COURT OF APPEAL OF ALBERTA

COURT OF APPEAL FILE NUMBER	2301-0216AC
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REGISTRY OFFICE	CALGARY
APPLICANT	MANTLE MATERIALS GROUP, LTD.
STATUS ON APPEAL	RESPONDENT
STATUS ON APPLICATION	RESPONDENT
RESPONDENT	TRAVELERS CAPITAL CORP.
STATUS ON APPEAL	PROPOSED APPELLANT
STATUS ON APPLICATION	APPLICANT
DOCUMENT	**MEMORANDUM OF ARGUMENT**
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And to the Service List

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I. OVERVIEW[1]

1. Broadly, this appeal (the "**Appeal**") is about whether the Supreme Court of Canada expressly limited the scope of the priority conferred on a regulator over a debtor's assets for the cost of environmental reclamation and abandonment obligations pursuant to its decision in *Orphan Well Association v Grant Thornton Ltd* ("***Redwater***").[2] In turn, the answer to this broader question informs the issue of importance to this case: whether collateral that is subject to a lender's purchase money security interest ("**PMSI**"), and is entirely unrelated to and unaffected by any environmental condition or damage giving rise to end-of-life obligations, must be appropriated to satisfy those obligations before the lender is entitled to recovery.

2. The learned Chambers Judge erred when he held that the Court in *Redwater* did not make a legal determination about the limitations on the scope of the regulator's priority, and thus, incorrectly considered himself bound by the facts and analysis in *Orphan Well Association v Trident Exploration Corp*, 2022 ABKB 839 ("***Trident***").[3] In *Trident*, the Court also failed to appreciate the express limitations placed on the scope of the regulator's priority by the Supreme Court of Canada.

3. The Appellant, Travelers Capital Corp. ("**Travelers**") holds a purchase money security interest (the "**Travelers PMSI**") in certain equipment (the "**Travelers Equipment**") owned by Mantle Materials Group, Ltd. ("**Mantle**"). Mantle brought an application seeking, *inter alia*, an order that an interim financing charge in favour of Mantle's affiliate (the "**Financing Charge**") be granted priority over the Travelers Equipment to secure the financing needed to complete end-of-life reclamation work ordered by Alberta Environment and Protected Areas ("**Alberta Environment**").

4. The Chambers Judge granted the Financing Charge priority over the Travelers PMSI based on his erroneous finding that there is no *ratio decidendi* in *Redwater* on the question of whether assets unrelated to any environmental condition or damage must be used to satisfy obligations to remediate such condition or damage before any creditor is entitled to payment. The Chambers Judge committed a further and related error in finding that the decision of the Court of King's Bench of Alberta in *Trident* is consistent with *Redwater* and this Court's decision in *Manitok Energy Inc (Re)*, 2022 ABCA 117 ("***Manitok***"). These errors led the Chambers Judge to conclude, incorrectly, that he was bound by *Trident*.

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[1] This Appeal is from the Order made pursuant to the Reasons for Judgment of the Honourable Justice C.C.J. Feasby dated August 28, 2023, indexed as 2023 ABKB 488 [**APPENDIX A**].
[2] *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 [**TAB 1**].
[3] *Orphan Well Association v Trident Exploration Corp*, 2022 ABKB 839 ("***Trident***") [**TAB 2**]

5. Travelers is entitled to appeal as of right under s. 193(c) of the *Bankruptcy and Insolvency Act* (the "***BIA***"), because the order sought to be appealed puts into jeopardy Travelers' recovery of its loan to Mantle, which is of a value well in excess of $10,000.

6. In the alternative, if leave is required, the test for leave under s. 193(e) of the *BIA* is easily met in the circumstances: the proposed appeal is *prima facie* meritorious, significant to insolvency and banking practice, significant to Travelers and other similarly situated creditors within Mantle's proceedings, and will not result in any undue delay to Mantle's proposal proceedings.

II. FACTS

A. Mantle

7. Mantle operates 14 gravel pits on public land pursuant to surface material leases issued by Alberta Environment. Mantle also operates 10 gravel pits on private lands pursuant to royalty agreements with landowners.[4] Mantle acquired these assets by way of an amalgamation completed pursuant to the *Companies' Creditors Arrangement Act* proceedings (the "**JMB CCAA**") of JMB Crushing Systems Inc. and its affiliates (collectively "**JMB**") in May 2021.[5]

B. The EPOs and the Reclamation Obligation

8. Following the commencement of the JMB CCCA, Alberta Environment issued Environmental Protection Orders (the "**EPOs**") to JMB in respect of some of the gravel pits.[6] The EPOs required JMB to address end-of-life reclamation steps to be taken at various gravel-producing or formerly gravel-producing assets operated by JMB (the "**Reclamation Obligation**"). The Reclamation Obligation was transferred to Mantle as part of a restructuring transaction in the JMB CCAA.[7]

C. The Travelers Loan

9. On October 8, 2021, Travelers and Mantle entered into a loan agreement (the "**Travelers Loan**") in the amount of $1.7 million to finance the acquisition of the Travelers Equipment. Travelers is presently owed approximately $1.1 million.[8] As security for the Travelers Loan, Mantle granted Travelers a first-ranking PMSI in the Travelers

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[4] Affidavit of Byron Levkulich, filed on August 8, 2023 ["**Levkulich #1**"] at para. 10 (Exhibit "F" of the Affidavit of Alex Henze sworn on September 7, 2023 ["**Henze Affidavit**"]).
[5] Levkulich #1 at para. 7.
[6] Levkulich #1 at para. 13.
[7] Levkulich #1 at para. 15; see also Affidavit of Heather Dent, filed on August 11, 2023 at paras 3 and 4 (Exhibit "J" of the Henze Affidavit).
[8] Affidavit of Warren Miller, filed on August 15, 2023 ["**Miller #1**"] at para. 3 (Exhibit "E" of the Henze Affidavit).

Equipment, which includes universal assets such as skidsteers, trucks, excavators, flat hoses and buckets.[9]

D. Mantle's NOI Proceedings

10. On July 14, 2023, Mantle filed a notice of intention to make a proposal (the "**NOI**") under s. 50.4 of the *BIA* and FTI Consulting Canada Inc. was named as proposal trustee of Mantle (in such capacity, the "**Proposal Trustee**") (the "**Proposal Proceedings**").[10]

E. The Financing Charge

11. On August 8, 2023, Mantle filed an application with the Court seeking, relief including an order that the Financing Charge be granted priority over the Travelers PMSI in relation to the Travelers Equipment.[11] In seeking this relief Mantle relied on its position that *Redwater*, *Manitok* and *Trident* preclude any distribution to secured creditors until all of the reclamation work required under the EPOs is completed.

12. Travelers opposed this relief on a number of grounds, including that Mantle's interpretation of *Redwater* was incorrect, such that Mantle was not required to use assets "unrelated to the environmental condition or damage"—such as the Travelers Equipment—to satisfy reclamation obligations arising from the EPOs.

F. The Chambers Decision

13. The Chambers Judge considered *Redwater*, *Manitok* and *Trident* and whether he was bound by those decisions under the principles of vertical and horizontal *stare decisis*.[12]

14. The Chambers Judge considered paragraph 159 of *Redwater*, which addresses the question of whether assets unrelated to an environmental condition or damage may be used to fulfill end-of-life obligations associated with that condition or damage:

> …it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* — rather, it facilitates them.[13]

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[9] Miller #1, Ex. B.
[10] Levkulich #1 at para. 5.
[11] Application by Mantle, filed August 8, 2023 at para. 1 (Exhibit "C" of the Henze Affidavit).
[12] Chambers Decision at para. 17.
[13] *Redwater*, *supra* note 1 at para 159 [**TAB 1**].

15. The Chambers Judge concluded that neither *Redwater* nor *Manitok* decided the issue of whether or not certain assets of a bankrupt company may be considered "assets unrelated to the environmental condition or damage". Consequently, the Chambers Judge concluded that there was no *ratio decidendi* that bound him in the present case.[14]

16. The Chambers Judge concluded that *Trident* extended the principles of *Redwater* to include unlicensed assets that were not directly involved in oil and gas production (such as real estate used to store equipment). Given that the Travelers Equipment was used to operate Mantle's gravel business, the Chambers Judge held he could not sensibly distinguish the Travelers Equipment from the unlicensed assets in *Trident*. Consequently, he concluded that he was bound by the principles of horizontal *stare decisis* to follow *Trident*.[15]

III. LAW AND ANALYSIS

A. Grounds of Appeal

17. Travelers submits that the learned Chambers Judge erred in law in finding that:

(a) there was no *ratio decidendi* in *Redwater* regarding the issue before him, namely whether assets unrelated to the environmental condition or damage giving rise to environmental remediation obligations must be used to satisfy such obligations before any creditor is entitled to payment;

(b) *Trident* is consistent with *Redwater* and *Manitok*; and

(c) ultimately, that he was not bound to follow *Redwater* on the issue before him, and instead was bound to follow *Trident*.

B. Appeal as of right under the BIA

18. Mantle commenced the Proposal Proceedings by filing the NOI under s. 50.4(1) of the *BIA*. Accordingly, this appeal is subject to the procedures under the *BIA* and the associated Rules, including rules as to when an appeal may proceed as of right, without leave.

19. Travelers is entitled to appeal the Chambers Decision as of right under s. 193(c) of the BIA, which provides that an appeal lies to the Court of Appeal from any order or decision of a judge of the court if the property involved in the appeal exceeds in value ten thousand dollars.

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[14] Chambers Decision at para. 34.
[15] Chambers Decision paras. 36-38.

20. The Saskatchewan Court of Appeal recently held in *MNP Ltd v Wilkes* that s. 193(c) should not be construed narrowly so as to reduce more appeals under the BIA to the need to apply for leave,[16] and endorsed various formulations of the test to be used in applying s. 193(c), namely: (i) what loss is entailed by the granting or refusing of the right claimed; (ii) what is the value in jeopardy; (iii) what does the order appealed from provide in comparison to the remedy is sought in the notice of appeal; and (iv) what is the amount of money at stake?[17]

21. The Ontario Court of Appeal in *Hillmount Capital Inc v Pizale* succinctly described the inquiry under s. 193(c) as follows:

> … While the cases under s. 193(c) have explained the interpretative task using differing language (as is to be expected in a body of jurisprudence under a national statute), at their core the cases share common ground in attempting to discern the operative effect of the order sought to be appealed: **does the order result in a loss or gain, or put in jeopardy value of property, in excess of $10,000?**[18]
>
> [**emphasis added**]

22. Travelers is owed approximately $1.1 million, secured only against the Travelers Equipment. Mantle's cash flow projections show that reclamation of Mantle's inactive gravel pits will cost approximately $1.64 million over the 21 week period ending December 29, 2023,[19] exceeding the security held by Alberta Environment.[20] Further, Mantle's reclamation costs are projected to increase after December 29, 2023. The order granted by the learned Chambers Judge requires Travelers' Equipment (or its proceeds) to be used to satisfy Mantle's interim financing (which effectively stands in place of the regulator), and only after the reclamation costs are funded, to satisfy Mantle's indebtedness to Travelers. Thus, the order appealed from puts into jeopardy Travelers' recovery of its loan to Mantle, which is of a value well in excess of $10,000.[21]

23. Travelers is therefore entitled to appeal the learned Chambers Judge's decision as of right under s. 193(c) of the *BIA*.

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[16] *MNP Ltd v Wilkes*, 2020 SKCA 66 ("***Wilkes***") at para 60 [**TAB 3**]
[17] *Ibid*, at para 61 [**TAB 2**]
[18] *Hillmount Capital Inc v Pizale*, 2021 ONCA 364, at para 45 [**TAB 4**]
[19] Supplement to the First Report of FTI Consulting Canada Inc., in its capacity as Proposal Trustee of Mantle Materials Group, Ltd. dated and filed August 11, 2023 (the "**Supplemental Report**") at para 12 and Appendix "A" (Exhibit "K" of the Henze Affidavit)
[20] First Report of FTI Consulting Canada Inc. in its capacity as Proposal Trustee of Mantle Materials Group, Ltd. dated August 4, 2023 and filed August 11, 2023, at para 30 (Exhibit "D" of the Henze Affidavit).
[21] Miller #1 at para 10.

C. Leave to appeal

24. If s. 193(c) is not engaged, Travelers is entitled to leave under s. 193(e). An application for leave to appeal under s. 193(e) requires the Court to consider the following factors:

(a) Whether the appeal is of significance to the practice;

(b) Whether the point raised is of significance to the action itself;

(c) Whether the appeal is *prima facie* meritorious or frivolous; and

(d) Whether the appeal will unduly hinder the progress of the action.[22]

25. All of these factors weigh in favour of granting leave to Travelers.

i. Significance to the practice

26. This element of the test for leave to appeal is not concerned with whether the matter is something of academic interest to lawyers, but whether it is of actual significance to the industry and professions involved in bankruptcy matters.[23]

27. The Appeal raises the issue of whether property that is entirely unaffected by the environmental condition or damage that gives rise to end-of-life obligations associated with regulated assets must be used to satisfy those end-of-life obligations before any distribution can be made to creditors. This issue is of immense significance to insolvency practice and to the banking and financing industries.

28. If left to stand, the Chambers Decision will make the lending process for equipment financiers and other PMSI lenders so economically and practically infeasible that lending to any borrower except the largest of companies would border on being impossible.

29. Equipment financiers typically provide financing on the basis that they can ultimately recoup their capital on the underlying security. From an economic standpoint, it is unreasonable and impractical to expect equipment financiers with modest loans secured against specific collateral of modest value, which is unaffected by an environmental condition or damage, to dedicate the time and capital necessary to perform a proper risk quantification and assessment, requiring specialized third-party reports and qualitative assessments, of risks that do not directly affect the lender's collateral.

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[22] *Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd*, 2021 ABCA 66 ("***Greenfire***") at paras 17 and 18 [**TAB 5**]. In addition to the four factors, some courts consider as a separate factor whether the judgment appears to be contrary to law, amounts to an abuse of judicial power or involves an obvious error, causing prejudice for which there is no remedy. However, these considerations are subsumed in the analysis of the merits of the appeal under the third factor: See *Business Development Bank of Canada v Pine Tree Resorts Inc*, 2013 ONCA 282 at paras 19 to 33 [**TAB 6**].

[23] *Re Fantasy Construction Ltd (Bankrupt)*, 2007 ABCA 335 at para. 65 [**TAB 7**].

30. Furthermore, PMSI lenders and financiers would have to continually assess the economic and commodity fluctuations that affect the underlying value of regulated assets in determining risk. Lenders in this position cannot be expected to assess, mitigate and appropriately price the risk of potentially multimillion dollar reclamation costs taking priority to their collateral, which is unrelated to that obligation.

31. Practically, even if it were economically feasible to assess and price the risk of lending to a company with known or potential environmental reclamation obligations, diligence done by a lender at a given point in time will not help the lender to mitigate future, unknown, and unquantifiable environmental reclamation obligations that arise through continued operations, enterprise growth, or other changing conditions, all of which are outside the lender's control and monitoring capabilities. Lenders who cannot properly and regularly assess and act to mitigate their risk will simply refuse to lend.

32. Given the feasibility issues outlined above, it is a foreseeable consequence of the Chambers Decision that equipment financiers and PSMI lenders will decline to provide financing to any borrower with current or potential future reclamation liabilities. The Chambers Decision adds to the growing risk to secured lenders in Canada posed by recent judicial consideration of the relative priority to be accorded to environmental reclamation liabilities in relation to asset-specific lenders.[24]

33. Finally, while interim financing charges are often permitted to prime secured creditors with all-asset security, it is more common for PMSI lenders to maintain their priority position over their specific collateral relevant to interim financing. At the very least, PMSI lenders are typically paid for the use of their collateral, unlike in the present case.

ii. Significance to the action itself

34. Courts have held that in most instances this question will be answered in the affirmative and balanced against other criteria, as a party will rarely advance an appeal that is not significant to the action itself.[25]

35. The proposed Appeal is significant to the action as it will determine whether the Financing Charge takes priority to the Travelers PMSI (and any security of any of Mantle's other PMSI lenders or equipment financiers) in relation to the Travelers Equipment. If the Chambers Decision is overturned, Travelers will be entitled to an immediate distribution from the proceeds of the Travelers Equipment, thus reducing interest costs and freeing up capital. If the Chambers Decision stands, Travelers will be left hoping that Mantle can fulfill its environmental reclamation obligations without

[24] *Qualex-Landmark Towers Inc v 12-10 Capital Corp*, 2023 ABKB 109 [**TAB 8**].
[25] *Greenfire*, *supra* note 17 at para. 20 [**TAB 5**].

resort to the proceeds of the Travelers Equipment to repay the interim financing used to fund the required reclamation work.

iii. The Proposed Appeal is prima facie meritorious

36. On a leave application, a full examination of the merits is not required; Travelers need only show that it has an arguable case, meaning that the issue raised by the appellant cannot be dismissed through a preliminary examination of the question of law.[26] Put differently, the court must be satisfied the appeal is not frivolous, in that the likelihood of success is extremely low.[27] The issues raised by Travelers cannot be dismissed through a preliminary examination of the questions of law engaged. Travelers' likelihood of success on appeal is high.

37. First, the Chambers Judge erred in law by finding there was no *ratio decidendi* in *Redwater* on the issue before him: whether the whole of the debtor's estate, including unrelated assets, must be used to satisfy end-of-life environmental obligations prior to any distribution to creditors.

