets unless funds are earmarked for remediation costs of the disclaimed assets.

[72] The timing of the trustee's disclaimer is also not critical. "Ten days after an order" does not mean "between when the order is made and 10 more days"; "after" includes "before the order is

made". As s. 14.06(4)(c) shows, the trustee can renounce or disclaim assets before or after the order is made, and can disclaim the assets in anticipation of a regulator imposing environmental obligations on the bankrupt estate. It is consistent with the policy behind the various statutes to have trustees signal their intention with respect to non-producing wells as early as possible. The Regulator's letter of May 14, 2015 (trial reasons, para. 19) expressly asked the Trustee to confirm its intentions with respect to the assets. Trustees should not be encouraged to disguise their intentions, and wait until the Regulator actually issues an order requiring remediation before disclaiming the assets.

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The Redwater Environmental Claims

[73] The essential question is whether the environmental obligations of Redwater meet the test for a provable claim in s. 14.06, as it is interpreted in ***AbitibiBowater***. It is conceded that the first two parts of the ***AbitibiBowater*** test are met: an obligation exists to the Alberta Energy Regulator as a creditor, and the obligation has arisen prior to the conclusion of the insolvency. These appeals are only concerned with the third branch of the test.

[74] The third part of the test in ***AbitibiBowater*** requires that the claim must either be expressed in monetary terms, or not be too remote and speculative so that there is some certainty that the regulator will actually do the remediation work. The way that requirement was described in ***AbitibiBowater*** must be interpreted in light of the context: the Province had expropriated three of the sites, and had issued remediation orders with respect to all five of them. There was ample evidence that the Province was motivated to do the remediation, but there was no existing legal obligation on it to actually do the work. If the remediation was not to be done in a foreseeable period of time, the claim was not sufficiently crystallized to be dealt with in the insolvency. Another concern would be that governments not be permitted to make claims in insolvencies for environmental remediation, and then divert the funds for other purposes. It was that context that informed the requirement that there be some certainty that the environmental remediation would actually be done. The requirement of certainty can, however, also be met if it is "certain" that the government is insisting that funds be immediately dedicated to guarantee performance of the environmental obligations.

[75] In this case the Regulator has not yet been asked to approve a transfer of the producing wells, although it has indicated (through the affidavit of its General Counsel) that such a transfer would be contrary to its fixed policies, prompting this litigation. It is, however, clear that the Trustee is not going to carry on Redwater's business; the plan is to sell off Redwater's assets, distribute the net proceeds, and obtain a discharge for the Trustee. It is also clear that if the Trustee does attempt to sell the producing assets, the Regulator will require the posting of security, or will require the purchaser to purchase all the producing and non-producing assets. If the purchaser is required to assume the environmental obligations of the non-producing wells, the uncontradicted evidence of the Receiver is that that will reduce the purchase price that the purchaser will pay: trial reasons at para. 5. On this record, it would appear that there would be little or no net value to

Redwater's oil and gas assets. By placing restrictions on the conditions under which the oil and gas assets could be transferred, the Regulator would in effect transfer the value of all of the Redwater assets from the secured creditor to meet the outstanding environmental liabilities.

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[76] As the chambers judge noted at para. 173:

> 173 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*. Compliance with the orders would require the Trustee and Receiver to expend funds by way of security that would be used to perform the abandonment work. The effect is that if the obligations to remediate property are fully complied with by the Trustee within this bankruptcy context, the claim of the Province for remediation costs will be given a super priority not provided for under section 14.06. The creditors deprived of the usual order of priority in bankruptcy will be subject to a "third-party-pay" principle in place of the "polluter-pay" principle. The history of amendments to the *BIA* in this case shows that Parliament intended that the priority of creditors as provided under section 14.06, and thus the distribution of funds, ought not to be disturbed by provincial legislation. In the result, I find that although not expressed in monetary terms, the AER orders are in this case intrinsically financial.

The chambers judge was correct that the reality of the Regulator's position should prevail over any narrow and technical interpretation. The facts here do, however, satisfy the ***AbitibiBowater*** test in both a technical and substantive way.

[77] First of all, the substance of the Alberta Energy Regulator's requirements must be examined. As pointed out in ***AbitibiBowater*** at paras. 19, 31, environmental obligations may appear in many different forms, and it is the substance of the obligation that must prevail. It is irrelevant whether Redwater's obligation to remediate the wells arises directly from a cleanup order, or indirectly from a Directive which imposes financial consequences on the transfer of assets. The Regulator's policy on transfers essentially strips away from the bankrupt estate enough value to meet the outstanding environmental obligations.

[78] Secondly, it does not matter which public body actually does the remediation, and which therefore qualifies as the "creditor" in the insolvency proceedings. It does not matter whether the remediation work will be done directly by the government of Alberta, by an administrative agency like the Alberta Energy Regulator, or by a sub-delegate like the Orphan Well Association: *Oil and Gas Conservation Act*, s. 70(1)(a)(ii). In any case there is a "creditor" with a provable claim in bankruptcy. As a result, it is no answer that the Alberta Energy Regulator rarely does any

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remediation work itself. Further, it is no answer that the Regulator does not attempt to enforce its remediation orders until no solvent parties remain, making it academic at that late point to seek recovery of those remediation costs. If the Regulator insists on funds being set aside up front by the trustee for environmental remediation, the ***AbitibiBowater*** principles are engaged. The obligation has been reduced to a certain monetary claim.

[79] Thirdly, whether it is sufficiently "certain" that the remediation work will be done depends on the factual context. The Regulator cannot manage the timing of its intervention in order to escape the insolvency regime: ***AbitibiBowater*** at paras. 37, 44-5. It cannot do indirectly what it cannot do directly: ***AbitibiBowater*** at para. 19; ***Moloney*** at para. 29. It 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.

[80] The concept of "certainty" was described in ***AbitibiBowater*** at para. 50 as arising in the context of a "unique set of facts". The Province had not actually done the remediation work, but the trial judge found that:

> . . . in all likelihood, the pith and substance of the EPA orders is an attempt by the Province to lay the groundwork for monetary claims against Abitibi, to be used most probably as an offset in connection with Abitibi's own NAPTA claims for compensation. (quoted at para. 51)

The Supreme Court concluded at para. 52 that this was "an implicit finding that the Province would most likely perform the work and make a claim to offset its costs". "Certainty" can, however, be manifested in many forms. Requiring the depositing of security, or diverting value from the bankrupt estate to ensure that the remediation will be done, clearly meets the standard. There is nothing more certain than "cash on the table". This not only reduces the claim to a specific monetary amount, it has an immediate effect on the distribution of the bankrupt estate. Any purchaser who assumes the remediation obligations will naturally adjust the purchase price accordingly. The level of "certainty" on this record is considerably higher than the "certainty" found to be sufficient by the majority in ***AbitibiBowater***, and would even meet the stricter test proposed by the minority.

[81] Fourthly, the effect of the Regulator's policy on the sale of assets is to artificially transfer the value of the oil and gas assets to the AER licence, which itself has no intrinsic value (*supra*, paras. 37-40). The trustee is disclaiming the *profits à prendre* in the oil and gas assets, not the AER licences. The Regulator's policy (relying on ***Northern Badger***) effectively requires that the full value of the bankrupt's oil and gas assets be applied first to environmental liabilities. That not only

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demonstrates that the claim has been sufficiently reduced to money to meet the ***AbitibiBowater*** test, it also demonstrates that the effect of the policy is to create a super priority for environmental claims. The regulatory technique of placing financial conditions on a transfer of the AER licences in order to shift value in the bankrupt estate to discharge the environmental obligations provides sufficient "certainty" to meet the ***AbitibiBowater*** test. It both fixes a monetary value on the obligations, and makes it certain that funds will be set aside to perform the remediation. Saying that the trustee "steps into the shoes" of the bankrupt, and that the trustee must take the licence "warts and all", does not displace the plain wording of s. 14.06, nor does it enable reversal of the priorities set in the *BIA*. The Regulator cannot, by purporting to deal with licensing requirements, effectively upset the priorities in the *BIA*: ***Moloney***; ***407 ETR***; ***Husky Oil Operations***.

[82] Even if one assumes that the AER licence is being transferred, or that there is some value in those licenses, the problem still appears. The Trustee might choose to transfer the 20 producing wells alone, or with their existing AER licences. In either event, the purchaser would have to be qualified to hold those licences. Each well has its own AER licence. Therefore, what the Regulator is attempting to do is attach conditions on the 20 AER licences that might be transferred, which really relate to the 107 wells that have been disclaimed by the Trustee and are not being transferred. The effect is to transfer economic value from the producing wells to the non-producing wells in order to enforce the environmental obligations attached to the latter. This clearly has the effect of disrupting the distribution scheme under the *BIA*. Even if the Trustee must take the licences "warts and all", there is no justification for the Regulator transferring warts from one licence to another.

[83] The Alberta Energy Regulator argues that "there is no entitlement under the *Bankruptcy and Insolvency Act* to maximize sale proceeds at the expense of compliance with a public duty" (trial reasons, para. 32). This argument overlooks that regulatory orders can become "provable claims" if reduced to monetary terms, and that regulators can be "creditors". If those tests are met, then the "public duty" is converted into a claim provable in bankruptcy, and it is only entitled to the priority accorded to all other claims. Under the scheme in the *BIA*, the secured creditors are entitled to "maximize sale proceeds" in priority to other provable claims.

[84] On the one hand, the Alberta Energy Regulator's argument separates the mineral deposits from the AER licences. It argues it has a legitimate right to regulate transfers of oil and gas assets as a part of regulating the industry, and that it is not really dealing with estate assets. Under this argument, conditions it puts on the transfer of the AER licences do not interfere with the property rights of the bankrupt, but only the AER licences. As previously noted (*supra*, paras. 37-40) the real economic value rests in the assets, not the AER licences. The Regulator can control the transfer of AER licences of bankrupt companies, but not by placing financial conditions on transfer that disrupt the priorities under the *BIA*. For example, the Regulator can limit transfers to qualified transferees. The Regulator cannot, however, indirectly interfere with the disposition of the value of the assets in bankruptcy by placing financial preconditions on the transfer of permissive AER licences.

[85] On the other hand, the Alberta Energy Regulator's argument sometimes merges the mineral deposits with the AER licences. It argues that it can effectively deal with value that is inherent in the mineral deposits, as if that value actually attaches to the AER licences. By imposing financial conditions on the transfer of the AER licences, it effectively assigns the economic value of the mineral deposit to the AER licences themselves, and then argues that the trustee "cannot disclaim the AER licences". This in the end has the impermissible effect of changing the distribution of the estate of the bankrupt company as a result of dealings with the AER licences.

[86] The Alberta Energy Regulator requires the abandonment and remediation of the physical real property, not the AER licences. The orders directly relate to the property of the bankrupt, Redwater, and would appropriate value from real property assets in the bankrupt estate and allocate them to remediating other property. Notwithstanding their intended effect as conditions of licensing, the Regulator's policies have a direct effect on property, priorities, and the Trustee's right to renounce assets, all of which are governed by the *BIA*.

[87] Analogous issues were recently considered in ***Moloney*** and ***407 ETR***. Both of those decisions involved a provincial licensing scheme premised on the assumption that certain debts or liabilities were outstanding. ***Moloney*** concerned unsatisfied personal injury judgments, which precluded the judgment debtor from holding a driver's licence. ***407 ETR*** concerned unpaid toll road fees, which precluded the judgment debtor from renewing the registration of the vehicle. In both cases the debt on which the licence restriction was premised had been extinguished on bankruptcy. The provinces, nevertheless, purported to apply the regulatory regime as if the debt still existed. The Supreme Court of Canada found both pieces of provincial legislation to be inoperative under the paramountcy doctrine.

[88] In this appeal, the regulatory regime controlling the transfer of AER licences is also premised on the assumption that there is an obligation outstanding. That obligation is the actual or potential cost of abandoning the well. However, if the environmental obligation is provable in bankruptcy, it cannot be enforced indirectly outside the bankruptcy regime under the Regulator's licensing scheme: ***Moloney***; ***407 ETR***. The Alberta Energy Regulator's licensing scheme depends on the enforcement of environmental liabilities outside the bankruptcy regime, in violation of the "single proceeding" model. The Regulator cannot sidestep the problem by artificially distinguishing between "managing obligations" and "recovering claims". The Regulator cannot establish a parallel process to collect claims.

[89] As previously noted, the Alberta Energy Regulator takes the position that receivers and trustees are liable for all of the obligations imposed on licensees because the definition of "licensee" in both the *Oil and Gas Conservation Act* and the *Pipeline Act* include receivers and trustees. On this theory, receivers and trustees are liable for:

(a) the duty to abandon oil wells under s. 27(1) of the *Oil and Gas Conservation Act*;

(b) the duty to abandon pipelines under s. 24 of the *Pipeline Act*;

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(c) the costs of remediation performed by other persons (s. 29 of the *Oil and Gas Conservation Act,* and s. 25 of the *Pipeline Act*);

(d) the duty to obey any order of the Regulator (s. 106(1) of the *Oil and Gas Conservation Act*, and s. 52(2) of the *Pipeline Act*).