38. In making this finding, the Chambers Judge failed to give effect and meaning to the words used by Wagner C.J.C. in paragraph 159 of *Redwater*. The Chambers Judge was incorrect when he stated that further guidance is needed from the Court in *Redwater* as to what "assets unrelated" means. This interpretation fails to give meaning to the words used by the Court and to the textual context in which those words appear.

39. In paragraph 159 of *Redwater*, the Court held that by enacting s. 14.06(7) of the *BIA*, Parliament intended to permit regulators to place a first charge on real property of a bankrupt that is affected by an environmental condition or damage in order to fund remediation, and that recognizing that abandonment orders and LMR requirements are not provable claims does not conflict with, but rather, facilitates, the aims of the *BIA*.

40. The reference to the "aims of the *BIA*" can only be a reference to the aim that is specifically addressed in paragraph 159, namely allowing a regulator to extract value from the bankrupt's property, if that property is affected by an environmental condition or damage. The phrase "assets unrelated" appears later in the paragraph, and is followed by the words "to the environmental condition or damage." No further guidance is needed to determine the plain meaning of "assets unrelated" when read in this context: it means assets that are not affected by an environmental condition or damage.

41. Not only is the Chambers Judge's finding about the absence of a *ratio* on the point before him contrary to the plain meaning of the words used in paragraph 159 of *Redwater*, it is

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[26] *DGDP-BC Holdings v Third Eye Capital Corp*, 2021 ABCA 284 at para 47 [**TAB 9**].
[27] *DGDP-BC Holdings v Third Eye Capital Corp, PricewaterhouseCoopers*, 2021 ABCA 33 ("**Third Eye #1**") at paras 21-26 [**TAB 10**].

also contrary to his own statements about what the Court in *Redwater* decided. The Chambers Judge held that, in *Redwater*, the Court stated the debtor's environmental liabilities were not required to be satisfied with unrelated assets,[28] and that the Court's reasons reveal that it "did not want to foreclose a scenario where assets were so unrelated to an environmental obligation that they should not be called upon to satisfy the environmental obligation."[29]

42. The findings from *Redwater*, as identified and described by the Chambers Judge, clearly fit into the definition of *ratio decidendi* used by him: they are statements of law, not facts; questions of law, and not the "various factual matrices from which that question of law might arise."[30] Furthermore, the *ratio decidendi* in *Redwater* must not be confined to the specific facts of that case. The breadth of a decision's ratio varies according to the level of court rendering it. Where the Supreme Court of Canada turns its full attention to an issue and deals with it definitively, its guidance should be treated as binding, even where the comments made are not strictly necessary for resolving that particular case.[31]

43. While the Chambers Judge was likely correct in finding that *Manitok* does not directly address the issue before him, this Court's decision in *Manitok* is consistent with the *ratio decidendi* of *Redwater* identified above, that environmental reclamation obligations associated with licensed assets are not required to be satisfied with "unrelated assets", i.e., assets unaffected by any environmental condition or damage.

44. While this Court in *Manitok* expressly left for another day the status of assets completely unrelated to a regulated industry, this Court held that all of Manitok's licensed assets (both those retained and those disclaimed) should be treated collectively as contaminated and as having to answer for the abandonment and reclamation obligations attached to the disclaimed assets. This is consistent with the *ratio* in *Redwater* that assets that are not affected by an environmental condition or damage may not be used to satisfy end-of-life obligations arising from such condition or damage.

45. The Chambers Judge was therefore bound under the principles of vertical *stare decisis* by both *Redwater* and *Manitok* to find that because the Travelers Equipment was not affected by an environmental condition or damage, and had no end-of-life obligations associated with it, the Financing Charge should not have attached to the Travelers Equipment in priority to Travelers PMSI.

46. The foregoing analysis also demonstrates that the Chambers Judge erred in finding that *Trident* was consistent with *Redwater* and *Manitok*. In *Trident*, the Court held that

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[28] Chambers Decision, para 29.
[29] Chambers Decision at para 30.
[30] Chambers Decision at para 26, citing *R v Kirkpatrick*, 2022 SCC 33 at para 127 ("***Kirkpatrick***") [**TAB 11**]
[31] *Kirkpatrick, supra* note 28 at paras 122-123 [**TAB 11**].

Redwater shifts liability from "polluter-pay" to "everyone pays", and that all classes of creditors, including secured creditors writ large, is subject to the AER super priority. This finding is directly contrary to the words used in paragraph 159 of *Redwater*, specifically that "unrelated assets" should not be used to satisfy reclamation obligations.

47. Further, the decision in *Trident* is contrary to the Supreme Court's endorsement of the necessary balance between the environment and creditors' rights, which is achieved by ensuring that end-of-life obligations are satisfied using only those assets in which such obligations are inherent. *Trident* also fails to consider the fact that its findings interfere with, rather than facilitate, the aims of the *BIA* in limiting a regulator's super priority to assets affected by an environmental condition or damage, contrary to *Redwater*.

iv. No Undue Delay

48. This factor focuses on the effect granting leave to appeal will have on the insolvency process.[32] Evidence of the delay and its consequences is necessary.[33] Mantle's proposal proceedings will not be unduly delayed if leave to appeal is granted, and there is no evidence of any delay or associated consequences.

49. The only delay that might occur as a result of an appeal is a delay in the availability of interim financing, and thus, in the commencement of Mantle's reclamation activities. However, the evidence on the record indicates that even if an appeal did cause delay in the availability of interim financing, Mantle's cash flows show that interim financing is not strictly necessary to complete the reclamation work, but for issues of timing.[34] There is also no evidence that the interim lender will refuse to advance funds in the face of an appeal. Furthermore, Alberta Environment holds more than $1 million to secure Mantle's reclamation obligations, which in turn provides security to the interim lender.

IV. CONCLUSION

50. Travelers respectfully requests a determination that it may pursue its proposed Appeal as of right, or alternatively a determination granting it leave to do so.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of September, 2023.

LAWSON LUNDELL LLP

Per: Alexis Teasdale / Joel Schachter
Counsel for Travelers Capital Corp.

[32] ***Third Eye #1***, *supra* note 25 at para 27 [**TAB 10**].
[33] *2003945 Alberta Ltd v 1951584 Ontario Inc*, 2018 ABCA 48 at para 43 [**TAB 12**].
[34] Supplemental Report at para 30 and Appendix "A".

TABLE OF APPENDICES AND AUTHORITIES

Appendices

A. Reasons for Judgment of the Honourable Justice C.C.J. Feasby dated August 28, 2023, indexed as 2023 ABKB 488

Authorities

TAB

1. *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5

2. *Orphan Well Association v Trident Exploration Corp*, 2022 ABKB 839

3. *MNP Ltd v Wilkes*, 2020 SKCA 66

4. *Hillmount Capital Inc v Pizale*, 2021 ONCA 364

5. *Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd*, 2021 ABCA 66

6. *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282

7. *Re Fantasy Construction Ltd (Bankrupt)*, 2007 ABCA 335

8. *Qualex-Landmark Towers Inc v 12-10 Capital Corp*, 2023 ABKB 109

9. *DGDP-BC Holdings v Third Eye Capital Corp,* 2021 ABCA 284

10. *DGDP-BC Holdings v Third Eye Capital Corp, PricewaterhouseCoopers,* 2021 ABCA 33

11. *R v Kirkpatrick*, 2022 SCC 33

12. *2003945 Alberta Ltd v 1951584 Ontario Inc*, 2018 ABCA 48

APPENDIX A

Court of King's Bench of Alberta

Citation: Re Mantle Materials Group, Ltd, 2023 ABKB 488

Date:
Docket: 2301 10358
Registry: Calgary

In the Matter of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as Amended

And in the Matter of the Notice of Intention to Make a Proposal of Mantle Materials Group, Ltd.

Reasons for Decision
of the
Honourable Justice Colin C.J. Feasby

Introduction

[1] Mantle Materials Group, Ltd. applied for an extension of time to make a proposal pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 s 50.4(8), approval of various charges on the bankrupt estate ("Restructuring Charges") including the priority of those charges, and approval of the payment of certain pre-filing debts to creditors whose support is required to perform environmental reclamation work that will be integral to the pending proposal. The application was granted with a temporary proviso with respect to the priority of the Restructuring Charges over certain equipment to ensure that Travelers Capital Corp, a secured lender, was not prejudiced prior to the release of these Reasons.

[2] Mantle advises that the proposal that it intends to make will not allow payment to any creditors before Mantle has satisfied its end-of-life obligations stemming from Environmental Protection Orders issued by Alberta Environment and Protected Areas ("AEPA" formerly Alberta Environment and Parks) with respect to several gravel producing properties. Mantle submits that this is what is required by ***Orphan Well Association v Grant Thornton Ltd***, 2019 SCC 5 ("*Redwater*") because the environmental remediation obligation is an obligation of the company that must be satisfied prior to distributions to creditors. AEPA supports Mantle's position.

[3] Travelers asserts that it has priority with respect to security in certain equipment and Travelers' ability to realize on its security should not be postponed until after the remediation work has been completed to AEPA's satisfaction and subordinated to the Restructuring Charges. Travelers offers a different interpretation of ***Redwater***. Travelers contends that ***Redwater*** held that an end-of-life environmental obligation need only be satisfied using assets encumbered by or related to the end-of-life obligation. Travelers submits the Court should find that a creditor with security over assets unrelated to assets burdened with the environmental remediation obligation may realize on such security without delay.

Background

[4] Mantle operates 14 gravel pits on public land pursuant to surface material leases issued by AEPA. Mantle also operates 10 gravel pits on private land pursuant to royalty agreements with the landowners.

[5] Mantle acquired its gravel-producing assets in 2021 in the *Companies' Creditors Arrangement Act* proceedings for JMB Crushing Systems Inc. and associated companies.[1] Financial liabilities of JMB were compromised and undesired assets were transferred to a residual company pursuant to a Reverse Vesting Order. The desired assets remained in JMB and its subsidiary 2161889 Alberta Ltd, both of which then amalgamated with Mantle on May 1, 2021.

[6] Following the commencement of the JMB CCAA proceedings, AEPA issued Environmental Protection Orders ("EPOs") to JMB and 216 in respect of some of the gravel-producing properties.

[7] EPOs are issued pursuant to AEPA's authority under the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 s 140. An AEPA inspector is permitted to "issue an environmental protection order regarding conservation and reclamation to an operator directing the performance of any work or the suspension of any work if in the inspector's opinion the performance or suspension of the work is necessary in order to conserve and reclaim the land."

[8] An EPO issued by AEPA in respect of end-of-life reclamation is similar in nature to an Abandonment and Reclamation Order ("ARO") issued by the Alberta Energy Regulator ("AER"). Indeed, all the parties in the present case proceeded on the basis that an EPO issued by AEPA had the same legal effect and should be subject to like treatment in insolvency proceedings as an ARO issued by the AER.

[9] The EPOs issued by AEPA to JMB address end-of-life reclamation steps to be taken at various gravel-producing or formerly gravel-producing assets operated by JMB on both public and private land.

[10] The original Reverse Vesting Order presented to the Court in the JMB CCAA proceedings sought to absolve the directors of JMB and 216 of responsibility for the EPOs and sought to usurp AEPA's regulatory role by putting the Court in a supervisory role with respect to

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[1] For a discussion of the restructuring of JMB and the use of a reverse vesting order in that case, see Candace Formosa, "Dampening the Effect of *Redwater* Through a Reverse Vesting Order," in Jill Corrani & D. Blair Nixon, eds., *Annual Review of Insolvency Law,* (Toronto: Thomson Reuters, 2021) 697.

the performance of reclamation work by Mantle and compliance with the EPOs. AEPA objected to the original proposed Reverse Vesting Order.

[11] As a result of AEPA's objections, the Court approved a revised Reverse Vesting Order that provided that the order did not affect the liability of JMB, 216, or the directors of those companies for "Compliance Issues" or performing "Reclamation Obligations" in respect of the various gravel-producing properties. Mantle accordingly remained liable for the EPOs issued with respect to both the properties acquired in the amalgamation with JMB and 216 and the properties now possessed by the residual company. Mantle negotiated a plan with AEPA for the reclamation work to be done to satisfy the EPOs.

[12] Following completion of the JMB CCAA proceedings, Mantle entered a loan transaction with Travelers. Travelers loaned Mantle $1,7000,000 for the acquisition of equipment for use in its operations. Mantle granted Travelers a purchase-money security interest (PMSI) over the equipment. The security interest was registered in the Alberta Personal Property Registry. Pursuant to an agreement between Travelers, Mantle, and Fiera Private Debt Fund V LP, which holds a general security interest in all of Mantle's present and after acquired property, Travelers' security interest in the equipment was designated to have first priority. As of July 21, 2023, Mantle owed Travelers just short of $1.1 million.

[13] Mantle experienced operational problems and was burdened with excessive debt inherited from the JMB CCAA proceedings and incurred in the period following the acquisition of the gravel-producing properties. Mantle's difficulties were compounded by the significant reclamation obligations it was required to complete to satisfy the EPOs. On July 14, 2023, Mantle filed a notice of intention to make a proposal under s 50.4 of the BIA.

[14] On August 15, 2023, I granted an extension of the BIA stay period and the time period to permit Mantle to make its proposal. I further approved the creation and priority ranking of various Restructuring Charges, including an Administration Charge, a Directors & Officers Charge, and an Interim Lending Facility Charge. I was satisfied that the participation of lawyers, insolvency professionals, and directors and officers was required for the proposal to succeed. I was further satisfied that the Interim Lending Facility, which is to be primarily used to fund reclamation work, is necessary for the success of the proposal.

[15] Travelers' argued that the Restructuring Charges should not have priority over Travelers' security interest in the equipment and that Travelers should be able to be paid out or realize on its security without delay. Mantle, supported by AEPA, submitted that the Restructuring Charges were necessary to put the proposal into effect and that the main plank of the proposal was the completion of the reclamation work to satisfy the EPOs. Mantle is of the view that the value of the gravel pits that are still active exceeds the amount of the reclamation obligations. Mantle has also posted more than $1 million as security with AEPA which will be returned upon completion of the reclamation obligations to AEPA's satisfaction. Mantle submits that Travelers should not be permitted to realize on its security prior to the completion of the reclamation work because if it were allowed to do so, that would jeopardize Mantle's ability to complete the reclamation work and thereby jeopardize its ability to make a proposal to its creditors.

[16] I granted an Order to allow work on the pending proposal, including reclamation work, to get underway while preserving Travelers' position pending these Reasons. The Order provided, in part, as follows:

> The Charges shall constitute a security and charge on the Property and, with the exception of the security interests in favour of Travelers registered in the Alberta Property Registry as base registration number 21100725361 (the "**Travelers' Security Interests**"), such Charges shall rank in priority to all other security interests, trusts, liens, charges, deemed trusts, encumbrances and claims of secured creditors, statutory or otherwise in favour of any person, including liens and trusts created by federal and provincial legislation (collectively, the "**Encumbrances**"), provided, however, that the relative priority of Charges and the Travelers' Security Interests is subject to further order of the Court....

Redwater, Manitok, Trident,* and *Stare Decisis

[17] Mantle and AEPA submit that three decisions dictate the outcome of this case: ***Redwater***; ***Manitok Energy Inc (Re)***, 2022 ABCA 117; and ***Orphan Well Association v Trident Exploration Corp***, 2022 ABKB 839. These decisions, they say, stand for the principle that end-of-life environmental obligations must be satisfied before any creditors may recover and that the whole estate of the insolvent entity is to be used to satisfy such end-of-life environmental obligations. This rule leaves no room for those with security in assets unrelated to the environmental condition or damage to realize on that security until end-of-life obligations have been satisfied using, if necessary, the unrelated assets in which they have security.

[18] Travelers submits that Mantle and AEPA are wrong that ***Redwater*** and ***Manitok*** are controlling and that instead the present case is one of "first instance." ***Redwater*** and ***Manitok*** indicate that there is an exception to the rule posited by Mantle and AEPA for assets unrelated to the environmental condition or damage and that it is for this Court to give that exception shape. Travelers, citing ***R v Comeau***, 2018 SCC 15 and ***R v Sullivan***, 2022 SCC 19, further asserts that ***Trident*** at para 66-67 is inconsistent with ***Redwater*** and ***Manitok*** and "violates the doctrine of vertical *stare decisis*...." ***Trident***, Travelers argues, should not be followed because of its conflict with ***Redwater*** and ***Manitok***.

[19] Rather than discussing a basic concept like *stare decisis* in Reasons, I normally just ask what the relevant cases and statutes say the law is and then apply the law to the facts of the case before me. Travelers, however, has raised the issue of *stare decisis* and provided me with some authorities, making it clear that they attach some importance to it.

[20] As a judge of a court of first instance, the principle of vertical *stare decisis* provides that I am bound to follow the *ratio decidendi* of decisions of higher courts. The inimitable Master Funduk explained: "The judicial pecking order does not permit little peckers to overrule big peckers. It is the other way around": ***South Side Woodwork v R.C. Contracting***, 1989 CanLII 3384 (AB KB) at para 53.

[21] The Court held in ***Comeau*** at para 26 "[s]ubject to extraordinary exceptions, a lower court must apply the decisions of higher courts to the facts before it." None of the exceptions apply in the present case. The issue, as will be come clear later in these Reasons, is whether there is a decision that is on point that must be followed or whether the reasons of the Supreme Court of Canada and the Court of Appeal left the question open.

[22] The principle of horizontal *stare decisis* requires that judges of the same Court pay heed to each others' decisions. This is particularly important in the commercial arena where parties

plan their affairs and make significant investment decisions based on the law that emerges from this Court.

[23] Kasirer J, writing for the Court, observed in ***Sullivan*** at para 65 "Horizontal *stare decisis* applies to courts of coordinate jurisdiction within a province.... While not strictly binding in the same way as vertical *stare decisis*, decisions of the same court should be followed as a matter of judicial comity, as well as for the reasons supporting *stare decisis* generally."

[24] Kasirer J explained in ***Sullivan*** at para 75 that a Court should only depart from horizontal *stare decisis* if:

1. The rationale of an earlier decision has been undermined by subsequent appellate decisions;
2. The earlier decision was reached per incuriam ("through carelessness" or "by inadvertence"); or
3. The earlier decision was not fully considered, e.g. taken in exigent circumstances.

[25] Vertical *stare decisis* requires me to determine the *ratio decidendi* of ***Redwater*** and ***Manitok*** while horizontal *stare decisis* demands that I determine the *ratio decidendi* of ***Trident*** with respect to the question before me – whether the whole of a debtor's estate, including unrelated assets, must be used to satisfy end-of-life environmental obligations prior to any distribution to creditors.

[26] Justices Côté, Brown, and Rowe writing for themselves and Wagner CJC in dissent in ***R v Kirkpatrick***, 2022 SCC 33 at para 127 explained what the *ratio decidendi* of a decision is:

> The *ratio decidendi* of a decision is a statement of law, not facts, and "[q]uestions of law forming part of the *ratio* . . . of a decision are binding . . . as a matter of *stare decisis*." A question of law cannot, therefore, be confused with the various factual matrices from which that question of law might arise [citations omitted].

[27] The *ratio decidendi* of a case can be difficult to separate from *obiter dictum*, which is an expression of opinion that is not essential to a decision. Binnie J explained in ***R v Henry***, 2005 SCC 76 at para 52: "the submissions of the attorneys general presuppose a strict and tidy demarcation between the narrow *ratio decidendi* of a case, which is binding, and *obiter*, which they say may safely be ignored. I believe that this supposed dichotomy is an oversimplification of how the common law develops."

[28] The discussion that follows shows that the issue in the present case is not one of distinguishing between *ratio decidendi* and *obiter dictum*; rather, it is to what extent the Court is bound by what ***Redwater*** and ***Manitok*** imply or, perhaps more accurately, what the parties infer from those decisions. With ***Trident***, the question is whether the *ratio decidendi*, which is clear, applies on the facts of the present case.

[29] What does *Redwater* say about environmental obligations and unrelated assets? Wagner CJC, writing for the majority, pointed out that Redwater's environmental liabilities were not required to be satisfied with unrelated assets. He held at para 159:

> it is important to note that Redwater's only substantial assets were affected by an environmental condition or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* — rather, it facilitates them [emphasis added].

[30] Travelers submits that Wagner CJC chose his words carefully and that the only plausible inference from those words is that unrelated assets cannot be conscripted to satisfy end-of-life environmental obligations. Though he may have chosen his words carefully in the sense that he did not want to foreclose a scenario where assets were so unrelated to an environmental obligation that they should not be called upon to satisfy the environmental obligation, he did not provide any guidance as to what he meant by "assets unrelated" or how unrelated the assets must be to escape the reach of the regulator.

[31] The Court of Appeal in ***Manitok*** addressed the question of whether a debtor's oil and gas assets could be divided into two pools, one consisting of valuable assets and the other consisting of assets burdened by environmental obligations. The Court viewed the situation in ***Manitok*** to be the same as in ***Redwater*** where the proceeds of the sale of valuable oil and gas assets "had to be used by Redwater's trustee to satisfy abandonment and reclamation obligations before any distribution to secured creditors" (para 31). The Court went on at para 31 to explain how it interpreted ***Redwater***:

> The point is that the outcome of ***Redwater*** demonstrates that the Supreme Court of Canada did not treat Redwater's assets as falling into different pools. All of the oil and gas assets were treated collectively as being contaminated, and they all had to answer for the abandonment and reclamation obligations attached to the disclaimed assets. None of the other oil and gas assets were 'assets unrelated' to the other oil and gas assets. Manitok is in exactly the same position. The 'substantial assets' of Manitok are the same as the 'substantial assets' of Redwater.

[32] Though the Court of Appeal adverted in ***Manitok*** to the question of whether in theory unrelated assets could not be called upon to satisfy environmental obligations it deferred the question because it did not have to be decided given the Court's conclusion that all of Manitok's substantial assets were related to the environmental obligations. The Court held at para 36:

> ***Redwater*** confirms that the proceeds of the sale of those assets must be applied first towards the satisfaction of abandonment and reclamation obligations. To the extent that there is any issue about it, the status of assets completely unrelated to the oil and gas business can be left for another day [emphasis added].

[33] Mantle and AEPA argue that Wagner CJC's words in para 159 must be viewed in the context of the whole ruling in ***Redwater***. Wagner CJC held that environmental obligations are a corporate or estate obligation that must be satisfied before any creditor claims (para 98; see also, ***Manitok*** at para 17, 30, & 35). According to Mantle and AEPA, the logic of this ruling leaves no room for the exception for assets unrelated to the environmental condition or damage asserted by Travelers.

[34] The reference to "assets unrelated" in ***Redwater*** unaccompanied by any explanation followed by the Court of Appeal's statement in ***Manitok*** that it was leaving the issue for "another day" indicates that there is no *ratio decidendi* in those cases that binds me in the present case. As I will explain below, the facts of the present case do not require me to decide whether Travelers is correct that some category of assets unrelated to the environmental condition or damage in issue may not be used to satisfy environmental regulatory obligations or Mantle and AEPA are correct that all the assets that comprise the estate of a debtor must be used to address environmental regulatory obligations before creditor claims are paid.

[35] That Redwater and Manitok's substantial assets were all oil and gas assets was not surprising. Many oil and gas companies do not own much in the way of assets other than oil and gas rights and the equipment required to produce oil and gas from those interests in land such as compressors, pumpjacks, and tanks. And even this kind of equipment may be leased instead of owned. Jack R Maslen & Tiffany Bennett, "Going Green? New Interpretations of Redwater from Canada's Natural Resource Sectors" in in Jill Corrani Nadeau & D. Blair Nixon, eds., *Annual Review of Insolvency Law*, (Toronto: Thomson Reuters, 2022) 105 concluded at 119, "based on *Manitok*, assets or proceeds that relate in any way to the debtor's oil and gas business will be used to satisfy non-monetary end-of-life obligations. For most oil and gas producers, this likely means all of their property." A question to be considered later in these Reasons is whether Mantle, a gravel company, is any different than oil and gas companies like Redwater and Manitok.

[36] Whether assets of an oil and gas company other than oil and gas rights are unrelated assets was tested in ***Trident***. Justice Neufeld in ***Trident*** was required to consider whether a receiver was required to allocate proceeds of the sale of assets, including "non-licensed assets such as real estate and equipment" (para 80) to satisfy environmental obligations in priority to municipal tax claims. Neufeld J took a pragmatic approach, refusing to get engaged in a debate over how to draw a line between related and unrelated assets of an oil and gas company. He concluded that because Trident had one business, oil and gas exploration and production, that all assets were related to the environmental obligation. He wrote at para 67:

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

[37] Neufeld J's statement of the law in ***Trident*** is consistent with ***Redwater*** and ***Manitok*** though his application of the law breaks new ground. Whereas in ***Redwater*** and ***Manitok***, it was held that all oil and gas assets should be treated as related to environmental obligations that attached only to some of the oil and gas assets, ***Trident*** extended this principle to other assets used in an oil and gas business even if they were not directly involved in oil and gas production (e.g. the real estate used to store equipment).

[38] None of the exceptions to the principle of horizontal *stare decisis* apply to ***Trident***. The decision was fully considered, carefully reasoned, and has not been undermined by appellate

authority. That means that the question in the present case is whether Mantle's equipment subject to the Travelers security interest is analogous to the equipment and real estate in ***Trident***.

[39] Warren Miller, Vice President of Structured Finance and Capital Markets at Travelers, deposed that it was his understanding that Mantle sought financing from Travelers so that it could "purchas[e] the equipment necessary to operate its business (instead of renting it)." Mr. Miller's Affidavit attached as part of an exhibit a Notice of Intention to Enforce Security which listed all Mantle's equipment that Travelers had financed. The descriptions include the following: Jaw Crushing Plant, Cone Crushing Plant, Screen Plant, Aggregate Feeder, Aggregate Surge Bin, Material Washer, Conveyor, Truck Scale, Articulated Dump Truck, Tracked Excavator, and the like. The equipment in which Travelers has a security interest appears to be part to Mantle's gravel production business.

[40] In my view, no sensible distinction can be made between the equipment and real estate in ***Trident*** and the equipment in the present case. The equipment over which Travelers has a security interest is as much a part of Mantle's gravel business as the equipment and real estate in ***Trident*** was a part of Trident's oil and gas business. Based on this factual finding, I am bound by the principle of horizontal *stare decisis* to follow ***Trident***. In finding that the equipment in the present case is part of Mantle's gravel business, I make no comment on how in theory a line should be drawn between related and unrelated assets or even if a line should be drawn. As the Court of Appeal said in ***Manitok***, that "can be left for another day."

[41] Travelers advanced policy arguments as to why it should not have to wait to realize upon its security until after Mantle completes the reclamation work required by the EPOs. Mantle and AEPA responded with policy arguments supporting the deferral of realization of all secured creditors, including Travelers, until after the satisfactory completion of the reclamation work. Given my conclusion that the equipment subject to the Travelers security interest is related to the assets to which Mantle's environmental obligations pertain in the sense that the equipment is used in gravel production, it is not necessary to explore these policy arguments.

[42] Though I decline to debate the wisdom of the policy of effectively subordinating secured creditors to environmental obligations in these Reasons, it is noteworthy that the evidential record shows that Travelers conducted due diligence prior to entering the financing arrangement with Mantle. Among the materials available to Travelers as part of that due diligence process were documents indicating the existence of Mantle's environmental reclamation obligations and the security posted by Mantle with AEPA. Prior to entering the financing arrangement, Travelers had the opportunity to assess the risk of doing business with Mantle, make an informed decision whether to do business with Mantle, and to negotiate a cost of borrowing that reflected the risk inherent in Mantle's business.

Conclusion

[43] The Travelers security interest in the equipment must be subordinated to the Restructuring Charges because the Restructuring Charges are necessary to the completion of the environmental remediation work that is an important part of the pending proposal. Travelers cannot realize on its security until the environmental reclamation work is completed to AEPA's satisfaction and the only way that such work can be done is with the support of the officers and directors of Mantle, lawyers and insolvency professionals, and the interim lender who are all protected by the Restructuring Charges.

[44] Paragraph 10 of the Order dated August 15, 2023 shall be amended to provide that the Restructuring Charges have priority over the Travelers security interest in the equipment identified in the Travelers security registration.

Heard on the 15th day of August, 2023.
Dated at the City of Calgary, Alberta this 28th day of August, 2023.

Colin C.J. Feasby
J.C.K.B.A.

Appearances:

Tom Cumming & Stephen Kroger, Gowling WLG
for Mantle Materials Group, Ltd.

Alexis Teasdale & Joel Schachter, Lawson Lundell LLP
for Travelers Capital Corp

Pantelis Kyriakakis, McCarthy Tétrault LLP
for the Proposal Trustee, FTI Consulting Canada Inc.

Doug Nishimura, Field LLP,
for Alberta Environment and Protected Areas

Darren Bieganek, Duncan Craig LLP
for 945441 Alberta Ltd

TAB 1

Orphan Well Association and Alberta Energy Regulator *Appellants*

v.

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

and

Attorney General of Ontario, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Ecojustice Canada Society, Canadian Association of Petroleum Producers, Greenpeace Canada, Action Surface Rights Association, Canadian Association of Insolvency and Restructuring Professionals and Canadian Bankers' Association *Interveners*

Orphan Well Association et Alberta Energy Regulator *Appelants*

c.

Grant Thornton Limited et ATB Financial (auparavant connue sous le nom d'Alberta Treasury Branches) *Intimées*

et

Procureure générale de l'Ontario, procureur général de la Colombie-Britannique, procureur général de la Saskatchewan, procureur général de l'Alberta, Ecojustice Canada Society, Association canadienne des producteurs pétroliers, Greenpeace Canada, Action Surface Rights Association, Association canadienne des professionnels de l'insolvabilité et de la réorganisation et Association des banquiers canadiens *Intervenants*

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

2019 SCC 5

File No.: 37627.

2018: February 15; 2019: January 31.

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

Répertorié : Orphan Well Association *c.* Grant Thornton Ltd.

2019 CSC 5

N° du greffe : 37627.

2018 : 15 février; 2019 : 31 janvier.

Présents : Le juge en chef Wagner et les juges Abella, Moldaver, Karakatsanis, Gascon, Côté et Brown.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Constitutional law — Division of powers — Federal paramountcy — Bankruptcy and insolvency — Environmental law — Oil and gas — Oil and gas companies in Alberta required by provincial comprehensive licensing regime to assume end-of-life responsibilities with respect to oil wells, pipelines, and facilities — Provincial regulator administering licensing regime and enforcing end-of-life obligations pursuant to statutory powers — Trustee in bankruptcy of oil and gas company not taking responsibility for company's unproductive oil and gas assets and seeking to walk away from environmental liabilities

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

Droit constitutionnel — Partage des compétences — Prépondérance fédérale — Faillite et insolvabilité — Droit de l'environnement — Pétrole et gaz — Sociétés pétrolières et gazières de l'Alberta tenues par le régime provincial complet de délivrance de permis d'assumer des responsabilités de fin de vie à l'égard de puits de pétrole, de pipelines et d'installations — Organisme de réglementation provincial administrant le régime d'octroi de permis et assurant le respect des obligations de fin de vie en vertu des pouvoirs que lui confère la loi — Syndic de faillite d'une société pétrolière et gazière refusant d'assumer la

associated with them or to satisfy secured creditors' claims ahead of company's environmental liabilities — Whether regulator's use of powers under provincial legislation to enforce bankrupt company's compliance with end-of-life obligations conflicts with trustee's powers under federal bankruptcy legislation or with the order of priorities under such legislation — If so, whether provincial regulatory regime inoperative to extent of conflict by virtue of doctrine of federal paramountcy — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 14.06 — Oil and Gas Conservation Act, R.S.A. 2000, c. O-6, s. 1(1)(cc) — Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12, s. 134(b)(vi) — Pipeline Act, R.S.A. 2000, c. P-15, s. 1(1)(n).

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

The Licensee Liability Rating Program is one means by which the Regulator seeks to ensure that end-of-life obligations will be satisfied by licensees. As part of this program, the Regulator assigns each company a Liability Management Rating ("LMR"), which is the ratio between the aggregate value attributed by the Regulator to a company's licensed assets and the aggregate liability attributed by the Regulator to the eventual cost of abandoning and reclaiming those assets. For the purpose of calculating the LMR, all the licences held by a given company are treated as a package. A licensee's LMR is calculated on a monthly basis and, where it dips below the prescribed ratio, the licensee is required to bring its LMR back up to the prescribed level by paying a security deposit, performing end-of-life obligations, or transferring licences with the Regulator's approval. If either the transferor or the transferee would have a post-transfer LMR below 1.0,

responsabilité des biens pétroliers et gaziers inexploités de la société et tentant de se soustraire aux engagements environnementaux associés à ces biens ou d'acquitter les réclamations des créanciers garantis avant les engagements environnementaux de la société — L'exercice par l'organisme de réglementation des pouvoirs que lui confère la législation provinciale pour contraindre la société faillie à respecter les obligations de fin de vie entre-t-il en conflit avec les pouvoirs accordés au syndic par la loi fédérale sur la faillite ou avec l'ordre de priorités fixé par cette loi? — Dans l'affirmative, le régime de réglementation provincial est-il inopérant dans la mesure du conflit par application de la doctrine de la prépondérance fédérale? — Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3, art. 14.06 — Oil and Gas Conservation Act, R.S.A. 2000, c. O-6, art. 1(1)(cc) — Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12, art. 134(b)(vi) — Pipeline Act, R.S.A. 2000, c. P-15, art. 1(1)(n).

Pour exploiter des ressources pétrolières et gazières en Alberta, une société a besoin d'un intérêt de propriété sur le pétrole ou le gaz (habituellement un bail d'exploitation minière avec la Couronne que les tribunaux canadiens qualifient de profit à prendre), des droits de surface et d'un permis délivré par l'Alberta Energy Regulator (« organisme de réglementation »). Selon la législation provinciale, l'organisme de réglementation n'accordera pas le permis voulu pour extraire, traiter ou transporter du pétrole et du gaz en Alberta à moins que le titulaire de permis n'assume les responsabilités de fin de vie consistant à obturer et à fermer les puits de pétrole afin d'éviter les fuites, à démanteler les structures de surface ainsi qu'à remettre la surface dans son état antérieur. Ces obligations de fin de vie sont appelées l'« abandon » et la « remise en état ».