These obligations are in operational conflict with the provisions of the *BIA* that exempt a trustee and receiver from personal liability, the provisions allowing a trustee and receiver to disclaim assets, and the provisions respecting the priority of remediation costs. They also frustrate the federal purpose of managing the winding up of insolvent corporations and settling the priority of claims against them. As such they are unenforceable by the Regulator.

[90] The Alberta Energy Regulator effectively concedes the outcome of this appeal by the following statement in its factum:

> 75. The AER acknowledges that compliance with its orders may ultimately lessen amounts recovered by the creditors because the costs of compliance are paid from the assets in the estate. However, the AER submits that the objective of maximizing recovery for creditors cannot be at the expense of complying with the licensee's statutory end of life obligations.

This frank statement confirms that the effect of the Regulator's orders is to interfere with the priority of distribution in the bankrupt estate. It also confirms that the Regulator's orders directly engage the paramountcy doctrine.

[91] It follows that under the proper interpretation of the *BIA*, the Regulator cannot 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. To the extent that the interpretation of the provincial legislation leads to a different result, the paramountcy doctrine is engaged.

Policy and Fairness Considerations

[92] The appellants and some of the intervenors presented a number of arguments based on general policy considerations, the overall fairness or reasonableness of the outcome, and the impact that the trial court's decision would have on environmental regulation. These considerations should be kept in mind, but it must also be assumed that Parliament considered and balanced them in drafting the *BIA*: ***AbitibiBowater*** at para. 32. The bankruptcy court has no ability to create exceptions to the statute based on general considerations of fairness or public policy.

Importance of Environmental Protection

[93] For example, the appellants pointed to the importance to society in general of environmental protection and of holding polluters accountable, values that have been recognized in the case law: ***Ontario v Canadian Pacific Ltd.***, [1995] 2 SCR 1031 at para. 55; ***Imperial Oil***

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Ltd. v Quebec (Minister of the Environment), 2003 SCC 58 at paras. 24-5, [2003] 2 SCR 624. They noted the legitimacy and importance of the Alberta Energy Regulator's desire to have orphan wells shut-in and remediated. None of the parties or interveners disagreed with any of this, but broadly based policy concerns cannot override the wording of the statute. Section 14.06 of the *BIA* has given environmental claims the priority that Parliament deems appropriate.

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[94] The Canadian Association of Petroleum Producers summarized the sentiments of a number of the parties in its factum: "It is not in the public interest for a receiver or trustee to be able to freely disclaim certain assets and thereby sidestep the obligations of abandonment and reclamation." In the abstract, the importance and legitimacy of the provincial purpose cannot have any ultimate effect on the outcome. ***Moloney*** outlines two bases under which the paramountcy doctrine might be applied:

(a) impossibility of compliance with both the federal and provincial legislation, or

(b) frustration of the purpose of the federal legislation by the provincial legislation.

There is no exception to these rules, such as:

(c) the public policy considerations behind the provincial legislation are more compelling than those underlying the federal legislation.

This hypothetical proviso would undermine the whole concept of division of powers and paramountcy. It is not open to the provinces to decide when their policy concerns outweigh those of the federal government. The Alberta Energy Regulator's argument that a licensee's "provincial public duty" must prevail over the bankruptcy regime (a line of argument that prevailed in ***Northern Badger***) approaches this hypothetical.

"Fairness" of the Outcome

[95] The appellants also argue that it is unfair or inappropriate for the cost of remediating the orphan wells to fall on the Orphan Well Association. That Association is funded by the levy imposed by the Alberta Energy Regulator on the industry, meaning that the "responsible" participants in the industry end up funding the insolvent ones. The appellants argue that this is at some level inappropriate, and therefore contend that the number of orphaned wells should be kept to a minimum. Again, these considerations cannot override the plain wording of the statute.

[96] The appellants also argued that general considerations of fairness support downloading some of the environmental costs on creditors, including secured creditors. This was said to be more appropriate than having these costs fall on the general public or the landowner. Creditors who have profited from the activities of the bankrupt should not complain if they have to bear some of the inchoate costs. The short answer, again, is that Parliament considered all of these competing policies: ***AbitibiBowater*** at para. 32. In addition to the environmental considerations, Parliament

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undoubtedly was concerned that giving environmental claims a super priority would drive away lenders, and deprive highly leveraged industries (like the oil and gas industry) of necessary financing.

[97] The appellants specifically noted that the secured creditor, the Alberta Treasury Branches, was aware of the obligations of Redwater Energy to remediate its wells. Those obligations were evaluated and included in the Alberta Treasury Branches' assessment of the creditworthiness of Redwater Energy when the loans were first advanced. The Alberta Treasury Branches concluded at that time that Redwater Energy would be able to meet all of its obligations (including its remediation obligations); otherwise, presumably Alberta Treasury Branches would not have advanced credit. Thus, the appellants argue, there is no unfairness in subordinating the Alberta Treasury Branches' position to Redwater's environmental obligations. Albert Treasury Branches knew of these risks, assessed them in its creditworthiness analysis, and should not now be able to complain that they have come to fruition.

[98] Fairness is perhaps in the eye of the beholder, but this argument cannot succeed. A secured creditor will always assess the creditworthiness of the potential borrower before making advances. The recognition of the actual and contingent obligations of the potential borrower does not, however, mean that the creditor is prepared to subordinate its interests to those obligations, nor that it is prepared to discharge those obligations if the borrower fails to do so.

[99] Further, the assessment of creditworthiness is not the end of the credit analysis. If it was, secured creditors would simply rely on that assessment and never ask for security. On the contrary, secured creditors always ask the next question: "What if we are wrong about creditworthiness?". Secured creditors hope that they are right, but if they are wrong they want to be first in line, and therefore they take security. If it turns out that the borrower is not as creditworthy as projected, the secured party always insists that its claim has priority and be paid first. Whether this is fair or not is not the issue, because the *BIA* and the general law of priority of claims expressly recognize the priority of secured claims.

Indulgences or Concessions by the Regulator

[100] On a related point, the validity of the position adopted by the Alberta Energy Regulator must be analysed without regard to any indulgences or concessions the Regulator is prepared to extend in this or any particular case. If the Regulator is right that it is not a creditor, and that environmental claims are not provable in bankruptcy, then environmental claims effectively have a super priority over all the creditors, including secured creditors. If that position is correct, the Regulator need not grant any indulgences.

[101] To illustrate, even though the definition of licensee in the provincial statutes specifically includes receivers and trustees, the Regulator does not attempt to enforce environmental orders other than against the assets of the insolvent estate. In other words, the Regulator is prepared to concede that receivers and trustees are not personally liable for environmental obligations.

However, if the Regulator is correct that environmental claims fall outside the bankruptcy regime, and its rules merely relate to the regulation of the oil and gas industry and not to bankruptcy priorities, then presumably the immunity from personal liability granted to receivers in the *BIA* would not apply.

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

[103] Thirdly, any indulgences that the Regulator might presently give with respect to the Licensee Management Rating cannot change the outcome. Even if the Regulator is presently satisfied that the existing rating (even if less than 1.0) be maintained, if it is correct the Regulator could insist on any rating, even one well in excess of 1.0. Even if the Regulator at present only insists on security equal to the formula deficit resulting from the Licensee Management Rating process, there is nothing to prevent it from insisting on security to cover the entire anticipated cost of remediation of all oil and gas assets.

[104] These indulgences presently extended by the Regulator are put forward as evidence of the reasonableness of its position. They are said to show that the Regulator is achieving a proper balance between the importance of environmental claims, and the "fair" rights of creditors. The first problem is that any balancing of considerations of this nature has been done by Parliament, and the Regulator has no mandate to rebalance them. Secondly, eliminating these indulgences from the analysis demonstrates the profound effect that the Regulator's position would have on the insolvency regime in Canada. The entire system would be converted from a "polluter-pay" system to a "third-party pay" system: ***AbitibiBowater*** at para. 40. Lenders would be justifiably wary of ever advancing funds to any industry with potential environmental obligations.

Abuse of the Insolvency Process

[105] A final related point is the argument that the decision of the chambers judge would motivate corporate reorganizations and insolvencies merely for the purpose of avoiding environmental liabilities. As pointed out in ***AbitibiBowater*** at para. 42, bankruptcy or insolvency are not easy solutions to financial problems, and these fears are exaggerated. Further, there is enough judicial discretion in the insolvency regime to prevent abuses.

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Conclusion

[106] In conclusion, the chambers judge's decision discloses no errors, and the appeals are dismissed.

Appeal heard on October 11, 2016

Reasons filed at Calgary, Alberta
this 24th day of April, 2017

Slatter J.A.

I concur: Schutz J.A.

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Dissenting Reasons for Judgment Reserved
of the Honourable Madam Justice Martin

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1. Overview

[107] The issues on this appeal arise in the context of the bankruptcy of an oil and gas company, Redwater Energy Corporation. Redwater leaves behind numerous licensed oil wells and other facilities, which have not been properly and safely abandoned as required by Alberta provincial legislation. There are two valid legislative regimes at play, one provincial and one federal, each with significant policy objectives. The question is whether both can co-exist. I have concluded that they can. Fundamentally, this is a constitutional case, one which underscores that there is no more important arena for co-operative federalism than the environment. Governments at both levels share the environment and the imperative need to protect it for all Canadians today and in the future. The right to a natural environment free of pollution is a widely held value throughout Canada: see *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031, 24 OR (3d) 454 at para 55. Canadians and their elected representatives recognize that this right is to be enjoyed not only by those living today but by future generations also. That objective depends upon the vigilant enforcement of legislative safeguards.

[108] Under s 92(13) of the *Constitution Act, 1867*, (UK), 30 & 31 Vict, c 3 reprinted in RSC 1985, App II, No 5 Alberta has the exclusive constitutional jurisdiction over property and civil rights in this province. Under s 92(A), it has the exclusive jurisdiction to make laws in relation to "the development, conservation and management of non-renewable natural resources" in Alberta. Under provincial legislation, the Alberta Energy Regulator (Regulator or AER) regulates all aspects of the exploration and extraction of the province's oil and gas resources. It governs, for example, who is entitled to receive a licence to exploit the resource; the terms and conditions for transfer of such licences; and the obligations imposed on licensees for operation and abandonment of oil wells and reclamation of well sites. Alberta's legislative power to enact legislation to regulate all aspects of oil and gas in the province is uncontested and the independent powers enjoyed by the provinces are "as plenary and as ample" as those of Parliament: *Hodge v The Queen*, [1883] 9 AC 117 (PC) at 132. The Supreme Court of Canada has directed that "the Court should avoid blocking the application of [provincial] measures which are taken to be enacted in furtherance of the public interest": *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 37, [2007] 8 WWR 1.

[109] Under s 91(20) of the *Constitution Act, 1867*, Canada has exclusive jurisdiction to make laws relating to bankruptcy and insolvency. The *Bankruptcy and Insolvency Act*, RSC 1985, c B-3

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[*BIA*], engaged because of Redwater's bankruptcy, seeks an equitable distribution of a bankrupt's assets among creditors, and financial rehabilitation of the debtor.

[110] Redwater's trustee in bankruptcy, the respondent Grant Thornton (Trustee), has invoked the constitutional law doctrine of paramountcy. The Trustee argues that the *BIA*, when read in the manner it proposes, allows it to take the benefit of profitable wells and walk away from the rest. In particular, it asserts that the Trustee is entitled to: (1) segregate out and sell only the 20 profitable wells from among Redwater's 127 licensed assets; (2) transfer those 20 licences to a party of the Trustee's choosing; (3) retain all proceeds for the secured creditors; and (4) and, most significant for this appeal, renounce the end of life obligations imposed by Alberta and assumed by the licensee to secure access to the resources in the first place. On this theory, Redwater walks away from its legislated obligations and public environmental duties in respect of the remaining 107 licensed assets. The sites Redwater used will either never be properly abandoned and reclaimed, or the end of life licensing obligations from its activities will be downloaded onto others: either the public or the industry. Both results breach the Alberta legislation and offend the underlying "polluter-pay" principle.

[111] Further, and as explained in more detail later, the most common situation in Alberta is that a company like Redwater exploits publicly owned oil or natural gas on lands it does not typically own and which most often belong to others. Therefore, when remediation work is not completed as required by law, the many deleterious and potentially dangerous impacts are often felt most acutely by the third-party landowners, usually farmers and ranchers, because it is their lands which were used to extract the resource. Wells and facilities that are abandoned in the colloquial sense, without being abandoned and remediated in the legal sense, continue to exist on their lands and serve as a reminder of unfulfilled statutory obligations and broken licence conditions. The Trustee argues that when the province insists on compliance with its generally applicable licence conditions, it is really trying to gain a position superior to that permitted under the *BIA*. The Trustee claims that the provincial legislation conflicts with and frustrates the federal and must give way. The Regulator disagrees.