Le Programme d'évaluation de la responsabilité du titulaire de permis constitue un moyen par lequel l'organisme de réglementation vise à s'assurer que les titulaires de permis rempliront les obligations de fin de vie. Dans le cadre de ce programme, l'organisme de réglementation attribue à chaque société une cote de gestion de la responsabilité (« CGR »), qui représente le rapport entre la valeur totale attribuée par l'organisme de réglementation aux biens d'une société qui sont visés par des permis et la responsabilité totale que l'organisme de réglementation attribue aux coûts éventuels de l'abandon et de la remise en état de ces biens. Pour les besoins du calcul de la CGR, tous les permis détenus par une société donnée sont traités comme un tout. La CGR d'un titulaire de permis est calculée sur une base mensuelle et, lorsqu'elle tombe sous le ratio prescrit, le titulaire de permis doit la ramener en versant un dépôt de garantie, en exécutant les obligations

the Regulator will normally refuse to approve the licence transfer.

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

Redwater, a publicly traded oil and gas company, was first granted licences by the Regulator in 2009. Its principal assets are 127 oil and gas assets — wells, pipelines and facilities — and their corresponding licences. A few of its licensed wells are still producing and profitable, but the majority are spent and burdened with abandonment and reclamation liabilities that exceed their value. In 2013, ATB Financial, which had full knowledge of the

de fin de vie ou en transférant des permis avec l'approbation de l'organisme de réglementation. Si le cédant ou le cessionnaire devait avoir une CGR inférieure à 1,0 après le transfert, l'organisme de réglementation refusera normalement d'approuver le transfert de permis.

L'insolvabilité d'une société pétrolière et gazière autorisée à exercer ses activités en Alberta met en jeu le régime complet de délivrance de permis de l'Alberta qui lie les sociétés actives dans l'industrie pétrolière et gazière, ainsi que la *Loi sur la faillite et l'insolvabilité* (« *LFI* »), une loi fédérale qui régit l'administration de l'actif d'un failli ainsi que la répartition ordonnée et équitable des biens entre ses créanciers. L'*Environmental Protection and Enhancement Act* (« *EPEA* ») de l'Alberta garantit que les obligations réglementaires d'un titulaire de permis continuent d'être respectées pendant qu'il fait l'objet d'une procédure d'insolvabilité en incluant le syndic d'un titulaire de permis dans la définition d'« exploitant » pour l'application de l'obligation de remettre en état et en prévoyant la possibilité qu'une ordonnance de remise en état soit adressée à un syndic. Cependant, faute de négligence grave ou d'inconduite délibérée, elle limite expressément la responsabilité du syndic à l'égard d'une telle ordonnance à la valeur des éléments de l'actif du failli. L'*Oil and Gas Conservation Act* (« *OGCA* ») et la *Pipeline Act* adoptent une approche plus générique : elles incluent simplement le syndic dans la définition de « titulaire de permis ». En conséquence, tout pouvoir que ces lois confèrent à l'organisme de réglementation à l'encontre d'un titulaire de permis peut, en théorie, s'exercer également contre un syndic. L'organisme de réglementation a délégué à l'Orphan Well Association (« OWA »), une entité indépendante sans but lucratif, le pouvoir d'abandonner et de remettre en état les « orphelins » — les biens pétroliers et gaziers ainsi que leurs sites délaissés sans que les processus en question n'aient été correctement effectués par les sociétés liquidées à la fin de leur procédure d'insolvabilité. L'OWA n'a pas le pouvoir de demander le remboursement de ses frais, mais elle peut être remboursée jusqu'à concurrence de la valeur du dépôt de garantie détenu, le cas échéant, par l'organisme de réglementation au profit du titulaire de permis associé au puits orphelin une fois ses travaux environnementaux terminés.

Redwater, une société pétrolière et gazière cotée en bourse, s'est vu octroyer ses premiers permis par l'organisme de réglementation en 2009. Son actif est principalement composé de 127 biens pétroliers et gaziers — puits, pipelines et installations — et des permis correspondants. Quelques-uns des puits autorisés de Redwater sont encore productifs et rentables, mais la majorité est tarie et grevée de responsabilités relatives à l'abandon et à la remise en

end-of-life obligations associated with Redwater's assets, advanced funds to Redwater and, in return, was granted a security interest in Redwater's present and after-acquired property. In mid-2014, Redwater began to experience financial difficulties. Grant Thornton Limited ("GTL") was appointed as its receiver in 2015. At that time, Redwater owed ATB approximately $5.1 million and had 84 wells, 7 facilities and 36 pipelines, 72 of which were inactive or spent, but, since Redwater's LMR did not drop below the prescribed ratio until after it went into receivership, it never paid any security deposits to the Regulator.

Upon being advised of Redwater's receivership, the Regulator notified GTL that it was legally obligated to fulfill abandonment obligations for all licensed assets prior to distributing any funds or finalizing any proposal to creditors. The Regulator warned that it would not approve the transfer of any of Redwater's licences unless it was satisfied that both the transferee and the transferor would be in a position to fulfill all regulatory obligations, and that the transfer would not cause a deterioration in Redwater's LMR. GTL concluded that it could not meet the Regulator's requirements because the cost of the end-of-life obligations for the spent wells would likely exceed the sale proceeds for the productive wells. Based on this assessment, GTL informed the Regulator that it was taking possession and control only of Redwater's 17 most productive wells, 3 associated facilities and 12 associated pipelines ("Retained Assets"), and that it was not taking possession or control of any of Redwater's other licensed assets ("Renounced Assets"). GTL's position was that it had no obligation to fulfill any regulatory requirements associated with the Renounced Assets. In response, the Regulator issued orders under the *OGCA* and the *Pipeline Act* requiring Redwater to suspend and abandon the Renounced Assets ("Abandonment Orders"). The Regulator imposed short deadlines, as it considered the Renounced Assets an environmental and safety hazard.

The Regulator and the OWA then filed an application for a declaration that GTL's renunciation of the Renounced Assets was void, and for orders requiring GTL to comply with the Abandonment Orders and to fulfill the end-of-life obligations associated with Redwater's licensed properties.

état qui excèdent leur valeur. En 2013, ATB, qui avait pleinement connaissance des obligations de fin de vie associées aux biens de Redwater, lui a avancé des fonds et, en contrepartie, s'est vu accorder une sûreté sur ses biens actuels et futurs. Au milieu de 2014, Redwater a commencé à éprouver des difficultés financières. Grant Thornton Limited (« GTL ») a été nommé séquestre de Redwater en 2015. À cette époque, Redwater devait environ 5,1 millions de dollars à ATB et comptait 84 puits, 7 installations et 36 pipelines, dont 72 étaient inactifs ou taris, mais, comme la CGR de Redwater n'est tombée sous le ratio prescrit qu'après la mise sous séquestre de cette dernière, elle n'a jamais versé de dépôt de garantie à l'organisme de réglementation.

Après avoir été informé de la mise sous séquestre de Redwater, l'organisme de réglementation a avisé GTL qu'il était légalement tenu de remplir les obligations d'abandon pour tous les biens visés par des permis avant de distribuer des fonds ou de finaliser toute proposition aux créanciers. L'organisme de réglementation a averti qu'il n'approuverait pas le transfert de l'un ou l'autre permis de Redwater à moins d'être convaincu que le cessionnaire et le cédant seraient en mesure de s'acquitter de toutes les obligations réglementaires, et que le transfert n'occasionnerait pas une détérioration de la CGR de Redwater. GTL a conclu qu'il ne pouvait pas satisfaire aux exigences de l'organisme de réglementation car le coût des obligations de fin de vie des puits taris dépasserait probablement le produit de la vente des puits productifs. Sur la base de cette évaluation, GTL a informé l'organisme de réglementation qu'il prenait possession et contrôle seulement des 17 puits les plus productifs de Redwater, ainsi que de 3 installations et de 12 pipelines connexes (« biens conservés »), et qu'il ne prenait pas possession ou contrôle de tous les autres éléments d'actif de Redwater visés par des permis (« biens faisant l'objet de la renonciation »). Selon GTL, il n'était aucunement tenu de satisfaire aux exigences réglementaires en lien avec les biens faisant l'objet de la renonciation. L'organisme de réglementation a réagi en rendant des ordonnances au titre de l'*OGCA* et de la *Pipeline Act* enjoignant à Redwater de suspendre l'exploitation des biens faisant l'objet de la renonciation et de les abandonner (« ordonnances d'abandon »). L'organisme de réglementation a imposé des délais serrés parce qu'il considérait les biens faisant l'objet de la renonciation comme un danger pour l'environnement et la sécurité.

L'organisme de réglementation et l'OWA ont alors déposé une demande en vue d'obtenir un jugement déclaratoire portant que l'abandon par GTL des biens faisant l'objet de la renonciation était nul, de même qu'une ordonnance obligeant GTL à se conformer aux ordonnances

The Regulator did not seek to hold GTL liable for these obligations beyond the assets remaining in the Redwater estate. GTL brought a cross-application seeking approval to pursue a sales process excluding the Renounced Assets and an order directing that the Regulator could not prevent the transfer of the licences associated with the Retained Assets on the basis of, *inter alia*, the LMR requirements, failure to comply with the Abandonment Orders, refusal to take possession of the Renounced Assets or Redwater's outstanding debts to the Regulator. A bankruptcy order was issued for Redwater and GTL was appointed as trustee. GTL invoked s. 14.06(4)(a)(ii) of the *BIA* in relation to the Renounced Assets.

The chambers judge and a majority of the Court of Appeal agreed with GTL and held that the Regulator's proposed use of its statutory powers to enforce Redwater's compliance with abandonment and reclamation obligations during bankruptcy conflicted with the *BIA* in two ways: (1) it imposed on GTL the obligations of a licensee in relation to the Redwater assets disclaimed by GTL, contrary to s. 14.06(4) of the *BIA*; and (2) it upended the priority scheme for the distribution of a bankrupt's assets established by the *BIA* by requiring that the provable claims of the Regulator, an unsecured creditor, be paid ahead of the claims of Redwater's secured creditors. The dissenting judge in the Court of Appeal would have allowed the Regulator's appeal on the basis that there was no conflict between Alberta's environmental legislation and the *BIA*.

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

Per Wagner C.J. and Abella, Karakatsanis, Gascon and Brown JJ.: The Regulator's use of its statutory powers does not create a conflict with the *BIA* so as to trigger the doctrine of federal paramountcy. Section 14.06(4) of the *BIA* is concerned with the personal liability of trustees, and does not empower a trustee to walk away from the environmental liabilities of the estate it is administering. Furthermore, the Regulator is not asserting any claims provable in the bankruptcy, and the priority scheme in the *BIA* is not upended. Thus, no conflict is caused by GTL's status as a licensee under Alberta legislation. Alberta's

d'abandon et à remplir les obligations de fin de vie associées aux biens de Redwater visés par des permis. L'organisme de réglementation n'a pas cherché à tenir GTL responsable de ces obligations au-delà des éléments qui faisaient encore partie de l'actif de Redwater. GTL a présenté une demande reconventionnelle visant à obtenir l'autorisation de poursuivre un processus de vente excluant les biens faisant l'objet de la renonciation ainsi qu'une ordonnance interdisant à l'organisme de réglementation d'empêcher le transfert des permis associés aux biens conservés en raison, notamment, des exigences relatives à la CGR, du non-respect des ordonnances d'abandon, du refus de prendre possession des biens faisant l'objet de la renonciation ou des dettes en souffrance de Redwater envers l'organisme de réglementation. Une ordonnance de faillite a été rendue à l'égard de Redwater, et GTL a été nommé syndic. GTL a invoqué le sous-al. 14.06(4)a)(ii) de la *LFI* à l'égard des biens faisant l'objet de la renonciation.

Le juge siégeant en cabinet et les juges majoritaires de la Cour d'appel ont donné raison à GTL et décidé que l'utilisation proposée par l'organisme de réglementation des pouvoirs que lui confère la loi pour contraindre Redwater à respecter les obligations d'abandon et de remise en état au cours de la faillite était incompatible avec la *LFI* de deux façons : (1) elle imposait à GTL les obligations d'un titulaire de permis relativement aux biens de Redwater auxquels GTL avait renoncé, ce qui est contraire au par. 14.06(4) de la *LFI*; (2) elle renversait le régime de priorité établi par la *LFI* pour le partage des biens d'un failli en exigeant que le paiement de ses réclamations prouvables, en tant que créancier ordinaire, soit effectué avant celui des réclamations des créanciers garantis de Redwater. La juge dissidente de la Cour d'appel aurait accueilli l'appel de l'organisme de réglementation au motif qu'il n'y avait pas de conflit entre la législation environnementale de l'Alberta et la *LFI*.

Arrêt (les juges Moldaver et Côté sont dissidents) : Le pourvoi est accueilli.

Le juge en chef Wagner et les juges Abella, Karakatsanis, Gascon et Brown : L'utilisation par l'organisme de réglementation des pouvoirs que lui confère la loi ne crée pas de conflit avec la *LFI* de façon à mettre en jeu la doctrine de la prépondérance fédérale. Le paragraphe 14.06(4) de la *LFI* intéresse la responsabilité personnelle du syndic et il ne l'investit pas du pouvoir de se soustraire aux engagements environnementaux liant l'actif qu'il administre. De plus, l'organisme de réglementation ne fait valoir aucune réclamation prouvable en matière de faillite, et le régime de priorité de la *LFI* n'est pas renversé. Donc, le statut

regulatory regime can coexist with and apply alongside the *BIA*.

Bankruptcy is not a licence to ignore rules, and insolvency professionals are bound by and must comply with valid provincial laws during bankruptcy. They must, for example, comply with non-monetary obligations that are binding on the bankrupt estate, that cannot be reduced to provable claims, and the effects of which do not conflict with the *BIA*, notwithstanding the consequences this may have for the bankrupt's secured creditors. Given the procedural nature of the *BIA*, the bankruptcy regime relies heavily on the continued operation of provincial laws but, where there is a genuine conflict between provincial laws concerning property and civil rights and federal bankruptcy legislation, the *BIA* prevails. The *BIA* as a whole is intended to further two purposes: the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation. As Redwater is a corporation that will never emerge from bankruptcy, only the former purpose is relevant here.

The Abandonment Orders and the LMR requirements are based on valid provincial laws of general application — exactly the kind of valid provincial laws upon which the *BIA* is built. There is no conflict between the Alberta regulatory scheme and s. 14.06 of the *BIA*, because, under s. 14.06(4), a trustee's disclaimer of real property when there is an order to remedy any environmental condition or damage affecting that property protects the trustee from personal liability, while the ongoing liability of the bankrupt estate is unaffected. This interpretation is supported by the plain language of the section, the Hansard evidence, a previous decision of this Court and the French version of the section. The same concept is also found in both s. 14.06(1.2) and s. 14.06(2), which also specifically state that the trustee is not personally liable — it is impossible to coherently read s. 14.06(2) as referring to personal liability and yet read s. 14.06(4) as somehow referring to the liability of the bankrupt estate.

Even assuming that GTL had successfully disclaimed in this case, no operational conflict or frustration of purpose would result from the fact that the Regulator requires GTL, as a licensee, to expend estate assets on abandoning the Renounced Assets. Furthermore, no conflict would be caused by continuing to include the Renounced Assets in the calculation of Redwater's LMR. Finally, given the

de GTL en tant que titulaire de permis au sens de la loi albertaine n'est à l'origine d'aucun conflit. Le régime de réglementation de l'Alberta peut coexister et s'appliquer conjointement avec la *LFI*.

La faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite. Par exemple, ils doivent respecter les obligations non pécuniaires liant l'actif du failli qui ne peuvent être réduites à des réclamations prouvables et dont les effets n'entrent pas en conflit avec la *LFI*, sans égard aux répercussions que cela peut avoir sur les créanciers garantis du failli. Étant donné la nature procédurale de la *LFI*, le régime de faillite repose en grande partie sur l'application continue des lois provinciales mais, en cas de conflit véritable entre les lois provinciales concernant la propriété et les droits civils et la législation fédérale sur la faillite, la *LFI* l'emporte. La *LFI* dans son ensemble est censée favoriser l'atteinte de deux objectifs : le partage équitable des biens du failli entre ses créanciers et la réhabilitation financière du failli. Puisque Redwater est une société qui ne s'extirpera jamais de la faillite, seul le premier objectif est pertinent en l'espèce.

Les ordonnances d'abandon et exigences relatives à la CGR reposent sur des lois provinciales valides d'application générale et elles représentent exactement le genre de loi provinciale valide sur lequel se fonde la *LFI*. Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et l'art. 14.06 de la *LFI* parce que, suivant le par. 14.06(4), la renonciation du syndic à un bien réel en cas d'ordonnance de réparation de tout fait ou dommage lié à l'environnement et touchant ce bien dégage le syndic de toute responsabilité personnelle, alors que la responsabilité continue de l'actif du failli n'est pas touchée. Cette interprétation est étayée par le texte clair de l'article, les débats parlementaires, un arrêt de notre Cour et la version française de l'article. On retrouve également le même concept aux par. 14.06(1.2) et (2), lesquels disposent expressément que le syndic est dégagé de toute responsabilité personnelle. Il est impossible d'interpréter de manière cohérente le par. 14.06(2) comme mentionnant la responsabilité personnelle tout en interprétant le par. 14.06(4) comme renvoyant d'une façon ou d'une autre à la responsabilité de l'actif du failli.

À supposer même que GTL ait renoncé avec succès à des biens en l'espèce, l'organisme de réglementation ne cause aucun conflit d'application ni n'entrave la réalisation d'un objet fédéral en exigeant de GTL, à titre de titulaire de permis, qu'il se serve d'éléments de l'actif pour abandonner les biens faisant l'objet de la renonciation. En outre, il n'y aurait aucun conflit du fait que ces biens soient

restraint with which the doctrine of paramountcy must be applied, and given that the Regulator has not attempted to hold GTL personally liable as a licensee for the costs of abandonment, no conflict with s. 14.06(2) or s. 14.06(4) of the *BIA* is caused by the mere theoretical possibility of personal liability under the *OGCA* or the *Pipeline Act*.

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

With respect to the first part of the test, *Abitibi* should not be taken as standing for the proposition that a regulator is always a creditor when it exercises its statutory enforcement powers against a debtor. A regulator exercising a power to enforce a public duty is not a creditor of the individual or corporation subject to that duty. Here, it is not disputed that, in seeking to enforce Redwater's end-of-life obligations, the Regulator is acting in a *bona fide* regulatory capacity and does not stand to benefit financially. It is clear that the Regulator acted in the public interest and for the public good in issuing the Abandonment Orders and enforcing the LMR requirements and that it is, therefore, not a creditor of Redwater. The public is the beneficiary of those environmental obligations; the province does not stand to gain financially from them. Strictly speaking, this is sufficient to dispose of this aspect of the appeal.

As it may prove helpful in future cases, under the third part of the test, a court must determine whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed

toujours inclus dans le calcul de la CGR de Redwater. Enfin, vu la retenue avec laquelle il faut appliquer la doctrine de la prépondérance, et vu que l'organisme de réglementation n'a pas tenté de tenir GTL personnellement responsable, en tant que titulaire de permis, des frais d'abandon, aucun conflit avec les par. 14.06(2) ou (4) de la *LFI* n'est causé par la simple possibilité théorique de responsabilité personnelle en application de la *OGCA* ou de la *Pipeline Act*.

Les obligations de fin de vie incombant à GTL ne sont pas des réclamations prouvables dans la faillite de Redwater. Les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite. Il faut appliquer le critère énoncé par la Cour dans *Terre-Neuve-et-Labrador c. AbitibiBowater Inc.*, 2012 CSC 67, [2012] 3 R.C.S. 443 (« *Abitibi* »), pour déterminer si une obligation réglementaire précise équivaut à une réclamation prouvable en matière de faillite : (1) on doit être en présence d'une dette, d'un engagement ou d'une obligation envers un créancier; (2) la dette, l'engagement ou l'obligation doit avoir pris naissance avant que le débiteur ne devienne failli; et (3) il doit être possible d'attribuer une valeur pécuniaire à cette dette, cet engagement ou cette obligation. Seules les première et troisième parties du critère sont en litige dans la présente affaire.

Pour ce qui est de la première partie du critère, l'arrêt *Abitibi* ne doit pas être considéré comme soutenant la thèse qu'un organisme de réglementation est toujours un créancier lorsqu'il exerce les pouvoirs d'application qui lui sont dévolus par la loi à l'encontre d'un débiteur. L'organisme de réglementation exerçant un pouvoir pour faire respecter un devoir public n'est pas un créancier de la personne ou de la société assujettie à ce devoir. En l'espèce, personne ne conteste qu'en cherchant à assurer le respect des obligations de fin de vie incombant à Redwater, l'organisme de réglementation agit de bonne foi à titre d'autorité de réglementation et il n'est pas en mesure d'obtenir un avantage financier. Il est clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public en rendant les ordonnances d'abandon et en assurant le respect des exigences relatives à la CGR, et qu'il n'est donc pas un créancier de Redwater. C'est le public qui bénéficie de ces obligations environnementales; la province n'est pas en mesure d'en bénéficier financièrement. Cela suffit, à proprement parler, pour trancher cet aspect du pourvoi.

Comme cela pourrait se révéler utile à l'avenir, à la troisième partie du critère, le tribunal doit décider s'il y a suffisamment de faits indiquant qu'il existe une obligation environnementale de laquelle résultera une dette envers un

to a regulator. In determining whether a non-monetary regulatory obligation of a bankrupt is too remote or too speculative to be included in the bankruptcy proceeding, the court must apply the general rules that apply to future or contingent claims. It must be sufficiently certain that the contingency will come to pass — in other words, that the regulator will enforce the obligation by performing the environmental work and seeking reimbursement. In the instant case, the Abandonment Orders and the LMR requirements fail to satisfy this part of the test. It is not established by the evidence that it is sufficiently certain that the Regulator will perform the abandonments and advance a claim for reimbursement. This claim is too remote and speculative to be included in the bankruptcy process. Furthermore, the Regulator's refusal to approve licence transfers unless and until the LMR requirements have been satisfied does not give it a monetary claim against Redwater.

In crafting the priority scheme of the *BIA*, Parliament intended to permit regulators to place a first charge on real property of a bankrupt affected by an environmental condition or damage in order to fund remediation. Thus, the *BIA* explicitly contemplates that environmental regulators will extract value from the bankrupt's real property if that property is affected by an environmental condition or damage. Although the nature of property ownership in the Alberta oil and gas industry meant that s. 14.06(7) was unavailable to the Regulator, the Abandonment Orders and the LMR replicate the effect of s. 14.06(7) in this case. Furthermore, Redwater's only substantial assets were affected by environmental conditions or damage. Accordingly, the Abandonment Orders and LMR requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* — rather, it facilitates them.

Per Moldaver and Côté JJ. (dissenting): GTL and ATB have satisfied their burden of demonstrating a genuine inconsistency between federal and provincial law under both branches of the paramountcy test, namely operational conflict and frustration of purpose. Accordingly, the appeal should be dismissed.

organisme de réglementation. Pour établir si une obligation réglementaire non pécuniaire du failli est trop éloignée ou trop conjecturale pour être incluse dans la procédure de faillite, le tribunal doit appliquer les règles générales qui visent les réclamations futures ou éventuelles. Il doit être suffisamment certain que l'éventualité se concrétisera ou, en d'autres termes, que l'organisme de réglementation fera respecter l'obligation en exécutant les travaux environnementaux et en sollicitant le remboursement de ses frais. Dans le cas présent, les ordonnances d'abandon et les exigences relatives à la CGR ne satisfont pas à cette partie du critère. La preuve n'établit pas qu'il est suffisamment certain que l'organisme de réglementation procédera à l'abandon et présentera une demande de remboursement. Cette réclamation est trop éloignée et conjecturale pour être incluse dans la procédure de faillite. En outre, le refus de l'organisme de réglementation d'approuver les transferts de permis jusqu'à ce que les exigences relatives à la CGR aient été satisfaites ne lui donne pas une réclamation pécuniaire contre Redwater.

Au moment d'élaborer le régime de priorité de la *LFI*, le Parlement voulait permettre aux organismes de réglementation d'imposer une charge prioritaire sur le bien réel du failli touché par un fait ou dommage lié à l'environnement en vue de financer la décontamination. Ainsi, la *LFI* envisage explicitement la possibilité que des organismes de réglementation tirent une valeur des biens réels du failli touchés par un fait ou dommage lié à l'environnement. Bien que l'organisme de réglementation n'ait pu se prévaloir du par. 14.06(7), compte tenu de la nature de la propriété des biens dans l'industrie pétrolière et gazière de l'Alberta, les ordonnances d'abandon et la CGR reproduisent l'effet du par. 14.06(7) en l'espèce. De plus, les seuls biens de valeur de Redwater étaient touchés par un fait ou dommage lié à l'environnement. Les ordonnances d'abandon et exigences relatives à la CGR n'avaient donc pas pour objet de forcer Redwater à s'acquitter des obligations de fin de vie avec des biens étrangers au fait ou dommage lié à l'environnement. Autrement dit, la reconnaissance que les ordonnances d'abandon et exigences relatives à la CGR ne sont pas des réclamations prouvables en l'espèce facilite l'atteinte des objets de la *LFI* au lieu de la contrecarrer.

Les juges Moldaver et Côté (dissidents) : GTL et ATB se sont acquittés de leur fardeau de démontrer qu'il existe une incompatibilité véritable entre la loi fédérale et la loi provinciale selon les deux volets du test de la prépondérance, à savoir le conflit d'application et l'entrave à la réalisation d'un objet fédéral. Par conséquent, il y a lieu de rejeter le pourvoi.

Because Alberta's statutory regime does not recognize the disclaimers by trustees of assets encumbered by environmental liabilities as lawful by virtue of the fact that receivers and trustees are regulated as licensees who cannot disclaim assets, there is an unavoidable conflict between federal and provincial law. Alberta's legislation governing the oil and gas sector should therefore be held inoperative to the extent that it does not recognize the legal effect of GTL's disclaimers. An operational conflict arises where it is impossible to comply with both laws. An operational conflict analysis is an exercise in statutory interpretation: the Court must ascertain the meaning of each competing enactment in order to determine whether dual compliance is possible. This interpretation exercise takes place within the guiding confines of cooperative federalism, which operates as a straightforward interpretive presumption — one that supports, rather than supplants, the modern approach to statutory interpretation. Courts should favour an interpretation of the federal legislation that allows the concurrent operation of both laws; however, where the proper meaning of the provision cannot support a harmonious interpretation, it is beyond a court's power to create harmony where Parliament did not intend it.

In the instant case, reliance on cooperative federalism must not result in an interpretation of s. 14.06(4) of the *BIA* that is inconsistent with its language, context and purpose. The natural meaning which appears when s. 14.06(4) is simply read through is that it assumes and incorporates a pre-existing common law right to disclaim property in the context of bankruptcy and insolvency. This right is in keeping with the fundamental objective of trustees, which is the maximization of recovery for creditors as a whole by realizing the estate's valuable assets. It enables trustees to administer the estate in the most efficient manner and to avoid significant costs of administration that would reduce creditor recovery. Section 14.06(4) expresses the disclaimer right in unqualified terms and emphasizes that a trustee may not be held liable whenever that right is exercised. Parliament did not intend to condition the right to disclaim property on the actual existence of a risk of personal liability. Although the opening words of s. 14.06(4) refer to the personal liability of the trustee, when the words of the provision are read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament, their meaning becomes apparent. Avoiding personal liability is not the only effect of the appropriate exercise of this power. By properly disclaiming certain properties, the trustee is relieved of

Étant donné que le régime législatif albertain ne reconnaît pas la légalité des renonciations des syndics à des biens grevés d'engagements environnementaux en raison du fait que les séquestres et les syndics sont réglementés comme des titulaires de permis qui ne peuvent renoncer à des biens, il y a un conflit inévitable entre la loi fédérale et la loi provinciale. La loi albertaine régissant l'industrie pétrolière et gazière devrait donc être déclarée inopérante dans la mesure où elle ne reconnaît pas l'effet juridique des renonciations de GTL. Il y a conflit d'application lorsqu'il est impossible de respecter les deux lois. L'analyse relative au conflit d'application relève de l'interprétation des lois : la Cour doit déterminer le sens de chaque loi concurrente afin de décider s'il est possible de respecter les deux lois. Cette démarche d'interprétation s'effectue à l'intérieur du cadre directeur du fédéralisme coopératif, lequel fait office de simple présomption en matière d'interprétation — qui appuie, sans la supplanter, la méthode moderne d'interprétation des lois. Les tribunaux doivent favoriser une interprétation de la loi fédérale permettant une application concurrente des deux lois; cependant, lorsque le sens qu'il convient de donner à la disposition ne peut appuyer une interprétation harmonieuse, un tribunal n'a pas le pouvoir de créer l'harmonie là où le Parlement n'a pas eu l'intention de le faire.

En l'espèce, le recours au principe du fédéralisme coopératif ne doit pas donner lieu à une interprétation du par. 14.06(4) de la *LFI* qui est incompatible avec son libellé, son contexte et son objet. Le sens naturel qui se dégage de la simple lecture du par. 14.06(4) dans son ensemble est qu'il présume et incorpore un droit préexistant en common law de renoncer à des biens dans le contexte de la faillite et de l'insolvabilité. Ce droit est en accord avec l'objectif fondamental poursuivi par les syndics : maximiser le recouvrement au bénéfice de l'ensemble des créanciers par la réalisation des éléments de valeur de l'actif. Il permet aux syndics d'administrer l'actif le plus efficacement possible et leur épargne des frais considérables d'administration qui réduiraient le recouvrement pour les créanciers. Le paragraphe 14.06(4) exprime le droit de renonciation en des termes qui ne comportent aucune restriction et fait ressortir que le syndic ne peut être tenu responsable quand ce droit est exercé. Le Parlement ne voulait pas rendre le droit de renoncer à un bien tributaire de l'existence d'un risque de responsabilité personnelle. Bien que le début du par. 14.06(4) parle de la responsabilité personnelle du syndic, lorsqu'on lit les termes de la disposition dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'économie de la loi, l'objet de la loi et l'intention du législateur, leur sens devient apparent. La protection contre

any liabilities associated with the disclaimed property and loses the ability to sell it for the benefit of the estate. The disclaimer right allows the trustee not to realize assets that would provide no value to the estate's creditors and whose realization would therefore undermine the trustee's objective of maximizing recovery. However, s. 14.06(4) does not relieve the estate of its liabilities or environmental obligations once a trustee exercises the disclaimer power. The disclaimed property ultimately reverts to the estate at the conclusion of the bankruptcy proceedings, as is the case with unrealized assets. Whether the estate has sufficient assets capable of satisfying those liabilities at that point in time is a separate question that is unrelated to the underlying fact of ongoing liability.

In accordance with the predominant and well-established modern approach to statutory interpretation, courts must read statutory provisions in their entire context, as parts of a coherent whole. In s. 14.06(4) of the *BIA*, Parliament has expressly referred to this disclaimer power and spelled out the particular effects flowing from its proper exercise. By doing so, it has purposefully incorporated the disclaimer power into its statutory scheme to achieve its desired purpose. Courts must read statutory provisions in their entire context, and Parliament is presumed to craft sections and subsections of legislation as parts of a coherent whole. The immediate statutory context surrounding s. 14.06(4), specifically, ss. 14.06(2), (5), (6) and (7), as well as the Hansard evidence, confirms that a trustee's right to disclaim property is not limited to protecting itself from personal liability.

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

The requirement by the Regulator that GTL satisfy Redwater's environmental liabilities ahead of the estate's

toute responsabilité personnelle n'est pas le seul effet de l'exercice régulier de ce pouvoir. En renonçant à bon droit à certains biens, le syndic est dégagé de toute responsabilité associée aux biens faisant l'objet de la renonciation et ne peut plus vendre les biens au profit de l'actif. Le droit de renonciation permet au syndic de ne pas réaliser des biens qui ne seraient pas profitables aux créanciers de l'actif et compromettraient par le fait même son objectif de maximiser le recouvrement. Cependant, le par. 14.06(4) ne décharge pas l'actif de ses obligations ou engagements environnementaux une fois que le syndic exerce le pouvoir de renonciation. Le bien visé par une renonciation retourne ultimement dans l'actif du failli à l'issue du processus de faillite, comme c'est le cas pour les biens non réalisés. La question de savoir si les éléments d'actif sont suffisants pour satisfaire à ces engagements à ce moment précis est une question distincte qui n'a aucun rapport avec le fait sous-jacent de la responsabilité continue.

D'après la méthode prédominante et bien établie d'interprétation des lois, les tribunaux doivent lire les dispositions législatives dans leur contexte global, comme un tout cohérent. Au paragraphe 14.06(4) de la *LFI*, le Parlement a mentionné expressément ce pouvoir de renonciation et exposé les effets particuliers découlant de son exercice approprié. Il a incorporé ainsi à dessein à son régime législatif le pouvoir de renonciation pour en réaliser l'objectif visé. Les tribunaux doivent lire les dispositions législatives dans leur contexte global, et le Parlement est présumé rédiger les articles et paragraphes d'une loi comme un tout cohérent. Le contexte immédiat du par. 14.06(4), plus précisément les par. 14.06(2), (5), (6) et (7), ainsi que les débats parlementaires, confirme que le droit du syndic de renoncer à des biens ne se limite pas à se prémunir contre une responsabilité personnelle.

Le pouvoir de renoncer à des biens que confère aux syndics le par. 14.06(4) de la *LFI* pouvait être exercé par GTL à la lumière des faits de la présente affaire. Les conditions statutaires préalables à l'exercice de ce pouvoir étaient réunies : les ordonnances d'abandon se rapportent clairement à la réparation d'un fait lié à l'environnement. En outre, le droit de renonciation s'applique dans le contexte du régime législatif régissant l'industrie pétrolière et gazière. En décidant des intérêts auxquels peut renoncer un syndic en vertu du par. 14.06(4), le Parlement a utilisé des mots exceptionnellement larges : il est permis au syndic de renoncer à « tout intérêt » sur « le bien réel ». GTL a tenté de renoncer aux profits à prendre et aux droits de surface, qui peuvent être qualifiés d'intérêts sur des biens réels.

L'exigence de l'organisme de réglementation voulant que GTL acquitte les engagements environnementaux de

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

In *Abitibi*, the Court established a three-part test, rooted in the language of the *BIA*, to determine whether a claim is provable in bankruptcy. The first prong of the *Abitibi* test asks whether the debt, liability or obligation at issue is owed by a bankrupt entity to a creditor. The language of *Abitibi* admits of no ambiguity, uncertainty or doubt: the only determination that has to be made is whether the regulatory body has exercised its enforcement power against a debtor. Most environmental regulatory bodies can be creditors, and government entities cannot systematically evade the priority requirements of federal bankruptcy legislation under the guise of enforcing public duties. In the instant case, the first prong is satisfied. There is no doubt that the Regulator exercised its enforcement power against a debtor when it issued orders requiring Redwater to perform the environmental work on the non-producing properties. It is neither appropriate nor necessary in this case to attempt to redefine the first prong of the *Abitibi* test by narrowing the broad definition of "creditor" as the majority does.