[112] The chambers judge framed the issue as whether the Regulator can "effectively create a priority for abandonment and environmental liabilities in bankruptcy". In my view, this framing of the issue is incorrect. It is premised on the assumptions that licence obligations are debts not public duties, and that there is a conflict between the legislative schemes. However, this steps past the real issue, which is: given Alberta's exclusive jurisdiction to regulate its oil and gas resources, do the licence obligations created by provincial legislation conflict with or frustrate the scheme of priorities set out in the *BIA*? I have concluded there is no such conflict or frustration; both schemes may continue to co-exist.

[113] In my view, the distinctive Alberta regulatory and licensing regime for oil and gas resources, which is wholly within provincial jurisdiction, creates generally applicable public legal duties, outside the scope of "claims provable in bankruptcy" as defined in the federal legislation

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and relevant jurisprudence. Most legal obligations have some compliance costs associated with them. However, the mere ability to assign a dollar value to compliance costs does not transform them into a monetary claim under the bankruptcy legislation. Since it "is presumed that Parliament intends its laws to co-exist with provincial laws," courts should favour harmonious over conflicting interpretations of provincial and federal laws: *Alberta (Attorney General) v Moloney*, 2015 SCC 51, [2015] 3 SCR 327 at para 27.

[114] Since the issues on this appeal arise in a constitutional context, I do not accept that the *BIA* should be read as widely as the Trustee contends. To allow trustees in bankruptcy to pick and choose when they will comply with valid and generally applicable provincial law would be a power so extraordinary that it would require clear and express articulation. There is no such clear and express conferral of this power in the *BIA*. Nor should this power be inferred when to do so contravenes principles of statutory interpretation, co-operative federalism and the rule of law. Specifically, I conclude that the Trustee cannot disclaim the end of life licence obligations on the basis they are not real property. Further, while trustees have certain powers under the *BIA*, these are designed to protect trustees from personal liability, not confer on them the authority to disregard binding provincial legislation. The estate of the bankrupt remains liable for these end of life environmental obligations and they cannot be renounced by the Trustee.

[115] For the reasons that follow, the Trustee has not demonstrated the high constitutional law threshold of an operational conflict or frustration of the federal purpose. The provincial legislation may have an impact on the value of Redwater's estate, but that does not mean the province is seeking an unauthorized priority in bankruptcy. Rather, it is enforcing laws and licence conditions designed to protect the public interest, the environment, and the rights of third-party landowners affected directly by this distinctive resource and regulatory regime.

2. Facts

[116] The background to the appeal is set out in the reasons for judgment of the majority, and need not be repeated here.

3. Alberta's Regulatory Regime

[117] An understanding of Alberta's oil and gas regulatory regime, and the nature of the resource itself, is essential to a proper disposition of the issues on this appeal. The regulatory regime governing Alberta's oil and gas resources addresses serious environmental concerns, but is also distinct from other general forms of environmental protection legislation. It is holistic legislation, aimed at regulating all aspects of the development and exploitation of Alberta's natural resources. A licensee is subject to a comprehensive approach with detailed and generally applicable requirements for conduct from the time a well is drilled or a facility constructed, through to its abandonment and reclamation. The keystone in the regulatory framework is that the licensee is responsible for the significant risks caused by its chosen activities and assumes end of life obligations, like abandonment and reclamation. Similar requirements apply in all cases. Bankrupt

licensees are not specifically targeted by any provincial legislation. They are simply subject to the same ongoing obligations imposed on all licensees.

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[118] The provincial licensing regime applies to all oil and natural gas extraction, whether publically or privately owned. However, the reality is that over eighty percent of the oil and gas in Alberta is owned by the public and administered on its behalf by the Crown in right of Alberta. This level of public ownership is a key aspect of the factual matrix of this case and affects the realities and equities of the situation. The oil and gas industry is a main driver of the Alberta economy, and the distinctive and longstanding legislative regime that governs it is a product of history and the 1930 Natural Resources Transfer Agreement. It is also true that Alberta, like other jurisdictions in Canada, has other legislation that deals broadly with the protection of the environment.

[119] By way of overview, a company, like Redwater, that seeks to exploit Alberta's public or private oil and gas reserves will typically require many authorizations to take an underground resource to market. The first involves a transfer of the mineral holder's right of ownership to take away the resource. Over eighty percent of the time, this will involve a Crown grant, in whatever form, that gives the right to take possession of the resource on prescribed terms and conditions. One of those terms is that the grantee will abide by all relevant laws governing extraction, as they exist from time to time. Second, all public or private grantees require a licence issued by the Government of Alberta that permits and governs various aspects of operation. It is this licensing regime and the provincial government's ability to set terms and conditions on the permissions it grants that are at the core of this appeal. Third, because of the nature of the resource, Redwater needs to place equipment such as wells, pumps, and other facilities on lands from which they may extract the resource. This distinctive regulatory regime also allows licensees to enter upon, use and occupy the surface of land owned by third parties to extract and remove the licensed resource. Sometimes this third party is the Crown, but very often they are farmers and ranchers.

[120] Thus, the most common situation for oil and gas extraction in Alberta is that a company like Redwater seeks to exploit publically owned resources on lands it does not own and which belong to others. The licensing regime as a whole is complex. It takes a "cradle to grave" approach to the regulation of the resource, and is intended to allow for minimal disruption to third-party landowners and to the future of the resource.

[121] An essential part of the distinctive licensing regime is a requirement that non-producing wells be safely and properly abandoned, meaning that the well is plugged down hole to seal it shut and prevent leaks. Remedial repairs are conducted to protect groundwater and prevent well leaks, and the wellhead is removed from the surface. The site is then reclaimed, contaminants removed, and the surface of the land restored to its previous condition. Abandonment and reclamation are necessary for many reasons, including ensuring public health and safety, reducing the environmental impact of drilling activities, and addressing the concerns of private landowners so that they are not left with unused and potentially unsafe well sites on their land. The company that

drilled and operated the well, like Redwater, is legally responsible for abandonment and reclamation at the end of the well's life.

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[122] There are thousands of oil well sites that need to be properly abandoned sitting on public and private lands in Alberta, a number almost certain to increase in times of financial difficulty. End of life obligations are the key manner in which the Regulator has sought to ensure that there is the proper and safe abandonment of wells and the reclamation of well sites. End of life obligations are imposed by law and stipulated and accepted as conditions on the granting of the right to take away any public resources, the permission to extract through the required licence, and as part of any surface rights acquired. The issue on this appeal addresses if, and how, the bankruptcy of a licensee affects its end of life obligations. The implications for the regulation of Alberta's publicly owned resource, and for the Alberta public, are significant.

(i) The Alberta Energy Regulator

[123] As has been noted, anyone who wishes to benefit from the exploration and development of Alberta's oil and gas resources must apply for and be granted a licence by the AER, Alberta's sole regulator for all upstream oil and gas activities. The licensee must also hold an underlying property interest in the resource, most commonly by way of a mineral lease with the Crown. I will focus first on the AER-issued licences.

[124] The AER was established by the *Responsible Energy Development Act*, SA 2012, c R 17.3 [*REDA*]. To fulfill its mandate, the AER establishes rules regarding Alberta upstream oil and gas activities and issues licences, approvals, permits, orders, decisions and directions. An AER licence is required in order to explore, drill, extract and produce oil and gas resources. The licence requirement permits the provincial government to control who is developing the resource, to ensure a responsible licensee is available to deal with potentially dangerous situations, and to control who gets access to public property for the purpose of resource development activities. Without an AER licence, it is not possible to extract or exploit the resource. The provincial legislation is premised on the understanding that even when it is not a publicly owned resource, all extraction in Alberta should be governed by a public licensing regime, under which there is a public duty to ensure the safety and security of wells and facilities permitted under the regime.

[125] The AER's mandate is set out in its governing legislation, and includes providing "for the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta": *REDA* at s 2(1)(a). The AER is also responsible to carry out the purposes of the *Oil and Gas Conservation Act*, RSA 2000, c O-6 [*OGCA*], which are set out in s 4 and include:

> 4 (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,

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> 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 and efficient 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;
>
> (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.

[126] The regulatory regime takes a "cradle to grave" approach to the regulation of exploration and development activities, from exploration, drilling and production, to the end of life obligations associated with wells, facilities and pipelines – closure, abandonment, remediation and reclamation.

[127] The end of life obligations are an inherent part of the issuance of a well licence. For example, s 16(3)(b) of the *OGCA* provides that the licensee of a well licence remains liable to complete or abandon the well and reclaim the well site even after the cancellation of the licence. Section 27(1) requires a licensee to suspend or abandon a well or facility when directed to do so by the AER, or required by regulations or rules. As this Court noted in its decision in *PanAmericana de Bienes y Servicios v Northern Badger Oil and Gas Limited*, 1991 ABCA 181 at para 21, "... 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". In this context, the "abandonment" of an oil well refers 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": *Northern Badger* at para 2.

[128] The nature of the AER licences, and the end of life obligations attached to and inherent in them, are known to all industry participants, including lenders and those individuals and companies who put themselves forward to obtain licences and thereby obtain access to the resource. Undertaking to fulfill the end of life obligations is a pre-condition to access the resource. It is a threshold requirement of becoming a licensee; a public duty and charge that is known from the outset of the issuance of a licence. Unlike many environmental problems that are governed by other types of environmental legislation, the end of life obligations of licensees are anticipated. They will arise, without exception, at the end of the life of the well or pipeline, generally when the licensee runs out of oil, gas, or money.

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[129] Although AER-issued licences are necessary for resource development, they are not sufficient to permit a licensee to take the benefit of the resource. The licence permits the licensee to explore and to drill, but does not grant an interest in the oil and gas. To take the benefit of the resource, therefore, the resource company must also hold an underlying property interest in the mineral resources. As the vast majority of mineral titles in Alberta are publicly-held, a resource company that wishes to exploit the resource will most commonly do so under a mineral lease agreement with the Crown. The licensee will also be obliged to secure the right to place the wells and other facilities on the surface of land if owned by third parties. The commercial understanding and legal expectation is that when drilling has stopped, the licensee will secure and stabilize the formation drilled and restore the landowner's property.

[130] The third requirement arises because ownership of, or an interest in, the minerals does not include the right to occupy the surface of the land: *Surface Rights Act*, RSA 2000, c S-24, s 12. The title to privately-owned land in Alberta is generally separated into a surface title and a mineral title. The surface of the land may be owned by the Crown, or be privately owned by a third party. The land is not often owned by the resource company that seeks to exploit and develop the mineral resource. The resource company must, therefore, also obtain the right to occupy the surface. In most cases, a surface lease agreement with the landowner, or a right of entry order issued by the Surface Rights Board, is required for the resource company to be able to access the well site and place infrastructure on the surface of the land. The surface of the land remains the property of the Crown or the third-party landowner. While safety concerns drive the need for abandonment and reclamation, the underlying equities and practical consequences of what happens when wells are not abandoned as promised and as required are also important. The failure to fulfill these public duties creates disproportionate burdens on the third-party landowners forced to live with the physical evidence of unfulfilled obligations.

[131] There is a distinction between the rights granted by the AER licence and those granted by the mineral lease; the lease conveys an interest in property, while the licence does not. A licence, at its most basic, is the right to do that which would otherwise be illegal, or would amount to a trespass absent the licence. The common law recognizes three types of licences: (1) a "mere" or "bare" licence, which is unsupported by consideration and revocable; (2) a contractual licence, subject to contractual terms; and (3) a licence coupled with a grant of legal interest, such as a *profit à prendre*: Bruce Ziff, *Principles of Property Law,* 6th ed. at 318-321; see also Anne Warner La Forest, *Anger & Honsberger*, *Law of Real Property,* 3rd ed. at §16:40. The oil and gas lease is conceptualized as a *profit à prendre* at common law, and carries with it an implied licence to enter land and capture resources as a necessary incident to the mineral interest acquired: *Alberta Energy Co v Goodwell Petroleum Corp*, 2003 ABCA 277, [2003] AJ No 1207 at para 63, see also *Berkheiser v Berkeiser*, [1957] SCR 387 (SCC), 7 DLR (2d) 721 at 391-392. That implied licence is not to be confused with the regulatory licences issued by the AER, which are necessary to carry out lawfully specific development activities.