There is no dispute that the second prong of the *Abitibi* test, which requires that the debt, liability or obligation be incurred before the debtor becomes bankrupt, is satisfied. The third prong asks whether it is sufficiently certain that the regulator will perform the work and make a claim for reimbursement. In this case, it is sufficiently certain that either the Regulator or its delegate, the OWA, will ultimately perform the abandonment and reclamation work and assert a monetary claim for reimbursement. Therefore, the final prong of the *Abitibi* test is satisfied. The chambers

Redwater avant les autres dettes de l'actif contrevient au régime de priorité établi par la *LFI*. Le régime provincial de délivrance de permis devrait donc être déclaré inopérant suivant le second volet du critère de la prépondérance, l'entrave à la réalisation d'un objet fédéral. Même lorsqu'il est à proprement parler possible de se conformer à la fois à la loi fédérale et à la loi provinciale, la loi ou les dispositions provinciales seront néanmoins rendues inopérantes dans la mesure où elles ont pour effet d'entraver la réalisation d'un objet valide d'une loi fédérale. L'analyse est axée sur l'effet de la loi ou de la disposition provinciale, et non sur son objet. En l'espèce, si les réclamations environnementales que fait valoir l'organisme de réglementation (c.-à-d. les ordonnances d'abandon) sont prouvables en matière de faillite, il n'est pas autorisé à faire valoir ces réclamations en dehors du processus de faillite et avant les créanciers garantis de Redwater, car cela entraverait la réalisation de l'objet du régime de priorité fédéral.

Dans *Abitibi*, la Cour a établi un test à trois volets, fondé sur le libellé de la *LFI*, pour déterminer si une réclamation est prouvable en matière de faillite. Le premier volet du test *Abitibi* pose la question de savoir si la dette, l'engagement ou l'obligation en cause sont dus par une entité faillie à un créancier. Le texte de cet arrêt ne laisse place à aucune ambiguïté, incertitude ou doute à cet égard : la seule question à trancher est de savoir si l'organisme de réglementation a exercé, à l'encontre d'un débiteur, son pouvoir de faire appliquer la loi. La plupart des organismes de réglementation environnementaux peuvent agir à titre de créanciers, et les entités gouvernementales ne sauraient systématiquement se soustraire aux exigences en matière de priorité de la loi fédérale sur la faillite sous le couvert de l'obligation de faire respecter les devoirs publics. Dans la présente affaire, il est satisfait au premier volet. Il ne fait aucun doute que l'organisme de réglementation a exercé son pouvoir d'appliquer la loi à l'encontre d'une débitrice lorsqu'il a rendu les ordonnances enjoignant à Redwater d'accomplir les travaux environnementaux sur les biens inexploités. Il n'est ni approprié ni nécessaire en l'espèce d'essayer de redéfinir ce volet du test *Abitibi* en restreignant le large sens attribué par la majorité au mot « créancier ».

Personne ne conteste qu'il est satisfait au second volet du test *Abitibi*, lequel exige que la dette, l'engagement ou l'obligation ait pris naissance avant que le débiteur ne devienne failli. Le troisième volet pose la question de savoir s'il est suffisamment certain que l'organisme de réglementation exécutera les travaux et présentera une demande de remboursement. En l'espèce, il est suffisamment certain que l'organisme de réglementation ou sa délégataire, l'OWA, effectuera ultimement les travaux d'abandon et de remise en état et fera valoir une réclamation pécuniaire

judge made three critical findings of fact that easily support this conclusion. First, he found that GTL was not in possession of the disclaimed properties and, in any event, had no ability to perform any kind of work on these assets because the environmental liabilities exceeded the value of the estate itself and Redwater had no working interest participants that would step in to perform the work. As a result, he concluded that there was no other party who could be compelled to carry out the work. Second, in light of the fact that neither GTL nor Redwater's working interest participants would (or could) undertake this work, the chambers judge found as a fact that the Regulator will ultimately be responsible for the abandonment costs, since it has the power to seek recovery of abandonment costs and has actually performed the work on occasion, and has expressly stated an intention to seek reimbursement for the costs of abandoning the renounced assets. Third, the chambers judge found that the Regulator's only realistic alternative to performing the remediation work itself was to deem the renounced assets to be orphan wells. In this circumstance, he found that the legislation and evidence shows that if the Regulator deems a well an orphan, then the OWA will perform the work. In light of these factual determinations, the chambers judge rightly concluded that the sufficient certainty standard of *Abitibi* was satisfied because at a minimum, either the Regulator or the OWA will complete the abandonment work.

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

afin d'obtenir un remboursement. Il est donc satisfait au dernier volet du test *Abitibi*. Le juge en cabinet a tiré trois conclusions de fait cruciales qui appuient aisément cette conclusion. Premièrement, il a conclu que GTL n'était pas en possession des biens visés par les renonciations et, de toute façon, qu'il ne peut pas exécuter de travaux sur ces biens parce que les engagements environnementaux dépassaient la valeur de l'actif même et Redwater ne comptait aucun participant en participation directe qui se chargerait d'exécuter les travaux. Il a donc conclu qu'il n'existe aucune autre partie susceptible d'être contrainte d'exécuter les travaux. Deuxièmement, compte tenu du fait que ni GTL ni les participants en participation directe de Redwater ne voudraient (ou ne pourraient) entreprendre ces travaux, le juge en cabinet a tiré la conclusion de fait selon laquelle l'organisme de réglementation sera en fin de compte responsable des frais d'abandon, car il a le pouvoir de tenter de recouvrer les frais d'abandon et a réellement exécuté les travaux à l'occasion. Il a aussi expressément manifesté l'intention de demander le remboursement des frais liés à l'abandon des biens faisant l'objet de la renonciation. Troisièmement, le juge en cabinet a conclu que la seule solution réaliste qui s'offre à l'organisme de réglementation autre que celle d'effectuer lui-même les travaux de décontamination était de considérer les biens faisant l'objet de la renonciation comme des puits orphelins. Il a conclu qu'en pareil cas, les dispositions législatives et les éléments de preuve démontrent que, si l'organisme de réglementation considère un puits comme orphelin, l'OWA exécutera les travaux. À la lumière de ces conclusions de fait, le juge en cabinet a eu raison de conclure qu'il était satisfait à la norme de certitude suffisante énoncée dans *Abitibi* parce qu'à tout le moins, l'organisme de réglementation ou l'OWA mènerait à terme les travaux d'abandon.

La majorité fait passer la forme avant le fond en concluant qu'il n'est pas satisfait à la norme de certitude suffisante lorsque le délégataire de l'organisme de réglementation, et non l'organisme de réglementation lui-même, effectue les travaux. Vu les caractéristiques saillantes de l'OWA et de sa relation avec l'organisme de réglementation, force est de constater qu'ils sont inextricablement liés. Lorsque l'organisme de réglementation exerce le pouvoir de déclarer un bien « orphelin » que lui confère le par. 70(2) de l'*Oil and Gas Conservation Act* de l'Alberta, il délègue effectivement l'exécution des travaux d'abandon à l'OWA. La conclusion subsidiaire de la majorité selon laquelle il n'est pas suffisamment certain que même l'OWA exécutera les travaux d'abandon permettrait à l'organisme de réglementation de tirer profit de manœuvres stratégiques en manipulant le moment de son intervention afin de se soustraire au régime d'insolvabilité et de dépouiller Redwater de ses biens.

Since it is sufficiently certain that the Regulator (or the OWA, as its delegate) will complete the abandonment and reclamation work, all three prongs of the *Abitibi* test are satisfied. The Regulator's Abandonment Orders constitute "claims provable in bankruptcy". It would undermine the *BIA*'s priority scheme and therefore frustrate an essential purpose of the *BIA* if the Regulator could assert those claims outside the bankruptcy process — and ahead of the estate's secured creditors — whether by compelling GTL to carry out those orders or by making the sale of Redwater's valuable assets conditional on the fulfillment of those obligations.

Cases Cited

By Wagner C.J.

Applied: *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 Alta. L.R. (2d) 45; *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443; **approved:** *Nortel Networks Corp., Re*, 2013 ONCA 599, 368 D.L.R. (4th) 122; *Strathcona (County) v. Fantasy Construction Ltd. (Trustee of)*, 2005 ABQB 559, 256 D.L.R. (4th) 536; **distinguished:** *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327; *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154; **referred to:** *Berkheiser v. Berkheiser*, [1957] S.C.R. 387; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, 2003 SCC 58, [2003] 2 S.C.R. 624; *Peters v. Remington*, 2004 ABCA 5, 49 C.B.R. (4th) 273; *Garner v. Newton* (1916), 29 D.L.R. 276; *Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536; *GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601; *New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154, 251 D.L.R. (4th) 328; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781; *M. v. H.*, [1999] 2 S.C.R. 3; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686; *R. v. Elshaw*, [1991] 3 S.C.R. 24; *AbitibiBowater Inc., Re*, 2010 QCCS 1261, 68 C.B.R. (5th) 1; *Strathcona (County) v. Fantasy Construction Ltd. (Trustee of)*, 2005 ABQB

Comme il est suffisamment certain que l'organisme de réglementation (ou l'OWA, sa délégataire) achèvera les travaux d'abandon et de remise en état, il est satisfait aux trois volets du test *Abitibi*. Les ordonnances d'abandon de l'organisme de réglementation constituent des « réclamations prouvables en matière de faillite ». Ce serait saper le régime de priorités établi par la *LFI* et entraver la réalisation d'un objet essentiel de la *LFI* que de permettre à l'organisme de réglementation de faire valoir ces réclamations en dehors du processus de faillite — et en priorité par rapport aux créanciers garantis de l'actif — que ce soit en obligeant GTL à exécuter ces ordonnances ou en faisant dépendre la vente des biens de valeur de Redwater de l'acquittement de ces obligations.

Jurisprudence

Citée par le juge en chef Wagner

Arrêts appliqués : *Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 Alta. L.R. (2d) 45; *Terre-Neuve-et-Labrador c. AbitibiBowater Inc.*, 2012 CSC 67, [2012] 3 R.C.S. 443; **arrêts approuvés :** *Nortel Networks Corp., Re*, 2013 ONCA 599, 368 D.L.R. (4th) 122; *Strathcona (County) c. Fantasy Construction Ltd. (Trustee of)*, 2005 ABQB 559, 256 D.L.R. (4th) 536; **distinction d'avec les arrêts :** *Alberta (Procureur général) c. Moloney*, 2015 CSC 51, [2015] 3 R.C.S. 327; *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154; **arrêts mentionnés :** *Berkheiser c. Berkheiser*, [1957] R.C.S. 387; *Cie pétrolière Impériale ltée c. Québec (Ministre de l'Environnement)*, 2003 CSC 58, [2003] 2 R.C.S. 624; *Peters c. Remington*, 2004 ABCA 5, 49 C.B.R. (4th) 273; *Garner c. Newton* (1916), 29 D.L.R. 276; *Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *Saskatchewan (Procureur général) c. Lemare Lake Logging Ltd.*, 2015 CSC 53, [2015] 3 R.C.S. 419; *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161; *Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3; *Québec (Procureur général) c. Canadian Owners and Pilots Association*, 2010 CSC 39, [2010] 2 R.C.S. 536; *Société de crédit commercial GMAC — Canada c. T.C.T. Logistics Inc.*, 2006 CSC 35, [2006] 2 R.C.S. 123; *Hypothèques Trustco Canada c. Canada*, 2005 CSC 54, [2005] 2 R.C.S. 601; *New Skeena Forest Products Inc. c. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154, 251 D.L.R. (4th) 328; *Ocean Port Hotel Ltd. c. Colombie-Britannique (General Manager, Liquor Control and Licensing Branch)*, 2001 CSC 52, [2001] 2 R.C.S. 781; *M. c. H.*, [1999] 2 R.C.S. 3; *R. c. Sappier*, 2006 CSC 54, [2006] 2 R.C.S. 686; *R. c. Elshaw*, [1991] 3 R.C.S. 24; *AbitibiBowater Inc., Re*, 2010 QCCS 1261, 68 C.B.R.

794, 261 D.L.R. (4th) 221; *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534; *Daishowa-Marubeni International Ltd. v. Canada*, 2013 SCC 29, [2013] 2 S.C.R. 336; *Alberta Energy Regulator v. Grant Thornton Limited*, 2017 ABCA 278, 57 Alta. L.R. (6th) 37.

By Côté J. (dissenting)

Newfoundland and Labrador v. AbitibiBowater Inc., 2012 SCC 67, [2012] 3 S.C.R. 443; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 S.C.R. 189; *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724; *New Skeena Forest Products Inc. v. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154, 251 D.L.R. (4th) 328; *Re Thompson Knitting Co., Ltd.*, [1925] 2 D.L.R. 1007; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85; *GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 D.L.R. (4th) 280; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610; *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616; *R. v. L.T.H.*, 2008 SCC 49, [2008] 2 S.C.R. 739; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; *Teva Canada Ltd. v. TD Canada Trust*, 2017 SCC 51, [2017] 2 S.C.R. 317; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Nortel Networks Corp., Re*, 2013 ONCA 599, 6 C.B.R. (6th) 159; *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154; *Sydco Energy Inc. (Re)*, 2018 ABQB 75, 64 Alta. L.R. (6th) 156.

Statutes and Regulations Cited

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

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 2 "claim provable in bankruptcy, provable claim or claim

(5th) 1; *Strathcona (County) c. Fantasy Construction Ltd. (Trustee of)*, 2005 ABQB 794, 261 D.L.R. (4th) 221; *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534; *Daishowa-Marubeni International Ltd. c. Canada*, 2013 CSC 29, [2013] 2 R.C.S. 336; *Alberta Energy Regulator c. Grant Thornton Limited*, 2017 ABCA 278, 57 Alta. L. R. (6th) 37.

Citée par la juge Côté (dissidente)

Terre-Neuve-et-Labrador c. AbitibiBowater Inc., 2012 CSC 67, [2012] 3 R.C.S. 443; *Alberta (Procureur général) c. Moloney*, 2015 CSC 51, [2015] 3 R.C.S. 327; *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453; *Saskatchewan (Procureur général) c. Lemare Lake Logging Ltd.*, 2015 CSC 53, [2015] 3 R.C.S. 419; *Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3; *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161; *Renvoi relatif à la réglementation pancanadienne des valeurs mobilières*, 2018 CSC 48, [2018] 3 R.C.S. 189; *Lignes aériennes Canadien Pacifique Ltée c. Assoc. Canadienne des pilotes de lignes aériennes*, [1993] 3 R.C.S. 724; *New Skeena Forest Products Inc. c. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154, 251 D.L.R. (4th) 328; *Re Thompson Knitting Co., Ltd.*, [1925] 2 D.L.R. 1007; *Bell ExpressVu Limited Partnership c. Rex*, 2002 CSC 42, [2002] 2 R.C.S. 559; *Procureur général du Québec c. Carrières Ste-Thérèse Ltée*, [1985] 1 R.C.S. 831; *Mitchell c. Bande indienne Peguis*, [1990] 2 R.C.S. 85; *Société de crédit commercial GMAC — Canada c. T.C.T. Logistics Inc.*, 2006 CSC 35, [2006] 2 R.C.S. 123; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 D.L.R. (4th) 280; *Canada (Procureur général) c. JTI-Macdonald Corp.*, 2007 CSC 30, [2007] 2 R.C.S. 610; *Morgentaler c. La Reine*, [1976] 1 R.C.S. 616; *R. c. L.T.H.*, 2008 CSC 49, [2008] 2 R.C.S. 739; *Banque de Montréal c. Hall*, [1990] 1 R.C.S. 121; *Century Services Inc. c. Canada (Procureur général)*, 2010 CSC 60, [2010] 3 R.C.S. 379; *Teva Canada Ltd. c. TD Canada Trust*, 2017 CSC 51, [2017] 2 R.C.S. 317; *Canada c. Craig*, 2012 CSC 43, [2012] 2 R.C.S. 489; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235; *Nortel Networks Corp., Re*, 2013 ONCA 599, 6 C.B.R. (6th) 159; *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154; *Sydco Energy Inc. (Re)*, 2018 ABQB 75, 64 Alta. L.R. (6th) 156.

Lois et règlements cités

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

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

provable", "creditor", 14.06, (2), (4) [am. 1997, c. 12, s. 15(1)], 16 to 38, 40, 69.3(1), (2), 72(1), 80, 121 to 154, 169(4), 197(3).

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

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

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

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

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

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

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

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

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

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

Authors Cited

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

Alberta Energy Regulator. *Licensee Eligibility — Alberta Energy Regulator Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision*, June 20, 2016 (online: https://www.aer.ca/documents/bulletins/Bulletin-2016-16.pdf; archived version: https://www.scc-csc.ca/cso-dce/2019SCC-CSC5_1_eng.pdf).

Bankes, Nigel. *Majority of the Court of Appeal Confirm Chief Justice Wittmann's Redwater Decision*, May 3, 2017 (online: https://ablawg.ca/2017/05/03/majority-of-the-court-of-appeal-confirms-chief-justice-wittmanns-redwater-decision; archived version: https://www.scc-csc.ca/cso-dce/2019SCC-CSC5_2_eng.pdf).

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

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

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

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

Loi constitutionnelle de 1867, art. 91(21), 92(13), 92A(1)c).

Loi sur la faillite et l'insolvabilité, L.R.C. 1985, c. B-3, art. 2 « réclamation prouvable en matière de faillite ou réclamation prouvable », « créancier », 14.06, (2), (4) [mod. 1997, c. 12, s. 15(1)], 16 à 38, 40, 69.3(1), (2), 72(1), 80, 121 à 154, 169(4), 197(3).

Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36, art. 11.8(8).

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

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

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

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

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

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

Doctrine et autres documents cités

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

Alberta Energy Regulator. *Licensee Eligibility — Alberta Energy Regulator Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision*, June 20, 2016 (en ligne : https://www.aer.ca/documents/bulletins/Bulletin-2016-16.pdf; version archivée : https://www.scc-csc.ca/cso-dce/2019SCC-CSC5_1_eng.pdf).

Bankes, Nigel. *Majority of the Court of Appeal Confirm Chief Justice Wittmann's Redwater Decision*, May 3, 2017 (en ligne : https://ablawg.ca/2017/05/03/majority-of-the-court-of-appeal-confirms-chief-justice-wittmanns-redwater-decision; version archivée : https://www.scc-csc.ca/cso-dce/2019SCC-CSC5_2_eng.pdf).

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

Canada. Chambre des communes. Comité permanent de l'industrie. *Témoignages*, nº 16, 2e sess., 35e lég., 11 juin 1996.

Canada. Chambre des communes. Comité permanent de l'industrie, *Témoignages*, nº 21, 2e sess., 35e lég., 25 septembre 1996.

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

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

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

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

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

Lund, Anna J. "Lousy Dentists, Bad Drivers, and Abandoned Oil Wells: a New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law" (2017), 80 *Sask. L. Rev.* 157.

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

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

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

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

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

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

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

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

Canada. Sénat. *Délibérations du comité sénatorial permanent des Banques et du commerce*, no 13, 2e sess., 35e lég., 4 novembre 1996.

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

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

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

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

Lund, Anna J. « Lousy Dentists, Bad Drivers, and Abandoned Oil Wells : a New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law » (2017), 80 *Sask. L. Rev*. 157.

Oxford English Dictionary (en ligne : http://www.oed.com), « *probably* ».

Robert & Collins (en ligne : https://grc.bvdep.com/login_.asp), « ès qualités ».

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

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

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

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

POURVOI contre un arrêt de la Cour d'appel de l'Alberta (les juges Slatter, Schutz et Martin), 2017 ABCA 124, 47 C.B.R. (6th) 171, [2017] 6 W.W.R. 301, 8 C.E.L.R. (4th) 1, 50 Alta. L.R. (6th) 1, [2017] A.J. No. 402 (QL), 2017 CarswellAlta 695 (WL Can.), qui a confirmé une décision du juge en chef Wittmann, 2016 ABQB 278, 37 C.B.R. (6th) 88, [2016] 11 W.W.R. 716, 33 Alta. L.R. (6th) 221, [2016] A.J. No. 541 (QL), 2016 CarswellAlta 994 (WL Can.). Pourvoi accueilli, les juges Moldaver et Côté sont dissidents.

Ken Lenz, *c.r.*, *Patricia Johnston*, *c.r.*, *Keely R. Cameron*, *Brad Gilmour* et *Michael W. Selnes*, pour les appelants.

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

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

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

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

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

Adrian Scotchmer, for the intervener Ecojustice Canada Society.

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

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

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

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

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

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

THE CHIEF JUSTICE —

I. Introduction

[1] The oil and gas industry is a lucrative and important component of Alberta's and Canada's economy. The industry also carries with it certain

Kelly J. Bourassa, *Jeffrey Oliver*, *Tom Cumming*, *Ryan Zahara*, *Danielle Maréchal*, *Brendan MacArthur-Stevens* et *Chris Nyberg*, pour les intimées.

Josh Hunter et *Hayley Pitcher*, pour l'intervenante la procureure générale de l'Ontario.

Gareth Morley, *Aaron Welch* et *Barbara Thomson*, pour l'intervenant le procureur général de la Colombie-Britannique.

Richard James Fyfe, pour l'intervenant le procureur général de la Saskatchewan.

Robert Normey et *Vivienne Ball*, pour l'intervenant le procureur général de l'Alberta.

Adrian Scotchmer, pour l'intervenante Ecojustice Canada Society.

Lewis Manning et *Toby Kruger*, pour l'intervenante l'Association canadienne des producteurs pétroliers.

Nader R. Hasan et *Lindsay Board*, pour l'intervenante Greenpeace Canada.

Christine Laing et *Shaun Fluker*, pour l'intervenante Action Surface Rights Association.

Caireen E. Hanert et *Adam Maerov*, pour l'intervenante l'Association canadienne des professionnels de l'insolvabilité et de la réorganisation.

Howard A. Gorman, *c.r.*, et *D. Aaron Stephenson*, pour l'intervenante l'Association des banquiers canadiens.

Version française du jugement du juge en chef Wagner et des juges Abella, Karakatsanis, Gascon et Brown rendu par

LE JUGE EN CHEF —

I. Introduction

[1] L'industrie pétrolière et gazière est une composante lucrative et importante de l'économie albertaine et canadienne. Cette industrie entraîne

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

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

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

également certains coûts et certaines conséquences inévitables pour l'environnement. Pour y faire face, l'Alberta a mis en place un régime complet de délivrance de permis du berceau à la tombe qui lie les sociétés actives dans l'industrie. Une société n'obtiendra pas les permis dont elle a besoin pour extraire, traiter ou transporter du pétrole et du gaz en Alberta, à moins qu'elle n'assume les responsabilités de fin de vie consistant à obturer et à fermer les puits de pétrole afin d'éviter les fuites, à démanteler les structures de surface ainsi qu'à remettre la surface dans son état antérieur. Ces obligations sont appelées la [TRADUCTION] « remise en état » et l'« abandon » (*Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12 (« *EPEA* »), al. 1(ddd) et *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6 (« *OGCA* »), al. 1(1)(a)).

[2] La question en l'espèce est de savoir ce qu'il advient de ces obligations lorsqu'une société est en faillite et qu'un syndic de faillite est chargé de répartir ses biens entre divers créanciers conformément aux règles prévues dans la *Loi sur la faillite et l'insolvabilité*, L.R.C. 1985, c. B-3 (« *LFI* »). Redwater Energy Corporation (« Redwater ») est la société en faillite au cœur du présent pourvoi. Son actif est principalement composé de 127 biens pétroliers et gaziers — puits, pipelines et installations — et des permis correspondants. Quelques-uns des puits autorisés de Redwater sont encore productifs et rentables. La majorité est tarie et grevée de responsabilités relatives à l'abandon et à la remise en état qui excèdent leur valeur.

[3] L'Alberta Energy Regulator (« organisme de réglementation ») et l'Orphan Well Association (« OWA ») sont les appelants devant notre Cour (pour simplifier, je les appellerai l'organisme de réglementation au moment d'analyser la position des appelants, sauf indication contraire). L'organisme de réglementation administre le régime de délivrance de permis de l'Alberta et assure le respect, par les titulaires de permis, des obligations relatives à l'abandon et à la remise en état. L'organisme de réglementation a délégué à l'OWA, une entité indépendante sans but lucratif, le pouvoir d'abandonner et de remettre en état les « orphelins » — les biens pétroliers et gaziers ainsi que leurs sites délaissés ou non réclamés sans

remaining value of the Redwater estate must be applied to meet the abandonment and reclamation obligations associated with its licensed assets.

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

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

que les processus en question n'aient été correctement effectués par les sociétés liquidées à la fin de leur procédure d'insolvabilité. L'organisme de réglementation affirme que, d'une façon ou d'une autre, la valeur restante de l'actif de Redwater doit être utilisée pour satisfaire aux obligations d'abandon et de remise en état qui sont associées à ses biens visés par des permis.

[4] Le syndic de faillite de Redwater, Grant Thornton Limited (« GTL »), et le principal créancier garanti de Redwater, Alberta Treasury Branches (« ATB »), s'opposent au pourvoi (pour simplifier, je les appellerai GTL au moment d'analyser la position des intimées, sauf indication contraire). GTL soutient que, comme il a renoncé aux biens pétroliers et gaziers inexploités de Redwater, le par. 14.06(4) de la *LFI* l'investit du pouvoir de les délaisser et de se soustraire aux engagements environnementaux qui s'y rattachent et de s'occuper uniquement des biens pétroliers et gaziers productifs de Redwater. GTL soutient subsidiairement que, d'après le régime de priorité établi dans la *LFI*, il faut acquitter les réclamations des créanciers garantis de Redwater avant de respecter ses engagements environnementaux. Invoquant la doctrine de la prépondérance, GTL affirme que la législation environnementale de l'Alberta réglementant l'industrie pétrolière et gazière est constitutionnellement inopérante dans la mesure où elle autorise l'organisme de réglementation à se mêler de cet arrangement.

[5] Le juge siégeant en cabinet (2016 ABQB 278, 37 C.B.R. (6th) 88) et les juges majoritaires de la Cour d'appel (2017 ABCA 124, 47 C.B.R. (6th) 171) ont donné raison à GTL. L'utilisation proposée par l'organisme de réglementation des pouvoirs que lui confère la loi pour contraindre Redwater à respecter les obligations d'abandon et de remise en état au cours de la faillite a été jugée incompatible avec la *LFI* de deux façons : (1) elle imposait à GTL les obligations d'un titulaire de permis relativement aux biens de Redwater auxquels GTL avait renoncé, ce qui est contraire au par. 14.06(4) de la *LFI*; (2) elle renversait le régime de priorité établi par la *LFI* pour le partage des biens d'un failli en exigeant que le paiement de ses « réclamations prouvables », en tant que créancier ordinaire, soit effectué avant celui des réclamations des créanciers garantis de Redwater.

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

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

II. Background

A. *Alberta's Regulatory Regime*

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

[9] In order to exploit oil and gas resources in Alberta, a company needs three things: a property interest in the oil or gas, surface rights and a licence issued by the Regulator. In Alberta, mineral rights are typically reserved from ownership rights in land.

[6] La juge d'appel Martin, maintenant juge de notre Cour, n'était pas d'accord. Elle aurait accueilli l'appel de l'organisme de réglementation au motif qu'il n'y avait pas de conflit entre la législation environnementale de l'Alberta et la *LFI*. La juge Martin a estimé que : (1) l'art. 14.06 de la *LFI* n'a pas eu pour effet de libérer GTL des obligations de Redwater à l'égard de ses biens visés par des permis; (2) l'organisme de réglementation ne faisait valoir aucune réclamation prouvable, de sorte que le régime de priorité de la *LFI* n'était pas renversé.

[7] Pour les motifs qui suivent, j'accueillerais le pourvoi. Bien que mon analyse diffère de la sienne à certains égards, je conviens avec la juge Martin que l'utilisation par l'organisme de réglementation des pouvoirs que lui confère la loi ne crée pas de conflit avec la *LFI* de façon à mettre en jeu la doctrine de la prépondérance fédérale. Le paragraphe 14.06(4) intéresse la responsabilité personnelle du syndic et il ne l'investit pas du pouvoir de se soustraire aux engagements environnementaux liant l'actif qu'il administre. L'organisme de réglementation ne fait valoir aucune réclamation prouvable en matière de faillite, et le régime de priorité de la *LFI* n'est pas renversé. Donc, le statut de GTL en tant que titulaire de permis au sens de la loi albertaine n'est à l'origine d'aucun conflit. Le régime de réglementation de l'Alberta peut coexister et s'appliquer conjointement avec la *LFI*.

II. Contexte

A. *Le régime de réglementation de l'Alberta*

[8] Le règlement des questions constitutionnelles et l'issue finale du présent pourvoi reposent sur une compréhension adéquate du régime complexe de réglementation qui régit l'industrie pétrolière et gazière de l'Alberta. Je vais donc décrire ce régime de façon très détaillée.

[9] Pour exploiter des ressources pétrolières et gazières en Alberta, une société a besoin de trois choses : un intérêt de propriété sur le pétrole ou le gaz, des droits de surface et un permis délivré par l'organisme de réglementation. En Alberta, les droits miniers sont

About 90 percent of Alberta's mineral rights are held by the Crown on behalf of the public.

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

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

généralement soustraits des droits de propriété sur les terres. Environ 90 p. 100 des droits miniers de l'Alberta sont détenus par la Couronne au nom du public.

[10] L'intérêt de propriété d'une société dans le pétrole ou le gaz qu'elle cherche à exploiter prend généralement la forme d'un bail d'exploitation minière avec la Couronne (mais parfois avec un propriétaire privé). La société a également besoin de droits de surface, afin de pouvoir accéder au terrain physique situé au-dessus du pétrole et du gaz, de l'occuper, ainsi que d'installer l'équipement nécessaire pour pomper, stocker et transporter le pétrole de même que le gaz. On obtient les droits de surface au moyen d'un bail avec le propriétaire foncier, dans bien des cas un agriculteur ou un éleveur (mais parfois la Couronne). Lorsqu'un propriétaire foncier n'accorde pas volontairement des droits de surface, la loi albertaine autorise le Surface Rights Board (Conseil des droits de surface) à rendre une ordonnance d'accès aux terres en faveur d'un [TRADUCTION] « exploitant », soit la personne qui a droit à une substance minérale ou le droit de la travailler (*Surface Rights Act*, R.S.A. 2000, c. S-24, al. 1h) et art. 15).

[11] Les tribunaux canadiens qualifient le bail d'exploitation minière permettant à une société d'exploiter des ressources pétrolières et gazières de profit à prendre. Il n'est pas contesté qu'un profit à prendre constitue une forme d'intérêt détenue par la société sur un bien réel (*Berkheiser c. Berkheiser*, [1957] R.C.S. 387). Un profit à prendre est entièrement cessible et il a été défini comme [TRADUCTION] « un intérêt foncier sans possession, comme une servitude, qui peut être transmis de génération en génération et qui reste avec la terre, indépendamment des changements de propriétaire » (F. L. Stewart, « How to Deal with a Fickle Friend? Alberta's Troubles with the Doctrine of Federal Paramountcy », dans J. P. Sarra et B. Romaine, dir., *Annual Review of Insolvency Law 2017* (2018), 163 (« Stewart »), p. 193). Les sociétés, qu'elles soient solvables ou insolvables, détiennent souvent des profits à prendre tant dans les puits productifs que dans les puits inexploités ou épuisés. Il existe une foule d'ententes potentielles de « participation directe » par lesquelles plusieurs parties peuvent partager un intérêt dans des ressources pétrolières et gazières.

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

[12] La troisième chose — celle qui se rapporte le plus au présent pourvoi — dont une société a besoin pour avoir accès aux ressources pétrolières et gazières de l'Alberta ainsi que pour les exploiter, c'est un permis délivré par l'organisme de réglementation. L'*OGCA* interdit à toute personne non titulaire d'un permis de commencer le forage d'un puits, y compris les activités préparatoires ou accessoires à cette fin, ou d'amorcer la construction ou l'exploitation d'une installation (par. 11(1) et 12(1)). La *Pipeline Act*, R.S.A. 2000, c. P-15, interdit également la construction de pipelines sans permis (par. 6(1)). Le profit à prendre dans des gisements de pétrole et de gaz peut être acheté et vendu sans approbation réglementaire. Cependant, cela n'a qu'une utilité pratique restreinte en soi, puisque, sans le permis associé à un puits, l'acheteur ne peut pas [TRADUCTION] « poursuivre une opération de forage, d'exploitation ou d'injection » (*OGCA*, par. 11(1)), et sans le permis associé à une installation, l'acheteur ne peut pas [TRADUCTION] « poursuivre la construction ou l'exploitation » (*OGCA*, par. 12(1)).

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

[13] Les trois biens visés par des permis pertinents dans l'industrie pétrolière et gazière de l'Alberta sont les puits, les installations et les pipelines. Le « puits » est défini, entre autres, comme [TRADUCTION] « un orifice dans le sol complété ou en cours de forage pour la production de pétrole ou de gaz » (*OGCA*, al. 1(1)(eee)). L'« installation » est définie au sens large et englobe tous les bâtiments, structures, installations et matériaux qui sont liés ou associés à la récupération, à la mise en valeur, à la production, à la manutention, au traitement ou à l'élimination de ressources pétrolières et gazières (*OGCA*, al. 1(1)(w)). Le « pipeline » est défini comme [TRADUCTION] « un tuyau utilisé pour transporter une substance ou une combinaison de substances », y compris les installations connexes (*Pipeline Act*, al. 1(1)(t)).

[14] The licences a company needs to recover, process and transport oil and gas are issued by the Regulator. The Regulator is not an agent of the Crown. It is established as a corporation by s. 3(1) of the *Responsible Energy Development Act*, S.A. 2012, c. R-17.3 ("*REDA*"). It exercises a wide range of powers under the *OGCA* and the *Pipeline Act*. It also acts as the regulator in respect of energy resource

[14] Les permis dont une société a besoin pour récupérer, traiter ainsi que transporter le pétrole et le gaz sont délivrés par l'organisme de réglementation. Ce dernier n'est pas un mandataire de la Couronne. Il est constitué en société par le par. 3(1) de la *Responsible Energy Development Act*, S.A. 2012, c. R-17.3 (« *REDA* »). L'organisme de réglementation exerce un large éventail de pouvoirs en vertu de l'*OGCA*

activities under the *EPEA*, Alberta's more general environmental protection legislation (*REDA*, s. 2(2)(h)). The Regulator's mandate is set out in the *REDA* and includes "the efficient, safe, orderly and environmentally responsible development of energy resources in Alberta" (s. 2(1)(a)). The Regulator is funded almost entirely by the industry it regulates, and it collects its budget through an administration fee (Stewart, at p. 219; *REDA*, ss. 28 and 29; *Alberta Energy Regulator Administration Fees Rules*, Alta. Reg. 98/2013).