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[132] A *profit à prendre* is an interest in land, but a licence on its own is neither an interest in land, nor a *profit à prendre.* In this respect, I agree with Justice Rowe, as he was, in *Chain Lakes Logging Corporation Limited v Abitibi Consolidated Company of Canada*, 2005 NLCA 13, [2005] NJU No 79 at para 16:

> Profit à prendre is dealt with in *Halsbury's Laws of England*, 4th ed., vol. 14 (London: Butterworths, 1980), from which various excerpts are reproduced below. While Canadian law undoubtedly differs in many particulars from English law relating to profits à prendre, nonetheless I take the laws of both countries to be similar in the following ways:
>
> > A profit à prendre is a right to take something off another person's land. It may be more fully defined as a right to enter another's land and to take some profit of the soil [including timber] ... for the use of the owner of the right. ... [para. 240]
> >
> > A profit à prendre is an interest in land, and for this reason any disposition of it must be in writing. A profit à prendre which gives a right to participate in a portion only of some specified produce of the land is just as much an interest in the land as a right to take the whole of that produce. ... [para. 241]
> >
> > The owner of a profit à prendre has rights of a possessory nature, and can bring an action for trespass at common law for their infringement. [para. 251]
> >
> > Profits à prendre, though sometimes called "licences", must be carefully distinguished from mere licences, which are not tenements and do not pass any interest or alter or transfer property in anything, but only make an act lawful which otherwise would have been unlawful. A mere licence is not transferrable, nor can it be perpetual; it is not binding on the tenement affected, but is a personal matter between the licensor and the licensee. [para. 252] (Emphasis added)

[133] AER-issued licences exist separate and apart from any implied licence to enter land brought into existence by the oil and gas lease. The AER licence is obtained from the provincial regulatory body, not the lessor. In issuing the licence, the AER does not confer property interests in the minerals, only the right to do that which is otherwise made unlawful by statute. To take the benefit of the resource, a resource company requires both the AER licence and the mineral lease.

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(ii) The AER's Licensee Liability Rating Program

[134] The generally applicable provincial legislation requires AER approval before an AER-issued licence is transferred to a new licensee: *OGCA* s 24; *Pipeline Act*, RSA 200 c P-15, s 18. The government retains the unfettered ability to grant or withhold a licence, whether the application is for an initial grant or a subsequent transfer of an existing licence. Any approved transfers are subject to conditions or restrictions prescribed by the AER, to ensure that parties who acquire and hold AER licences meet applicable qualifications. For example, the AER is concerned with the safety record and reputation of prospective licensees. Another such requirement is the AER's licensee liability rating (LLR) program, which is set out in AER *Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process*. The purpose of the LLR program and licence transfer requirements are to ensure there are sufficient funds for end of life obligations and to prevent the costs of those obligations being borne by the Alberta public. The LLR program applies to all AER-licensed upstream oil and gas wells, facilities and pipelines.

[135] Essentially, the LLR program treats the licences held by a given licensee as a "package". The AER conducts a liability assessment for each licensee, based on the estimated cost of the end of life obligations associated with all the AER licensed assets of that licensee. Each licensee is assigned a liability management ration (LMR), which is the ratio of the licensee's eligible deemed assets as compared to its deemed liabilities. Consideration is given to all of the licensee's assets, and the estate is treated as a whole. There is no segregation or parcelling of assets.

[136] If a licensee's LMR becomes non-compliant with the requirements of Directive 006, the AER will typically issue closure and abandonment orders requiring the licensee to abandon the properties specified in the order. This involves removing surface equipment, debris and produced liquids by a specified date. A licensee may bring itself into compliance with the LLR program requirements by (1) abandoning and reclaiming one or more licensed properties in order to reduce its deemed liabilities; (2) transferring, with the AER's consent, one or more licensed properties and their associated obligations; or (3) posting security to ensure the work is done.

[137] The LMR is also a relevant consideration in licence transfers, which must be approved by the AER. Before the AER will consent to the transfer of a licence, the AER assesses the LMRs of both the proposed transferor and transferee, and assesses how the proposed transfer will affect the ratios of each party. If the transfer will cause the LMR of either party to fall below 1.0, the AER will either deny the transfer or require that additional security be posted.

[138] The LLR program, and the regulatory oversight of the AER generally, applies to all holders of AER-issued licences, including the receiver of an insolvent licensee. "Licensee" in the provincial legislation is defined to include a trustee or receiver-manager of the property of a licensee: see *OGCA* s 1(cc). Accordingly, the receiver or trustee "steps into the shoes" of the licensee in the case of receivership or bankruptcy. This is a vital part of the regulatory scheme, as it ensures that there remains an entity that is responsible for the care and custody of AER licensed wells, pipelines and related facilities; and an entity responsible for emergency and incident

response and ensuring public safety. This responsibility also includes the fulfillment of end of life obligations under the terms of the licence and the governing statutes.

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[139] The bankrupt licensee in this case, Redwater, held 127 AER-issued licences, comprising 84 well licences, 7 facility licences, and 36 pipeline licences. The Trustee proposes to take possession of only 20 of Redwater's licensed assets, representing approximately $6.7 million, while the majority of Redwater's licensed assets (which the Trustee proposes to disclaim) represent approximately $664,000. The Trustee's proposal presents three difficulties. First, it would leave the disclaimed assets with no responsible party to respond to safety and environmental issues. Second, it is an attempt by the Trustee to avoid the end of life obligations associated with that portion of the licensed assets that the Trustee seeks to disclaim, without posting any of the security that would normally be required as a condition of licence transfers of the non-disclaimed assets, in direct contravention of the LLR program. Third, the Trustee says that it no longer needs to commit estate assets to end of life obligations, although the debtor's full estate was considered when individual licences were granted and the totality of the assets, as a package, are generally the guiding factor in any licence transfer.

[140] In some circumstances, approval of a transfer will be subject to the posting of security to ensure sufficient funds remain to cover the end of life obligations for licensed assets. The chambers judge noted that the AER may block a sale by withholding the transfer of a licence unless the transfer conditions are met. The Trustee argues that in a case of bankruptcy, it, and not the Regulator should determine whether, and to whom it may transfer Redwater's licensed assets. The Trustee also says that Redwater need not post security from its assets on any requested transfer and that the value of its estate should not be used to satisfy the end of life obligations imposed by law and assumed in the licence. The Trustee's approach contravenes the validly enacted provincial legislation that governs the oil and gas industry in Alberta.

[141] It is important to appreciate that the statutory end of life obligations associated with AER-issued licences are known to all industry participants, including lenders, and can and should be considered by lenders when assessing the risk exposure involved in lending to holders of such licences. The primary lender in this case was no exception. The record makes clear that the respondent ATB approached the lending of funds to Redwater with full knowledge of the end of life obligations associated with Redwater's assets. An internal document of ATB, entitled "Industry Knowledge Guide – Oil and Gas Extraction", expressly notes that "[t]he costs for the borrower of abandoning a well and returning the well and land site to their pre-drilled condition can be significant. ... Abandonment liability and calculations are required in third party engineering reports". A third party engineering report that took into account Redwater's abandonment obligations was prepared in this case. The answers to undertakings given by ATB's representative also confirm that abandonment and reclamation liabilities are considered by ATB in its calculation of a customer's borrowing base.

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(iii) The Orphan Well Association

[142] Another participant in the regulatory regime is the Orphan Well Association (OWA). The OWA is a non-profit organization that conducts abandonment or site reclamation activities on specific properties that have been designated by the AER as "orphans" pursuant to the *OGCA*. Such a designation may occur where the licensee is insolvent, defunct, or is dissolved or struck as a corporation. The OWA is funded primarily by the oil and gas industry in Alberta, through an annual levy collected by the AER and paid directly to the OWA. The OWA is overseen by a board of directors made up of representatives from the Canadian Association of Petroleum Producers, the Explorers and Producers Association of Canada, the AER, and Alberta Environment and Parks.

[143] Proper abandonment and reclamation of well sites is important for public safety and land use. These activities involve the proper plugging of the orphan wells down hole, removing the wellhead at the surface of the well site, and returning the land use capability of the site, including removing contaminants.

[144] As of September 2015, the OWA had about 695 wells to be abandoned and 503 sites to be reclaimed. It aspires to have all of the current orphan sites reclaimed or abandoned over the next 10 to 12 years. Evidence from a director of the OWA expressed concern about a troubling trend in the number of new orphaned wells; he says that if that trend continues, the OWA's current resources will not be sufficient to maintain its target timeline for abandonment and reclamation. The number of new orphaned wells designated in 2013/2014 was 80; in 2014/2015 that number had increased to 591.

[145] The OWA prioritizes its abandonment work according to the following factors: health and public safety risk, environmental impacts, regulatory concerns, stakeholder concerns (such as landowner complaints), and an assessment of potential technical difficulties and probability of success. The OWA does not seek reimbursement from licensees of its costs related to abandonment and reclamation, and has no power to seek reimbursement from the licensee. Where the AER holds a security deposit on behalf of the licensee, the OWA is eligible to be reimbursed once the work is completed, up to the amount of the deposit.

4. Constitutional and Interpretive Principles

[146] This challenge to Alberta's regulatory regime must be placed within the appropriate framework. First, the regulatory regime is validly enacted provincial legislation; no one has suggested otherwise. The Alberta legislation at issue is clearly *intra vires* the province as involving property and civil rights in the province, and the exploration, development, conservation and management of non-renewable natural resources in the province: *Constitution Act, 1867*, ss 92(13) and 92A(1).

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[147] The nature of the regulatory regime is also relevant to the analysis. Unlike more general environmental legislation establishing agencies or departments aimed at tackling various environmental issues in whatever industry or location they occur, the licensing regime at issue here governs all aspects of the development and management of a specific natural resource. It is an overall system of regulation designed to protect the public and a resource which is owned largely by the public. There is no doubt that the province is competent to regulate the exploration and development of oil and gas, to ensure that exploration and development activities are carried out with adequate safeguards for public and environmental safety, and to regulate the issuance and transfer of licences that permit the activities necessary for resource development. Decisions regarding aspects of the regime must take into account the nature of the regime as a whole.

[148] The only challenge to the Alberta legislation is that it conflicts with the provisions of the *BIA* and that it is, therefore, "inoperative to the extent of the inconsistency", pursuant to the paramountcy principle: *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2005 SCC 13, [2005] 1 SCR 188 at para 11; *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd* 2015 SCC 53, [2015] 3 SCR 419 at para 15. A conflict between validly enacted provincial and federal legislation is said to arise in one of two situations: (1) operational conflict, meaning that it is impossible to comply with both the federal and provincial law; or (2) frustration of purpose, meaning that the provincial law thwarts the purpose of the federal law: *Moloney* at para 18. The burden to establish a conflict is on the party alleging that it exists.

[149] Fundamentally, whether such a conflict exists is a constitutional issue, and there are several constitutional principles that must be borne in mind. In *Lemare Logging* at paras 20-21, the Supreme Court emphasized the principle of cooperative federalism, and stated that courts should favour harmonious interpretations of allegedly conflicting legislation:

> [21] Given the guiding principle of cooperative federalism, paramountcy must be narrowly construed. Whether under the operational conflict or the frustration of federal purpose branches of the paramountcy analysis, courts must take a 'restrained approach', and harmonious interpretations of federal and provincial legislation should be favoured over interpretations that result in incompatibility. [citations omitted]

[150] In *Moloney* at para 27, the Supreme Court explained the proper approach to statutory interpretation when applying the doctrine of paramountcy:

> In keeping with co-operative federalism, the doctrine of paramountcy is applied with restraint. It is presumed that Parliament intends its laws to co-exist with provincial laws. Absent a genuine inconsistency, courts will favour an interpretation of the federal legislation that allows the concurrent operation of both laws. … *Conflict must be defined narrowly, so that each level of government may act as freely as possible within its respective sphere of authority.* [Citations omitted]

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[151] As noted above, there are two branches to the paramountcy test. An operational conflict requires an actual conflict; an inability to comply with both laws concurrently. If both laws "can operate side by side without conflict", or if "both laws can apply concurrently, and citizens can comply with either of them without violating the other", no operational conflict exists: *Moloney* at para 19.

[152] Even if there is no operational conflict there can still be a frustration of the purpose of the federal law. In *Moloney*, the Supreme Court identified two purposes said to be furthered by the *BIA*: (1) an equitable distribution of assets; and (2) the financial rehabilitation of the debtor: para 32. It was the second purpose that was frustrated in *Moloney*, where it was found that the provincial legislation purported to enforce a provable claim in bankruptcy that had been released by that bankruptcy: para 75. The purpose of financial rehabilitation of the debtor is not applicable here.

[153] The first purpose, the equitable distribution of assets, is achieved by requiring creditors wishing to enforce a claim provable in bankruptcy to participate in one collective proceeding. "For this model to be viable, creditors must not be allowed to enforce their provable claims individually, that is, outside the collective proceeding": *Moloney* at para 34.

[154] For this reason, provincial laws may be said to frustrate the purpose of the federal insolvency scheme when they alter bankruptcy priorities by giving priority to one provable claim over others. The Supreme Court has been clear that it is the substance, and not the form, of the provincial regime that must be examined, and that provincial laws will be rendered inapplicable in bankruptcy when the effect of the law is to conflict with or alter the order of priorities established by the *BIA*: *Husky Oil Operations Ltd v Minister of National Revenue*, [1995] 3 SCR 453, 107 WAC 81 at para 40.

[155] The Supreme Court has been equally clear that it is only a clear conflict, entailing a reordering of federal priorities that will result in a declaration that a provincial law is inapplicable in bankruptcy. This was made clear in *Husky Oil* at para 36.

> [37] I underline that the "effect" which Roman and Sweatman speak of is the effect on bankruptcy *priorities*…. Consequently, clear conflict, that is an inconsistent or mutually exclusive result, which in this case entails a *reordering* of federal *priorities*, is necessary to declare a provincial law to be inapplicable in bankruptcy. [emphasis in original]

[156] A mere effect on bankruptcy generally, such as an effect on the value of a bankrupt's estate or the amount that is available for distribution under the bankruptcy regime, does not frustrate the purpose of the *BIA*, and does not render a provincial law inapplicable in bankruptcy: see *Northern Badger* at para 63. This is made explicit by s 72(1) of the *BIA,* which ensures that provinces continue to have the ability to regulate property and civil rights during bankruptcy. The provincial

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law must have the much narrower effect of reordering bankruptcy priorities before it will be declared in conflict with the *BIA* and therefore inapplicable.

[157] In *Newfoundland and Labrador v AbitibiBowater Inc*, 2012 SCC 67, [2012] 3 SCR 443, the Supreme Court considered whether certain orders issued under Newfoundland's *Environmental Protection Act* were "claims" for the purpose of the *Companies' Creditors Arrangement Act*, RCS 1985, c C-36 [*CCAA*]. The court noted that it is the substance of the provincial actions that must be considered, stating at para 19, "[i]f the Province's actions indicate that, in substance, it is asserting a provable claim within the meaning of federal legislation, then that claim can be subjected to the insolvency process". Conversely, if the province's actions are not the assertion of a provable claim, they are not subject to the insolvency process.

[158] The Supreme Court in *Abitibi* recognized that not every provincial order regarding environmental issues is a provable claim, or has the effect of reordering bankruptcy priorities. Not all provincial regulation is rendered inoperative in bankruptcy. As Deschamps J noted at para 2, "[a]s a matter of principle, reorganization does not amount to a licence to disregard rules". The Ontario Court of Appeal in *Nortel Networks Corporation (Re)*, 2013 ONCA 599, [2013] OJ No 4458 agreed and cautioned against a broad approach that would "result in virtually all regulatory environmental orders being found to be provable claims": para 32.

[159] When one considers the substance of the licensing regime governing end of life obligations for AER-licensed wells, pipelines and facilities, it is apparent that there are fundamental distinctions between it and the environmental orders considered by the Supreme Court in *Abitibi* and governed by s 14.06 of the *BIA*, the provision on which the Trustee relies. The respondents' approach equates all provincial regulations touching on environmental matters, regardless of their source or substance. The Supreme Court in *Abitibi* made clear that is not the correct approach. Although some environmental claims by regulators are claims provable in bankruptcy, and must be dealt with in accordance with s 14.06 of the *BIA*, other regulatory requirements are public obligations that exist outside, and survive, the bankruptcy. Alberta's oil and gas licensing regime creates such public obligations, as this Court concluded in *Northern Badger*. At issue is not Alberta's general power to regulate pollution, enforced through an environmental agency, but its ability to set licensing terms on the extraction of natural resources within the province, most of which are publically owned.

5. Issues on Appeal

[160] In approaching the issues on this appeal, I have considered, first, whether the regulatory regime governing Alberta's oil and gas industry creates a provable claim that is subject to the bankruptcy scheme. I then considered whether the regulatory regime conflicts with the *BIA*, either by way of operational conflict or by reordering bankruptcy priorities so as to frustrate the *BIA's* purpose of ensuring equitable distribution to creditors. I have concluded that the answer to both questions is "no".

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6. Are the Licensing Obligations a Claim Provable in Bankruptcy?

(i) This Court's decision in Northern Badger

[161] In *Northern Badger*, the regulator (the predecessor of the AER) sought compliance with its order to carry out proper abandonment procedures on seven suspended oil wells. The issue was whether the receiver-manager of the insolvent and bankrupt oil company was prevented from complying by the terms of the *BIA*. The chambers judge concluded that the provincial licence granting authority was "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 the *Bankruptcy Act*". A similar argument is made on behalf of the respondents on this appeal.

[162] On appeal in *Northern Badger*, this Court disagreed with the chambers judge's characterization of the regulator's actions, and rejected the contention that, in enforcing the requirement for the abandonment of oil and gas wells, the regulator was acting as a creditor. The obligation to abandon the wells was a general regulatory obligation, not a provable claim in the bankruptcy. Chief Justice Laycraft said, at para 33:

> The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding on every citizen of the Province. All who become licensees of oil and gas wells are bound by them. … 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.

(ii) Developments subsequent to Northern Badger

[163] The respondents submit that the reasoning in *Northern Badger* has been completely overtaken, indeed overruled, by the Supreme Court of Canada's more recent decision in *Abitibi* and by s 14.06 of the *BIA*. They argue these two changes have fundamentally altered the law of bankruptcy.

[164] I acknowledge these two recent changes, but do not accept that they lead to a different conclusion on the facts of this case. The Supreme Court in *Abitibi* did not overturn *Northern Badger*, but rather emphasized the need to consider the substance of provincial regulation in assessing whether it creates a claim provable in bankruptcy. That is precisely what this Court did in *Northern Badger*, and what I am doing here.

[165] In my view, the respondents' argument, and the approach taken in the court below, do not give sufficient consideration to the substance and unique nature of the Alberta regulatory regime

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over oil and gas extraction. Rather, there is an attempt to shoehorn Alberta's regulation of its oil and gas resources into the provisions of s 14.06 of the *BIA*. As I will explain further below, this distinctive regulatory regime differs in fundamental ways from the environmental orders at issue in *Abitibi* and the matters that Parliament intended to address through the enactment of s 14.06.

(iii) The Supreme Court of Canada's decision in Abitibi

[166] In *Abitibi*, the Supreme Court considered remediation orders issued by the provincial government for the clean-up of five contaminated sites in the context of a *CCAA* proceeding. The case involved contamination at several industrial sites that were owned by the debtor Abitibi. The facts of the case are involved and rather unique because of the interplay between generally applicable governmental environmental orders and specific legislation that targeted only Abitibi in an expropriation of some of its property.

[167] The main issue before the court was whether the remediation orders were a "claim provable in bankruptcy", and therefore subject to the insolvency process. In other words, were the orders, in effect, a claim by the provincial government for repayment of remediation work undertaken by the regulator? If so, then that claim was subject to the priorities established in the insolvency process. Writing for the majority in *Abitibi*, Deschamps J noted that environmental orders may come in many forms, "including stop, control, preventative and clean-up orders": para 31. She went on to describe the issue, from an insolvency perspective, at para 32:

> Parliament recognized that regulatory bodies sometimes have to perform remediation work … When one does so, its claim with respect to remediation costs is subject to the insolvency process …

[168] In considering whether a particular order is a "claim provable in bankruptcy" within the meaning of s 2 of the *BIA* and therefore subject to the insolvency process, the court set out three requirements: (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*; (3) it must be possible to attach a *monetary value* to the debt, liability or obligation: para 26 (emphasis of Deschamps J).

[169] It is clear from the court's approach in *Abitibi* that not every provincial regulation that touches on environmental matters is in conflict with insolvency legislation, nor is every order issued to enforce compliance with provincial regulation a claim provable in bankruptcy. To the contrary, the *Abitibi* decision expressly recognizes that "orders relating to the environment may or may not be considered provable claims": *Abitibi*, para 43. Only those orders that are "monetary in nature" and "will ripen into a financial liability owed to the regulatory body that made the order" are subject to the *CCAA* process: *Abitibi* at paras 3, 43. A similar sentiment was expressed by the Ontario Court of Appeal in *Nortel*, which rejected the argument that any order requiring an expenditure of funds is monetary within the meaning of the *Abitibi* test: *Nortel* at para 32.

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[170] The *Abitibi* approach makes a distinction between monetary claims that are part of a bankruptcy and general regulatory obligations. This distinction was succinctly expressed by Chief Justice McLachlin in her dissenting reasons in *Abitibi*, when she noted that the *CCAA* and the *BIA* draw "a fundamental distinction between ongoing regulatory obligations owed to the public, which generally survive the restructuring, and monetary claims that can be compromised": para 72. She went on to note that "[t]he distinction between regulatory obligations under the general law aimed at the protection of the public and monetary claims that can be compromised in *CCAA* restructuring or bankruptcy is a fundamental plank of Canadian corporate law": at para 74.

[171] The Chief Justice noted several examples of "ongoing regulatory obligations" under the general law that survive restructuring, including those arising from statutory schemes governing matters like "employment, energy conservation and the environment": paras 71, 74. She also cited this Court's decision in *Northern Badger* as an example of such a regulatory obligation, noting that "the Alberta Court of Appeal held that a receiver in bankruptcy must comply with an order from the Energy Resources Conservation Board to comply with well abandonment requirements" because "the duty is owed as a public duty by all the citizens of the community to their fellow citizens": para 73.

[172] These are important distinctions, and I do not read the majority judgment in *Abitibi* as disagreeing with the Chief Justice on this point. The majority considered this Court's decision in *Northern Badger*, but did not overrule it. Throughout her reasons for the majority, Deschamps J emphasized the need to consider the substance of provincial regulations: see, e.g., para 31. At para 45, she noted that "courts have never shied away from putting substance ahead of form", referring to this Court's decision in *Northern Badger*, seemingly as an example of that approach.

[173] The need to consider the substance of provincial legislation was reiterated at para 48, when Deschamps J continued:

> Whether the regulatory body has a contingent claim is a determination that must be grounded in the facts of each case. Generally, a regulatory body has discretion under environmental legislation to decide how best to ensure that regulatory obligations are met. Although the court should take care to avoid interfering with that discretion, the action of a regulatory body is nevertheless subject to scrutiny in insolvency proceedings.

[174] This quote recognizes expressly that regulatory bodies have the discretion, albeit subject to supervision, to decide how to best ensure that environmental obligations are met. It is noteworthy that this was addressed to environmental liabilities, a large category of regulated conduct that can occur anywhere, anytime, across any industry or other form of legal regulation. The same reasoning would apply, even more strongly, when the provincial legislation is a valid exercise of a province's jurisdiction to decide how best to regulate the exploration and development of a largely public resource in a manner that best serves the public, and exists to ensure those who are licensed to conduct such development meet the obligations imposed on them. The regime imposes

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"ongoing regulatory obligations owed to the public", not monetary claims in the bankruptcy. There are two sources for this ongoing public duty in the Alberta situation. There is a public obligation imposed by the regulatory regime and, moreover, those obligations were imposed in return for access to a public resource. As this Court concluded in *Northern Badger*, such public obligations are not provable claims that can be counted or compromised in the bankruptcy.

[175] The test in *Abitibi*, intended to permit courts to assess when an environmental order should be treated as a claim made in the bankruptcy, demonstrates the continued validity of the *Northern Badger* conclusion.

[176] The third branch of the *Abitibi* test, whether the obligation or liability owed by the debtor amounts to a monetary claim, was described at paras 59 and 61:

> [59] … an environmental order issued by a regulatory body can be treated as a contingent claim, and … such a claim can be included in the claims process if it is sufficiently certain that the regulatory body will make a monetary claim against the debtor.
>
> …
>
> [61] … the contingency to be assessed in a case such as this is whether it is sufficiently certain that the regulatory body will perform remediation work and be in a position to assert a monetary claim.

[177] It is important to bear in mind the nature of the environmental claims at issue in *Abitibi*: five environmental clean-up orders aimed at industrial pollution on the debtor's land. These were the general environmental orders issued by the environmental agency to address various types of pollution and environmental challenges and which may "come in many forms, including stop, control, preventative, and clean-up orders": para 31. What these orders have in common is that they are aimed at the prevention and clean-up of a limited number of environmental problems, such as spills of industrial chemicals, that often arise unexpectedly, during operations on the property of the debtor. These events are often contingent, episodic and unpredictable.

[178] That is what occurred in *Abitibi*. During the course of its operations, various contaminants spilled on the lands owned by Abitibi and the government issued orders and tried to have those lands transferred to the government through legislation. As the Supreme Court noted, when such conditions arise, "regulatory bodies sometimes have to perform remediation work". The decisions of the Ontario Court of Appeal in *Nortel* and *Northstar Aerospace Inc (Re)*, 2013 ONCA 600, 234 ACWS (3d) 642, both decided after *Abitibi*, also dealt with the same type of industrial contamination on land owned by the debtors, and the same kind of clean-up order.

[179] Contrast that with the licensing and regulatory regime here. The abandonment obligations are not an unknown or unexpected event; all parties involved know these obligations will arise at

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the end of the life of the well. The AER is not in the business of performing abandonment work itself; the evidence of the AER's affiant was that it rarely, if ever, conducts abandonment work on behalf of its licensees, and when it does so it virtually never asserts a claim for reimbursement. Specifically with respect to the Redwater assets, the AER does not intend to perform the abandonment work. Abandonment is the obligation of the licensee. It is sometimes funded through the LLR program, using security posted by licence-holders. This is the funding system the Trustee seeks to avoid. It is not a claim by the Regulator.

[180] If the wells are declared to be orphaned wells, the OWA may eventually abandon the wells, but it has no ability to seek reimbursement from the licensee or anyone else. The OWA's involvement is subject to the priorities assigned to the hundreds of other orphan sites within its mandate and would likely involve a significant timeline**.** In 2015, with less wells orphaned than currently exist, the OWA predicted it would take between 10 and 12 years to complete the necessary work. Moreover, as the OWA points out, it is a non-profit organization, largely funded by industry, and is separate from the AER. In neither situation (the LLR program nor the OWA) is the abandonment work performed by, or funded by, the provincial government. There is no "sufficient certainty" that the regulatory body, or the provincial government, will perform the end of life obligations and be in a position to assert a monetary claim.

[181] The chambers judge apparently recognized this uncertainty, noting at para 173 of his reasons:

> 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.

[182] Nevertheless, the chambers judge went on to hold that the situation met the intention of the majority in *Abitibi* because the Trustee would have to expend funds, in the nature of the posted security, in order to comply with the orders and that, "although not expressed in monetary terms, the AER orders are in this case intrinsically financial".

[183] With respect, that is an erroneous application of the test. It is not enough that a regulatory order is "intrinsically financial" to render it a claim in bankruptcy. The Ontario Court of Appeal rejected a similar characterization in *Nortel*, in which the respondents had argued that, "as long as the order requires an expenditure of funds its nature is monetary". In rejecting this position, the Court of Appeal said at paras 31 and 32:

> … 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*, 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.

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[184] I would apply the same reasoning here. The chambers judge’s approach to the question of whether the application of the provincial regulation amounts to a monetary claim is too broad. There is not sufficient certainty that the work will be done, either by the AER or the OWA, and no certainty at all that a claim for reimbursement would be made. There is no monetary claim that can be compromised in bankruptcy proceedings here; what we are dealing with are public duties and regulatory obligations that survive the bankruptcy. In law, the end of life obligations are licence conditions which must be assumed before an entity may profit from resource extraction. These are costs to comply with generally applicable laws. Even if end of life obligations are seen as part of the price of obtaining the desired licence, this does not transform them into a monetary claim in bankruptcy.

[185] In my view, the regulatory regime also does not satisfy the first requirement of the *Abitibi* test for monetary claims – that the regulatory body is a creditor of the insolvent debtor. The obligation to abandon a well and reclaim the well site, imposed on a licensee by provincial legislation, is not, in my view, the claim of a creditor. This was the view of Laycraft CJA in *Northern Badger* at para 32-33, when he noted that the cost of abandoning licensed wells “was one of the expenses, inherent in the nature of the properties themselves, taken over for management by the Receiver”. That cost is not owed to the Regulator, or to the province.

[186] I recognize that the majority in *Abitibi* cast the creditor net widely, holding that the provincial government in that rather unique case was a “creditor” for purposes of the *CCAA* as soon as it had exercised its enforcement power against the debtor: at para 27. In that case, it was the issuance of the environmental clean-up orders that identified the regulator as a creditor.

[187] In this case, even if one could characterize the AER’s issuance of the abandonment orders as fitting the description of creditor in *Abitibi*, the LLR program, which requires the posting of security upon licence transfer in certain circumstances, stands on a different footing. The LLR program applies to all licensees and pre-dates any bankruptcy. The continued application of the program upon insolvency falls outside the spirit of *Abitibi* on this issue. The requirement that a licensee obtain AER approval for licence transfers is fundamentally different from the clean-up orders at issue in *Abitibi*. The province has to be able to maintain control over the transfer of well and pipeline licences during a bankruptcy and there is no reason why that regulatory requirement

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cannot co-exist with the distribution of a debtor's estate. The trustee must comply with the licensing requirements during the bankruptcy process. The trustee cannot, for example, transfer AER-issued well licences to an unqualified licensee; AER approval is required for any transfer. Similarly, the trustee must comply with the LLR program when seeking to transfer licences. The requirement to post security as part of the licence transfer is not, in my view, a "debt" owed to the AER or the province. It is part of the conditions attached to the licence. The AER does not become a creditor when it seeks to enforce the licence conditions, whether it does so by the issuance of abandonment orders or otherwise. The definition of "creditor" in *Abitibi* does not fit comfortably with the LLR program at issue here.

[188] The application of the provincial legislation does not result in a "monetary claim" as defined in *Abitibi*. It is, rather, an ongoing regulatory obligation that continues following the bankruptcy.

(iv) The proper interpretation of section 14.06 of the BIA

[189] The respondents also argue that s 14.06, enacted after the decision in *Northern Badger*, fundamentally changed the approach to environmental claims in bankruptcy proceedings and constitutes a complete code governing the treatment of all environmental liabilities in bankruptcy. I accept that it is a specific provision that overrides any general power the trustee may otherwise have to renounce real property. I also accept that the amendments capture both provincial and federal environmental claims. However, the respondent argues for too expansive a reading of what is an awkwardly worded provision. The extraordinary power claimed by the trustees to pick and choose when they will comply with validly enacted and generally applicable provincial law would require a most clear, express and unambiguous grant of that extraordinary power. With respect, that is not s 14.06. When this overbroad interpretation is applied so as to capture the provincial licensing regime, it is also contrary to the direction of the Supreme Court to construe paramountcy narrowly: see *Lemare Logging; Moloney*.

[190] Moreover, the respondents' interpretation disregards the requirement to examine the substance of provincial regulations. Nor does it accord with the Supreme Court's decision in *Abitibi*. A review of the language and context of s 14.06 demonstrates that it, like the definition of monetary claim in *Abitibi*, does not encompass every provincial regulation that touches on environmental matters. It does not encompass the provincial regulations at issue here.

[191] For convenience, the particularly relevant provisions of s 14.06 are set out below:

> 14.06(2) Notwithstanding anything in any federal or provincial law, <u>a trustee is not personally liable</u> in that position for any environmental condition that arose or environmental damage that occurred
>
> > (a) before the trustee's appointment; or

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> (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 …

(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, <u>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</u>,

> (a) if, within such time as is specified in the order, … the trustee
>
> > (i) complies with the order, or
> >
> > (ii) on notice to the person who issued the order, abandons, disposes of or otherwise releases an interest in any real property, or any right in any immovable, affected by the condition or damage;
>
> …, 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 or condition or environmental damage and on any other real property or immovable of the debtor that is contiguous with that real property or immovable and that is related to the activity that caused the environmental condition or environmental damage, and the security

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…

> (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.

[192] In any statutory interpretation exercise, the starting point is Driedger's modern principle: "the words of an Act are to 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": *Re Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27, 154 DLR (4th) 193 at para 21. A review of both the language used in s 14.06 and the context in which it was enacted is important to understanding the intention of Parliament in adding these provisions to the *BIA*: *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, [2002] 2 SCR 559.

[193] The first point to note is that ss 14.06(2) and (4) both expressly speak of the personal liability of the trustee; both provisions specify situations in which a trustee will not be "personally liable" for environmental conditions on land belonging to a debtor that pre-exist the trustee's mandate. Sub-section 14.06(2) entered the *BIA* by way of amendment in 1992, following this Court's decision in *Northern Badger*: see Bill C-22, *An Act to Amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, 3rd Sess, 34 Parl, 1992, cl 14.06(2). As the respondent ATB points out, the decision in *Northern Badger* dealt with the liability of court officers for an insolvent debtor's environmental obligations. To address concerns regarding the potential liability of insolvency professionals, Parliament enacted s 14.06(2).

[194] The Supreme Court noted this legislative response at para 47 of *Abitibi*, saying "[i]n 1992, Parliament shielded trustees from the very liability imposed on the receiver in [*Northern Badger*]". Accordingly, the 1992 amendment to the *BIA* made it clear that trustees could not be personally liable for environmental damage that occurred before their appointment; if there was damage after the trustee's appointment, they could be liable only if the damage resulted from their negligence: SC 1992, c 27, s 9(1), enacting s 14.06(2) of the *BIA*. This was later amended to require gross negligence or wilful misconduct on the part of the trustee: SC 1997, c 12, s 15. These amendments were motivated by and aimed at concerns about the protection of trustees, not the protection of the full value of the estate for the creditors. This is apparent from the express language chosen by Parliament.

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[195] Jacques Hains, Director of Corporate Law Policy Directorate at the Department of Industry Canada, was involved in the 1992 amendments, as well as later amendments in 1997. He explained the purpose of the addition of s 14.06(2) in 1992 as follows:

> What Parliament tried to do in 1992 was to provide a relief to insolvency practitioners – essentially these are receivers and trustees, although it was only trustees in 1992 – because they were at risk when they accepted a mandate to liquidate an insolvent business. That was so because, technically and legally speaking, they are vested with the assets of the bankrupt individual; they become more or less the owner of those assets and are in control of them. 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 Senate Committee on Banking, Trade and Commerce, No 13 (4 November 1996) (Emphasis added)

[196] Moreover, shortly after *Northern Badger* was decided and the 1992 *BIA* amendments were enacted, the definition of "licensee" in Alberta's oil and gas legislation was amended to specifically include "trustee and receiver-manager", further pointing out the potential for the personal "out-of-pocket" liability of a trustee for environmental conditions that arose prior to the trustee's mandate.

[197] Additional amendments to the *BIA* followed in 1997: Bill C-5, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, 2nd Sess, 35th Parl, 1997, cl 15. The Hansard debates at that time demonstrate that a continued aim of s 14.06 was to limit the personal liability of insolvency professionals, as was noted by Mr. Hains:

> 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.
>
> House of Commons Debates, Evidence of the Standing Committee on Industry, 35th Parl, 2nd Sess, No 16 (11 June 1996) at 1549-1555.

[198] This was also noted by Gordon Marantz, Legal Advisor to the Department of Industry, who said that the 1997 amendments were intended to "provide the trustee with protection from being chased with deep-pocket liability": House of Commons Debates, Evidence of the Standing Committee on Industry, 35th Parl, 2nd Sess, No 21 (25 September 1996) at 1715.

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[199] Sub-section 14.06(4), enacted as part of the 1997 amendments, contains the key contested provisions relevant to this appeal. It refers to "orders" to remedy an environmental condition or damage, and provides that a trustee is not "personally liable" to comply with or pay costs associated with such orders if the trustee has "released an interest in real property" affected by the condition or damage, or has "abandoned or renounced or been divested of any interest in any real property" affected by the condition or damage.

[200] The respondents argue that s 14.06(4) grants to trustees a broad right to renounce <u>any</u> assets that are affected by <u>any</u> environmental order. This, they say, allows the trustee of Redwater's estate to avoid the costs associated with compliance with Redwater's licensing obligations, and to increase the value of the estate for the benefit of the creditors.

[201] I cannot accept the respondents' interpretation of s 14.06(4). As I will explain, their interpretation requires that several parts of the sub-section be read impermissibly broadly. Such a broad reading conflicts with the principle of cooperative federalism, which requires courts to avoid placing too broad an interpretation on the federal legislation and to read the federal and provincial legislation harmoniously so as to avoid a conflict wherever possible. The only matter on which all parties before the Court agreed was that the language of s 14.06(4) is not a model of clarity. It is certainly not apparent on the face of the provision that the respondents' preferred, expansive interpretation is the only available interpretation.

[202] First, the respondents' interpretation requires that the phrase "personal liability of the trustee" include the liability of the debtor's estate. In making the 1997 amendments, including s 14.06(4), Parliament chose to repeat the language adopted in s 14.06(2) regarding the protection of trustees from personal liability. That choice of language, and the context, indicates that Parliament's intent was to continue the protection earlier granted to trustees; to avoid trustees being saddled personally with liabilities the estate could not cover. As has been noted, this was Parliament's response to *Northern Badger*, and to the subsequent amendment of Alberta's oil and gas legislation.

[203] The appellants say that the trustee's ability to renounce real property is limited to that which is necessary for the trustee to avoid personal liability for complying with an environmental order, but that s 14.06(4) does not prevent the assets of the estate being used to comply with the order. I accept that argument to the extent that it reinforces that end of life obligations bind the estate and cannot be renounced. However, in my view the inapplicability of s 14.06 as a whole, and s 14.06(4) specifically, to Alberta's licensing regime is also apparent from other parts of the provision.

[204] For instance, the respondents would read the word "order" to encompass any and all regulation that touches on environmental matters. This reading is overbroad and is inconsistent with the decision of the Supreme Court in *Abitibi*. Not every provincial regulatory obligation is covered by the bankruptcy scheme.

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[205] The respondents' interpretation would treat s 14.06 as a complete code, occupying the entire field of environmental regulation after a bankruptcy has occurred. The Supreme Court in *Abitibi* rejected that approach, instead maintaining the distinction between ongoing regulatory obligations, as opposed to monetary claims by regulators that are subject to bankruptcy priorities. If s 14.06 occupied the entire field, there would be no need for the *Abitibi* test. As the Supreme Court has noted, the enactment of s 14.06 was, in part, a response to this Court's decision in *Northern Badger*. The respondents' argument ignores the holding in *Northern Badger* that some regulatory claims are duties owed to the public and that such public obligations survive bankruptcy, a distinction that was maintained by the Supreme Court in *Abitibi*. If, as the respondents argue, the *BIA* amendments in s 14.06(4) were intended to allow a trustee to pick and choose which ongoing regulatory obligations it would fulfill, the legislation would have to say so clearly. It does not. The Hansard debates would also be replete with analysis on the point. They are not.

[206] I do not read s 14.06(4) as allowing trustees to pick and choose which regulatory obligations apply to them. A proper interpretation of the provision must take a narrower focus. It is not only that the respondents' reading of the subsection is unnecessarily broad, although that renders it inconsistent with the constitutional imperative to read the federal and provincial legislation harmoniously together. For the following reasons, the respondents' interpretation is also contrary to the plain language of the provisions of s 14.06 and the context in which they were enacted.

[207] Sub-section 14.06(4) must be read together with the balance of s 14.06, in accordance with the interpretive principle that a statutory provision must be read as a whole. As Sullivan notes in her *Construction of Statutes,* "The broad general rule for the construction of statutes is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest"[5]. Subsection 14.06(4) does not stand in "splendid isolation" in the *BIA*, or even within s 14.06. It is part of an interconnected set of provisions that must be interpreted together.

[208] The provisions of subsections 14.06(4) to (8) were enacted together, as part of the 1997 amendments, and must be read together. Those provisions combine to enact a compromise with respect to the environmental clean-up of a bankrupt's real property. The Hansard debates prior to the 1997 amendments demonstrate that intention. Mr. Morantz, quoted above, spoke of the "trade-off" envisioned by the provision:

> You can't just look at one part of the environmental section, because it's a package. It's designed to ensure that a receiver or a trustee can take control of a property and determine whether or not there's an environmental problem and whether or not it's

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[5] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (2014, LexisNexis) at 404, citing *Greenshield v The Queen*, [1958] SCR 216 at 225

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> worth cleaning up, and to provide the trustee with protection from being chased with deep-pocket liability.
>
> *The trade-off of the environmental authorities agreeing to give that freedom to a trustee is that the environmental authorities get the lien on the property, so if it's abandoned to them, they have an easy means of getting title, remedying the damage and then recouping their cost out of the sale of the property.*
>
> House of Commons Debates, Evidence of the Standing Committee on Industry, 35th Parl, 2nd Sess, No 21 (25 September 1996) at 1715 (emphasis added)

[209] To similar effect is the following statement by Jacques Hains:

> Bill C-5 then adds two more options. The first is the possibility for trustees or receivers – insolvency practitioners – to seek time from courts to say, "I need to assess the economic viability of the proposal". Regulators would be there to say, "There is a health hazard; therefore you have 24 hours," or "You can take two to three weeks." The court will give that time. Moreover, 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.
>
> *That is when the third element of the proposal kicks in. For the first time, the Canadian Bankruptcy and Insolvency Act will give environmental claims an absolute first-rank priority over banks, over all secured creditors, over the real property that is the object of the order, plus any contiguous property related to the activity that caused the contamination. They will have an absolute super-priority, recognized in law, over the banks. A super-lien.*
>
> Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, No 13 (4 November 1996)

[210] To the extent, then, that s 14.06(4) is intended to permit trustees to renounce assets that are subject to remediation orders, that ability is restricted to real property that is the subject of the statutory compromise. If one side of the trade-off does not apply to a particular situation, none of the trade-off can apply. Section 14.06 puts into effect a *quid pro quo*, a balancing of interests. On my reading of the provision, the trustee's ability to renounce assets is restricted to real property of the debtor that is subject to an order that amounts to a monetary claim (and is therefore a claim provable in the bankruptcy). The ability to renounce is accompanied by a balancing provision to ensure the regulatory authority does not bear the full burden of remediating the debtor's real property, and creditors do not unduly benefit from remediation work performed by the authority. This balance is effected by provisions that grant the Crown a super-priority over contaminated real property of the debtor, or property of the debtor contiguous to it, for costs incurred in remedying environmental damage affecting that real property: s 14.06(7). If the super-priority is insufficient

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to cover the incurred clean-up costs, the remaining costs are a provable claim in the bankruptcy and will rank as an unsecured claim against all the debtor's assets: s 14.06(8).

[211] This interpretation is borne out by the intention of Parliament in enacting ss 14.06(4) to (8), as exhibited in the Hansard debates, is consistent with the Supreme Court of Canada's decision in *Abitibi*, and is supported by the language of the provision.

[212] In addition to the legislative debates already cited, Mr. Hains further explained the mechanism put in place for the balancing of interests, prior to the enactment of ss 14.06(4) to (8):

> My colleagues from the Department of the Environment also asked me what would become of the abandoned site. The Department of the Environment would be responsible for cleaning up the land and confirming the cost of such a clean-up. The contaminated land would then recover commercial value, it would be sold and the amount would first of all be used to refund the Department of the Environment.
>
> House of Commons Debates, Evidence of the Standing Committee on Industry, 35th Parl, 2nd Sess, No 16 (11 June 1996) at 1655.

[213] The Supreme Court also reviewed the Parliamentary debates, and described Parliament's intention at para 32 of *Abitibi*:

> Parliament recognized that regulatory bodies sometimes have to perform remediation work (see House of Commons, *Evidence of the Standing Committee on Industry*, No 16, 2nd Sess., 35th Parl., June 11, 1996). *When one does so, its claim with respect to remediation costs is subject to the insolvency process, but the claim is secured by a charge on the contaminated real property and certain other related property and benefits from a priority. ... Thus, Parliament struck a balance between the public's interest in enforcing environmental regulations and the interest of third party creditors in being treated equitably.* (Emphasis added)

[214] In other words, the balance struck by s 14.06 applies to those regulatory orders that are properly considered monetary claims, or claims provable in bankruptcy, pursuant to the test set out by the Supreme Court in *Abitibi*. When real property that is subject to such a claim is renounced, that real property is subject to the balancing super-priority. These conditions are exemplified by the situation at issue in *Abitibi* – pollution, industrial contamination, or similar environmental damage on the debtor's land. In *Abitibi*, the Supreme Court stated that the purpose of this part of s 14.06 was to "balance the creditor's need for fairness against the debtor's need to make a fresh start": para 47. Rather than having the creditor pay for environmental damage it could not foresee, therefore, Parliament devised a compromise, which would allow the Crown, if it proceeded with the clean-up of the debtor's land, to recoup some of its costs through a super-priority over that land.

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[215] The balancing of interests created by these provisions does not apply to ongoing regulatory obligations in the nature of a public duty; it does not apply to permit a trustee to renounce the end of life obligations inherent in the licences issued to permit access to Alberta's oil and gas resources. It does not apply to a licence that requires the consent and approval of the Regulator to transfer. The provisions of s 14.06 are simply inapplicable to those public obligations in the distinctive context of oil and gas development and regulation.

[216] Each of ss 14.06(4), (7) and (8) refer to "real property"; s 14.06(4) speaks of the trustee releasing "an interest in any real property affected by the condition", and s 14.06(7) speaks of the Crown having a claim for the cost of "remedying any environmental condition ... affecting the real property of the debtor". These subsections all focus on the debtor's interest in real property. The debtor would be in a position to transfer this real property to another, without the consent of any regulator. Alberta's regulatory regime, however, addresses the AER-issued licences, which, as discussed earlier, are not an interest in real property, and the wells drilled pursuant to those licences, which comprise chattels attached to land that is owned by the owner of the surface, not the debtor. Further, the consent of the Regulator is needed to transfer the licence. The unique nature of Alberta's oil and gas industry comes into play here, and it has significant implications for any attempt to apply s 14.06 to Alberta's regulatory regime.

[217] On the respondents' reading of the provision, section 14.06(4) permits a trustee to walk away from an asset of the debtor – the debtor's interest in land affected by environmental damage – when the costs to remediate that land will exceed its value. This ability to renounce must be read in conjunction with the other half of the compromise - the super-priority over the debtor's real property established by s 14.06(7).

[218] Section 14.06(7) grants the Crown a super-priority in the debtor's real property so that the Crown may recoup some of the costs incurred to clean up the environmental damage on that same property. This provision, and the compromise inherent in it, is effective only where it is the debtor's real property that has suffered environmental damage. It has no application here. There is no "real property of the debtor" in which the Crown can take a super-priority. The well licence is not real property, and it is nonsensical to contemplate a super-priority attached to an abandoned well or to a mineral interest often already owned by the Crown and leased to the debtor. In enacting subsection 14.06(7), Parliament intended to provide a meaningful source of recompense if the public incurs remediation costs to clean up a debtor's property. In this situation, that intention is rendered meaningless.

[219] *Abitibi* and cases decided subsequent to it concern contamination on land owned by the debtor. In *Abitibi*, the company's operations were carried out on, and industrial contamination occurred on, the company's land (although on the unique facts of that case, the land was subsequently expropriated by the government). In *Nortel*, manufacturing activities were carried out on several sites owned by Nortel, some of which had since been transferred to other owners. Clean up orders were directed to Nortel as well as the former and current owners of the land. The

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order found to be a claim provable in bankruptcy was associated with a site still partially owned by Nortel. In *Northstar*, the company operated a manufacturing and processing facility. A site at Cambridge was contaminated while Northstar owned it. The government commenced remediation work on the site, which established that the clean-up order was in substance a claim provable in bankruptcy.

[220] That is not the situation with Alberta's oil and gas regulation. The well licence conditions that impose ongoing public obligations to safely abandon and reclaim wells are not the sort of "order" at issue in these cases, and contemplated by s 14.06(4). Neither AER-issued well licences nor the chattels that comprise the well itself are the sort of "real property" contemplated by that provision. Importantly, the end of life obligations the trustee seeks to avoid primarily affect land that belongs not to the debtor, but to a third party – either the Crown or a private third party who owns the surface of the land on which the well and other facilities were placed. The creditor, who granted credit with full knowledge of the nature of the collateral available and the end-of-life obligations inherent in it, will take the benefit of more profitable portions of the debtor's estate, while leaving the surface owner's land in unsafe and less valuable condition. This sort of undesirable and unintended consequence should not happen unless there is no other available statutory interpretation.

[221] At para 132 of his reasons, the chambers judge stated that, "section 14.06 ensures that creditors do not unduly bear the burden of a debtor's environmental liabilities". The Supreme Court in *Abitibi* expressed a similar concern at para 40:

> … full compliance with orders that are found to be monetary in nature would shift the costs of remediation to third-party creditors, including involuntary creditors, such as those whose claims lie in tort or in the law of extra-contractual liability. In the insolvency context, the Province's position would result not only in a super-priority, but in the acceptance of a "third-party-pay" principle in place of the polluter-pay principle.

[222] However, in this case, it is a third party owner of the surface and/or the public at large that is being asked to bear the burden of the debtor's unfulfilled obligations, while the lender receives more value than it bargained for when it made its decision to lend.

[223] Sub-section 14.06(4) was not intended to operate in Alberta's regulatory environment. The balance struck by s 14.06 does not take into account the third party surface owner, who is a common player in the Alberta system. The diminution in value of that party's land will be the result of the debtor's failure to fulfill obligations that were statutorily imposed when the licence was issued, and the lender, who knew of the obligations when funds were advanced, will benefit. Sub-section 14.06(4), and its reference to a trustee renouncing interests in real property, simply does not apply to the end of life obligations attached to AER licences. Even assuming the assets can be renounced, the end of life obligations would continue to bind the remaining parts of the estate.

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[224] Finally, s 14.06(8) ensures "a claim against a debtor for environmental clean-up costs is a provable claim", but there is no such claim under the Alberta licensing and regulatory regime. Pursuant to the *Abitibi* analysis, discussed earlier, there is no monetary claim by the Crown that would qualify as a claim provable in bankruptcy. These known, assumed licence conditions are public duties, different from generally applicable environmental regulations.

[225] The interaction of ss 14.06(4) to (8) is a clear compromise between the cost to clean up environmental hazards or pollution on a debtor's real property, as incurred by a regulator, and the ability of the regulator to recoup some of those costs by selling the remediated property. It has absolutely no applicability to a provincial licensing regime that imposes obligations on licensees as part of granting access to develop a largely public resource.

[226] The chambers judge considered the effect of the *BIA* amendments on the reasoning in *Northern Badger*, noting that Burrows J in *Strathcona County v PriceWaterhouseCoopers* 2005 ABQB 559, [2005] AWLD 2962 held that "the amendments did not overrule the principles stated in *Northern Badger* regarding compliance with public duty, namely the bankrupt's obligation to comply with public safety or environmental standards even where it impacts creditors". I agree with that conclusion. The chambers judge seemed, however, to prefer the reasoning of the Ontario Court of Appeal in *Harbert Distressed Investment Fund LP v General Chemical Canada Ltd*, 2007 ONCA 600, 160 ACWS (3d) 217 which he described as follows:

> … to the extent that *Northern Badger* dealt with priorities in relation to the payment of environmental remediation costs, it was no longer applicable because subsections 14.06(7) and (8) of the *BIA* expressly stipulate the ranking of such claims and provincial legislation cannot reorder *BIA* priorities: *Redwater* (ABQB), para 127.

[227] As neither subsection 14.06(7) nor 14.06(8) has any application to the provincial regulations at issue here, I do not find this reasoning compelling in the situation before us. It does not recognize the need to consider the substance of Alberta's licensing regime. This is not surprising, as the Ontario Court of Appeal was dealing with a situation that was clearly covered by the *BIA* provisions, and found that the Ontario Ministry of the Environment had security against the debtor's real property pursuant to those provisions. The Ontario decision pre-dates *Abitibi*, but it seems to me that the orders at issue in *Harbert* would likely have been classified as monetary claims under the test set out in that case. Only those orders that are monetary claims are captured by s 14.06. Ongoing regulatory obligations remain outside the bankruptcy process and the reasoning in *Northern Badger* continues to apply to them.

[228] Alberta's regime for regulating the exploration and development of oil and gas resources and ensuring public and environmental safety during and after the life of a licensed well does not fit comfortably within the language of s 14.06 of the *BIA*. It requires a strained interpretation to make it fit. Courts should not have to work so hard to find a conflict. The Supreme Court has cautioned that conflict between provincial and federal legislation should not be found lightly.

Paramountcy must be narrowly construed, and "conflict" must also be defined narrowly, "so that each level of government may act as freely as possible within its respective sphere of authority": *Husky Oil*.

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7. Does Alberta's Regulation Of The Oil And Gas Industry Conflict With The *BIA*?

[229] The ultimate question on the appeal is: does Alberta's regulatory regime conflict with the *BIA*, in the sense that (i) it is operationally impossible to comply with both the federal and provincial law, or (ii) the provincial regime frustrates the purpose of the federal law.

(i) There is no operational conflict between the BIA and the regulatory regime

[230] In *Moloney*¸ Gascon J, writing for the majority of the court, cited the following description of the first branch of the paramountcy test, from *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161, 138 DLR (3d) 1 at para 19 of his reasons:

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is <u>actual conflict in operation</u> as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other. (Emphasis of Gascon J.)

[231] Gascon J further described the test as being whether "both laws 'can operate side by side without conflict', … or whether both 'laws can apply concurrently, and citizens can comply with either of them without violating the other'": para 19. He rejected the suggestion that there must be a conflict in the literal meaning of the words of the provisions at issue, instead preferring to look at "a proper reading of the provisions based on the modern approach to statutory interpretation" and asking whether this reading "led to the conclusion that the provincial and federal laws could operate side by side without conflict": para 23. In *Moloney* itself, the majority found an operational conflict because the provincial scheme was read as compelling payment of a provable claim that had been released, in direct contradiction with s 178(2) of the *BIA*.

[232] The only operational conflict said to arise here is between s 14.06(4) of the *BIA* and the definition of "licensee" under the *OGCA* and the *Pipeline Act*, which explicitly includes trustees. This conflict, as described in the respondents' arguments and the decision of the chambers judge, is premised on the entitlement of the Trustee to abandon or renounce some of Redwater's assets, said to be granted by s 14.06(4) of the *BIA*. The respondents say that the entitlement to renounce granted by the *BIA* includes the entitlement to renounce the corresponding end of life obligations associated with the renounced assets. The AER, they say, seeks to prevent the Trustee from renouncing those assets and the corresponding obligations by relying on the definition of licensee under the provincial legislation. They say the Trustee cannot be forced to comply with obligations imposed by provincial statute when it has renounced those obligations pursuant to the federal

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statute. The chambers judge concluded that there was an operational conflict, on the basis of this reasoning.

[233] The foundation for this conclusion falls completely away, of course, if s 14.06(4) does not grant a right to renounce the end of life obligations imposed by the regulatory regime. I have concluded that, on a proper interpretation of s. 14.06(4), it does not apply in this situation to permit the trustee to renounce those obligations. The *BIA* does not, therefore, release the Trustee from its ongoing regulatory obligations with respect to Redwater's licensed assets. If there is no entitlement to renounce the obligations under the *BIA*, there is no operational conflict in enforcing those obligations under the provincial regulatory regime. There is nothing in the *BIA* that prevents the trustee, or any licensee, from complying with the requirements of the provincial legislation.

[234] Conflict is a high standard and should not be easily inferred, created or satisfied. Conflict requires actual inconsistency, like in *Moloney* where the province sought to enforce a debt that was discharged and forgiven under the federal *BIA*. For about twenty-five years, before this constitutional challenge, the AER and trustees worked together to comply with the end of life licence conditions, while maximizing recovery for the creditors. This co-operation ended when the AER communicated changes in how it would exercise its discretion to permit or disallow licence transfers. While bankrupt licensees were certainly not targeted specifically, and trustees enjoy personal immunity, the trustees determined they could no longer work within the new rules. I do not say that because provincial licences have co-existed with federal legislation for many years that this precludes a finding that they are in operational conflict. What is relevant is not the mere passage of time, but the substance of the legislation. The fact that for over two decades trustees in bankruptcy have been able to discharge their mandates while also respecting the terms of the provincial oil and gas licences acquired through the estate suggests that these federal and provincial obligations are, in the language of paramountcy, not mutually exclusive. End of life obligations and bankruptcy have lived and operated together and their concurrent application has not then, and does not now, produce any genuine inconsistency.

(ii) The regulatory regime does not frustrate the purposes of the BIA

[235] In my view, the regulatory regime also does not frustrate the purpose of the *BIA*. As was discussed earlier, the relevant bankruptcy purpose for this analysis is the equitable distribution of assets among creditors. It will be recalled that this purpose is achieved by requiring creditors wishing to enforce a claim provable in bankruptcy to participate in one collective proceeding: *Moloney* at para 34. There is frustration of purpose where the effect of a provincial law is to conflict with or alter the priorities established by the *BIA*; where the provincial law purports to give priority to one provable claim over others: *Husky Oil* at para 40.

[236] In *Northern Badger*, this Court considered the substance of Alberta's regulatory regime for oil and gas development, and found that it did not involve a reordering of bankruptcy priorities, and did not conflict with the *BIA*. Chief Justice Laycraft set out the issue as follows, at para 45:

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> 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.

[237] The Chief Justice rejected this argument, concluding at para 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.* (Emphasis added)

[238] A consideration of Alberta's oil and gas regulatory regime in its current form leads me to the same conclusion.

[239] The cost of abandoning licensed wells and reclaiming well sites is an ongoing regulatory obligation and an inherent part of the licensed asset, well known and understood by the debtor licensee and the licensee's lenders. The record makes clear that it was well understood by the respondent ATB, the primary lender here. The end of life obligations associated with licensed assets, being compliance costs to generally applicable laws, are factored in to the lender's risk assessment and its decision to lend on the strength of the debtor's collateral.

[240] The continued application of the regulatory regime following bankruptcy does not determine or reorder priorities among creditors, but rather values accurately the assets available for distribution. The value of the debtor's estate must take into account the end of life obligations associated with the licences that form a part of that estate. If this means that, in the end, there is less value available for distribution to the creditors, that is part of the bankruptcy scheme and the risk that the creditor takes when lending on the basis of the debtor's assets, with their associated obligations.

[241] It is a fundamental principle of bankruptcy law that "creditors should not gain on bankruptcy any greater access to their debtors' assets than they possessed prior to bankruptcy": *RBC v North American Life Assurance Co*, [1996] 1 SCR 325, [1996] 3 WWR 457 at para 18. An approach to the issues raised in this appeal that does not include sufficient consideration of the nature of the regulatory regime risks contravention of that principle. The regulatory regime, prior to bankruptcy, contemplates that the value of all a licensee's licensed assets will be available to satisfy all end of life obligations. This is the basis of the LLR program, and that regulatory approach is factored into decisions regarding, for example, the approval of licence transfers, a

licensee's entitlement to additional licences, and the amount of security the licensee will be required to post upon licence transfer. The licensee's lenders are aware of the system. The occurrence of a bankruptcy should not enable lenders to avoid the system and access the value of specific licensed assets while ignoring the corresponding end of life obligations.

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[242] The LLR program, as part of the regulatory scheme, continues to apply following bankruptcy and applies, specifically, to any proposed licence transfers. Compliance with that program may affect the value of individual assets, but it does not alter priorities among creditors. The Trustee, by attempting to avoid its regulatory obligations, seeks to increase the value of the estate above what it would have been but for the bankruptcy. As in *Northern Badger*, compliance by the trustee with the law, through the posting of security upon licence transfer in accordance with the LLR program, may affect the overall value of the estate and therefore the amount of money available for distribution, but it does alter the priority of claims.

[243] The Alberta legislation operates to manage the exploration and exploitation of a largely public resource, and ensure public and environmental safety in the development of that resource. These are fundamentally provincial concerns. The legislation does not seek to reorder priorities on bankruptcy, nor, in my view, is that its effect. This is not the sort of "clear conflict" required to declare a provincial law to be inapplicable in bankruptcy: *Husky Oil* at para 37. Constitutionality is to be presumed, and the provincial and federal legislation should be read harmoniously together if it is possible to do so. That is what this court did in *Northern Badger*, and I would do the same here.

[244] The appellants argue that if Redwater can shed its end of life obligations, this would provide an incentive for many other similarly situated enterprises to organize their affairs to do the same, resulting in even more orphaned wells. They have a point, as the ability to avoid end of life obligations will not arise only on bankruptcy, but under the *CCAA* as well. This may encourage licensees to place wells with significant end of life expenses into one entity and separate that entity from other, more profitable, holdings. If that entity goes bankrupt or is re-organized, there is the fear that these public duties would be washed away from the entity and placed instead on others. There is unfairness if the entity is permitted to reserve and preserve any "assets" for itself and to avoid the costs of the public obligations assumed to gain access to the resource in the first place. The respondent and bankruptcy professionals before this Court argued that this fear is exaggerated. With respect, it is difficult to share their optimism. It is more realistic to assume that individuals will operate as rational economic actors who organize their affairs to maximize their own self- interest, within the limits allowed by law. If they are allowed to avoid or evade the end of life responsibilities attached to their licences, abandonment and reclamation, so necessary for the environment, would likely be among the first sacrifices made in times of fiscal difficulty.

8. Conclusion

[245] For the foregoing reasons, I would allow the appeal.

Appeal heard on October 11, 2016

Reasons filed at Calgary, Alberta
this 24th day of April, 2017

____
Martin J.A.

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Appearances:

K.T. Lenz, Q.C. and M.W. Selnes
for the Appellant Orphan Well Association

P. Johnston, Q.C. and K. Cameron
for the Appellant Alberta Energy Regulator

J.L. Oliver and T. Cumming
for the Respondent Grant Thornton Limited

R. Zahara and C. Nyberg
for the Respondent Alberta Treasury Branches

L. Riczu and L. Semenchuk
for the Intervenor Minister of Justice and Solicitor General of Alberta

B. Hughson (no appearance)
for the Attorney General of Canada

L.L. Manning
for the Intervenor Canadian Association of Petroleum Producers

C.E. Hanert and A.C. Maerov
for the Intervenor Canadian Association of Insolvency and Restructuring Professionals

R.J. Fyfe
for the Intervenor Attorney General for Saskatchewan

A. Welch
for the Intervenor British Columbia (Natural Gas Development) and the British Columbia Oil and Gas Commission