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

[16] "Abandonment" refers to "the permanent dismantlement of a well or facility in the manner prescribed by the regulations or rules" made by the Regulator (*OGCA*, s. 1(1)(a)). Specifically, the abandonment of a well has been defined as "the process of sealing a hole which has been drilled for oil or gas, at the end of its useful life, to render it environmentally safe" (*Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 Alta. L.R. (2d) 45 ("*Northern Badger*"), at para. 2). The abandonment of a pipeline refers to its "permanent deactivation . . . in the manner prescribed by the rules" (*Pipeline Act*, s. 1(1)(a)). "Reclamation" includes "the removal of equipment or buildings", "the decontamination of buildings . . . land or water", and the "stabilization, contouring, maintenance, conditioning or reconstruction of the surface of the land" (*EPEA*, s. 1(ddd)). A further duty

et de la *Pipeline Act*. Il agit également à titre d'organisme de réglementation des activités liées aux ressources énergétiques sous le régime de l'*EPEA*, la loi albertaine plus générale sur la protection de l'environnement (*REDA*, al. 2(2)(h)). Le mandat de l'organisme de réglementation est énoncé dans la *REDA* et comprend [TRADUCTION] « la mise en valeur efficiente, sûre, ordonnée et respectueuse de l'environnement des ressources énergétiques en Alberta » (al. 2(1)(a)). L'organisme de réglementation est financé presque entièrement par l'industrie qu'il réglemente et il recueille ses recettes budgétaires au moyen de frais administratifs (Stewart, p. 219; *REDA*, art. 28 et 29; *Alberta Energy Regulator Administration Fees Rules*, Alta. Reg. 98/2013).

[15] L'organisme de réglementation jouit d'un large pouvoir discrétionnaire lorsqu'il s'agit de délivrer des permis d'exploitation de puits, d'installations et de pipelines. À la réception d'une demande de permis, l'organisme de réglementation peut accorder le permis sous réserve de certaines conditions, restrictions et stipulations, ou il peut refuser le permis (*OGCA*, par. 18(1); *Pipeline Act*, par. 9(1)). Les permis d'exploitation d'un puits, d'une installation ou d'un pipeline sont accordés sous réserve d'obligations qui se manifesteront un jour d'abandonner le bien sous-jacent et de remettre en état le terrain sur lequel il est situé.

[16] Le terme [TRADUCTION] « abandon » désigne « le démantèlement permanent d'un puits ou d'une installation de la manière prescrite par les règlements ou les règles » pris par l'organisme de réglementation (*OGCA*, al. 1(1)(a)). Plus précisément, l'abandon d'un puits a été défini comme [TRADUCTION] « l'obturation d'un trou qui a été foré pour le pétrole ou le gaz, à la fin de sa vie utile, afin de le rendre sûr sur le plan environnemental » (*Panamericana de Bienes y Servicios S.A. c. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, 81 Alta L.R. (2d) 45 (« *Northern Badger* »), par. 2). L'abandon d'un pipeline fait référence à sa [TRADUCTION] « mise hors service permanente [. . .] de la manière prescrite par les règles » (*Pipeline Act*, al. 1(1)(a)). La remise en état comprend [TRADUCTION] « l'enlèvement des bâtiments et de l'équipement », « la décontamination des bâtiments, du terrain ou de l'eau », ainsi que

binding on those active in the Alberta oil and gas industry is remediation, which arises where a harmful or potentially harmful substance has been released into the environment (*EPEA*, ss. 112 to 122). As the extent of any remediation obligations that may be associated with Redwater assets is unclear, I will not refer to remediation separately from reclamation, unless otherwise noted. As has been done throughout this litigation, I will refer to abandonment and reclamation jointly as end-of-life obligations.

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

[18] The Licensee Liability Rating Program, which was, at the time of Redwater's insolvency, set out in *Directive 006: Licensee Liability Rating (LLR) Program and License Transfer Process* (March 12,

la « stabilisation, l'établissement des courbes de niveau, l'entretien, le conditionnement ou la reconstruction de la surface du terrain » (*EPEA*, al. 1(ddd)). Une autre obligation qui incombe à ceux qui œuvrent dans l'industrie pétrolière et gazière de l'Alberta est celle de la décontamination, qui prend naissance lorsqu'une substance nocive ou potentiellement nocive a été rejetée dans l'environnement (*EPEA*, art. 112 à 122). Puisque l'on ne connaît pas l'étendue des obligations de décontamination, s'il en est, qui peuvent être associées aux biens de Redwater, je ne traiterai pas la décontamination séparément de la remise en état, sauf indication contraire. Comme cela a été fait tout au long du présent litige, je qualifierai conjointement l'abandon et la remise en état d'obligations de fin de vie.

[17] Le titulaire de permis doit abandonner un puits ou une installation lorsque l'organisme de réglementation le lui ordonne, ou lorsque les règles ou les règlements l'exigent. L'organisme de réglementation peut ordonner l'abandon lorsqu'il [TRADUCTION] « l'estime nécessaire pour protéger le public ou l'environnement » (*OGCA*, par. 27(3)). Selon les règles, le titulaire de permis est tenu d'abandonner un puits ou une installation, notamment, à la résiliation du bail d'exploitation minière, du bail de surface ou de l'accès aux terres, lorsque l'organisme de réglementation annule ou suspend le permis, ou lorsqu'il avise le titulaire de permis que le puits ou l'installation peut constituer un danger pour l'environnement ou la sécurité (*Oil and Gas Conservation Rules*, Alta. Reg. 151/71, art. 3.012). L'article 23 de la *Pipeline Act* oblige les titulaires de permis à abandonner des pipelines dans des situations semblables. L'obligation de remise en état est prévue par l'art. 137 de l'*EPEA*. Cette obligation s'impose à un « exploitant », terme plus large qui englobe le titulaire d'un permis délivré par l'organisme de réglementation (*EPEA*, al. 134(b)). La remise en état est régie par les exigences procédurales fixées dans le règlement (*Conservation and Reclamation Regulation*, Alta. Reg. 115/93).

[18] Le Programme d'évaluation de la responsabilité du titulaire de permis, qui était, au moment de l'insolvabilité de Redwater, établi dans la *Directive 006 : Licensee Liability Rating (LLR) Program and*

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

License Transfer Process (12 mars 2013) (« Directive 006 ») constitue un moyen par lequel l'organisme de réglementation vise à s'assurer que les titulaires de permis rempliront les obligations de fin de vie, au lieu que celles-ci soient en fin de compte assumées par le public albertain. Dans le cadre de ce programme, l'organisme de réglementation attribue à chaque société une cote de gestion de la responsabilité (« CGR »), qui représente le rapport entre la valeur totale attribuée par l'organisme de réglementation aux biens d'une société qui sont visés par des permis et la responsabilité totale que l'organisme de réglementation attribue aux coûts éventuels de l'abandon et de la remise en état de ces biens. Pour les besoins du calcul de la CGR, tous les permis détenus par une société donnée sont traités comme un tout, sans isolement ou morcellement des biens. La CGR d'un titulaire de permis est calculée sur une base mensuelle et, lorsqu'elle tombe sous le ratio prescrit (1,0 à l'époque de l'insolvabilité de Redwater), le titulaire de permis est tenu de verser un dépôt de garantie. Le dépôt de garantie est ajouté aux [TRADUCTION] « biens réputés » du titulaire de permis, qui doit ramener sa CGR au ratio prescrit par l'organisme de réglementation. Si le dépôt de garantie requis n'est pas payé, l'organisme de réglementation peut annuler ou suspendre les permis de la société (*OGCA*, art. 25). Comme solution de rechange au versement d'une garantie, le titulaire de permis peut exécuter les obligations de fin de vie ou transférer des permis (avec approbation), afin de ramener sa CGR au niveau prescrit.

[19] Licences can be transferred only with the Regulator's approval. The Regulator uses the Licensee Liability Rating Program to ensure that end-of-life obligations will not be negatively affected by licence transfers. Upon receipt of an application to transfer one or more licences, the Regulator assesses how the transfer, if approved, would affect the LMR of both the transferor and the transferee. At the time of Redwater's insolvency, if both the transferor and the transferee would have a post-transfer LMR equal to or exceeding 1.0, the Regulator would approve the transfer, absent other concerns. Following the chambers judge's decision in this case, the Regulator implemented changes to its policies, including the requirement that transferees have an LMR of 2.0 or

[19] Les permis ne peuvent être transférés qu'avec l'approbation de l'organisme de réglementation. Ce dernier utilise le Programme d'évaluation de la responsabilité du titulaire de permis pour éviter que les transferts de permis aient un effet néfaste sur les obligations de fin de vie. À la réception d'une demande de transfert d'un ou de plusieurs permis, l'organisme de réglementation évalue la façon dont le transfert, s'il est approuvé, influerait sur la CGR du cédant et du cessionnaire. À l'époque de l'insolvabilité de Redwater, si le cédant et le cessionnaire devaient avoir, après le transfert, des CGR égales ou supérieures à 1,0, l'organisme de réglementation approuverait le transfert en l'absence d'autres préoccupations. Après la décision du juge siégeant en cabinet dans

higher immediately following any licence transfer: Alberta Energy Regulator, *Licensee Eligibility — Alberta Energy Regulator Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision*, June 20, 2016 (online). For the purposes of this appeal, I will be referring to the regulatory regime as it existed at the time of Redwater's insolvency.

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

[21] The *OGCA*, the *Pipeline Act* and the *EPEA* all contemplate that a licensee's regulatory obligations will continue to be fulfilled when it is subject to insolvency proceedings. The *EPEA* achieves this by including the trustee of a licensee in the definition of "operator" for the purposes of the duty to reclaim (s. 134(b)(vi)). The *EPEA* also specifically provides that an order to perform reclamation work (known as an "environmental protection order") may be issued to a trustee (ss. 140 and 142(1)(a)(ii)). The *EPEA* imposes responsibility for carrying out the

la présente affaire, l'organisme de réglementation a apporté des changements à ses politiques, y compris l'exigence selon laquelle les cessionnaires devaient avoir une CGR de 2,0 ou plus immédiatement après tout transfert de permis : Alberta Energy Regulator, *Licensee Eligibility — Alberta Energy Regulator Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision*, 20 juin 2016 (en ligne). Pour les besoins du présent pourvoi, je ferai référence au régime de réglementation tel qu'il existait à l'époque de l'insolvabilité de Redwater.

[20] Comme il est expliqué plus en détail ci-dessous, si le cédant ou le cessionnaire devait avoir une CGR inférieure à 1,0 après le transfert, l'organisme de réglementation refuserait d'approuver le transfert de permis. Dans une telle situation, l'organisme de réglementation insisterait pour que certaines mesures correctives soient prises afin de s'assurer qu'aucune des deux CGR ne descende en dessous de 1,0. Même si la Directive 006, dans sa version de 2013, exigeait que le cessionnaire ainsi que le cédant aient des CGR d'au moins 1,0 après le transfert, au cours de ce litige, l'organisme de réglementation a déclaré que, lorsque les titulaires de permis sont sous séquestre ou en faillite, sa règle pratique est d'approuver les transferts tant qu'ils n'entraînent pas une détérioration de la CGR du cédant, même si la CGR du cédant demeurerait inférieure à 1,0 après le transfert. L'explication donnée pour cette règle pratique est qu'elle vise à faciliter les achats. L'organisme de réglementation fait valoir que le Programme d'évaluation de la responsabilité du titulaire de permis continue de s'appliquer au transfert de permis dans le cadre de la procédure d'insolvabilité.

[21] L'*OGCA*, la *Pipeline Act* ainsi que l'*EPEA* envisagent toutes que les obligations réglementaires d'un titulaire de permis continuent d'être respectées pendant qu'il fait l'objet d'une procédure d'insolvabilité. L'*EPEA* y parvient en incluant le syndic d'un titulaire de permis dans la définition d'« exploitant » pour l'application de l'obligation de remettre en état (sous-al. 134(b)(vi)). L'*EPEA* prévoit aussi expressément la possibilité qu'une ordonnance de remise en état (appelée [TRADUCTION] « ordonnance de protection de l'environnement ») soit adressée à un syndic

terms of an environmental protection order on the person to whom the order is directed (ss. 240 and 245). However, absent gross negligence or wilful misconduct, a trustee's liability in relation to such an order is expressly limited to the value of the assets in the bankrupt estate (s. 240(3)). The *OGCA* and the *Pipeline Act* take a more generic approach to applying the various obligations of licensees to trustees in the insolvency context: they simply include trustees in the definition of "licensee" (*OGCA*, s. 1(1)(cc); *Pipeline Act*, s. 1(1)(n)). As a result, every power which these Acts give the Regulator against a licensee can theoretically also be exercised against a trustee.

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

[23] The Regulator has delegated its statutory authority to abandon and reclaim orphans to the OWA (*Orphan Fund Delegated Administration Regulation*,

(art. 140 et sous-al. 142(1)(a)(ii))). L'*EPEA* impose la responsabilité d'exécuter une ordonnance de protection de l'environnement à la personne visée par l'ordonnance (art. 240 et 245). Cependant, faute de négligence grave ou d'inconduite délibérée, la responsabilité du syndic à l'égard d'une telle ordonnance est expressément limitée à la valeur des éléments de l'actif du failli (par. 240(3)). L'*OGCA* et la *Pipeline Act* adoptent une approche plus générique pour appliquer les diverses obligations d'un titulaire de permis aux syndics dans le contexte de l'insolvabilité; elles incluent simplement le syndic dans la définition de [TRADUCTION] « titulaire de permis » (*OGCA*, al. 1(1)(cc); *Pipeline Act*, al. 1(1)(n)). En conséquence, tout pouvoir que ces lois confèrent à l'organisme de réglementation à l'encontre d'un titulaire de permis peut, en théorie, s'exercer également contre un syndic.

[22] Malgré cela, le régime de réglementation de l'Alberta envisage la possibilité qu'une partie des obligations de fin de vie d'un titulaire de permis demeure insatisfaite à la fin du processus d'insolvabilité. L'organisme de réglementation peut désigner des puits, des installations et leurs sites comme [TRADUCTION] « orphelins » (*OGCA*, al. 70(2)(a)). Un pipeline est défini comme une « installation » pour l'application du régime relatif aux orphelins (*OGCA*, al. 68(d)). La Directive 006 disposait qu'un [TRADUCTION] « puits, une installation ou un pipeline visé par le Programme d'évaluation de la responsabilité du titulaire de permis peut être déclaré orphelin lorsque le titulaire de ce permis devient insolvable ou est liquidé » (art. 7.1). Un « fonds pour les puits orphelins » a été créé dans le but de payer, entre autres choses, l'abandon et la remise en état des puits orphelins (*OGCA*, par. 70(1)). Le fonds pour les puits orphelins est financé au moyen d'une redevance annuelle, à l'échelle de l'industrie, payée par les titulaires de permis de puits et d'installations ainsi que de sites non remis en état (par. 73(1)). Le montant de la redevance est prescrit par l'organisme de réglementation en fonction du coût estimatif de l'abandon et de la remise en état des puits orphelins au cours d'un exercice donné (par. 73(2)).

[23] L'organisme de réglementation a délégué le pouvoir que lui confère la loi d'abandonner et de remettre en état les puits orphelins à l'OWA (*Orphan*

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

Fund Delegated Administration Regulation, Alta. Reg. 45/2001), un organisme sans but lucratif supervisé par un conseil d'administration indépendant. Cette entité est presque entièrement financée par la redevance décrite ci-dessus qui a été établie dans toute l'industrie, et la totalité de cette redevance est remise à l'OWA par l'organisme de réglementation. L'OWA n'a pas le pouvoir de demander le remboursement de ses frais. Toutefois, une fois ses travaux environnementaux terminés, l'OWA peut être remboursée jusqu'à concurrence de la valeur du dépôt de garantie détenu, le cas échéant, par l'organisme de réglementation au profit du titulaire de permis associé au puits orphelin. Au cours des dernières années, le nombre de puits orphelins a augmenté rapidement en Alberta. Par exemple, le nombre de nouveaux puits orphelins est passé de 80 en 2013-2014 à 591 en 2014-2015.

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

[24] Ce qui est en cause dans le présent pourvoi, c'est l'applicabilité, durant la faillite, de deux pouvoirs conférés à l'organisme de réglementation par la législation provinciale. Les deux sont conçus pour garantir que les titulaires de permis remplissent les obligations de fin de vie qui leur incombent.

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

[25] Le premier pouvoir en cause dans le présent pourvoi est celui dont dispose l'organisme de réglementation d'ordonner à un titulaire de permis d'abandonner des biens visés par des permis, auquel s'ajoutent les pouvoirs que la loi confère pour faire exécuter de telles ordonnances. Lorsqu'il y a eu délaissement d'un puits ou d'une installation sans que le processus d'abandon ait été effectué conformément aux directives de l'organisme de réglementation, ou aux règles et règlements, l'organisme peut autoriser toute personne à effectuer ce processus à l'égard du puits ou de l'installation, ou s'en charger lui-même (*OGCA*, art. 28). Quand l'organisme de réglementation ou la personne qu'il a désignée procède à l'abandon, les frais liés à cette opération constituent une dette payable à l'organisme de réglementation. Une ordonnance de l'organisme de réglementation indiquant ces frais peut être déposée à la Cour du Banc de la Reine de l'Alberta, inscrite comme un jugement de cette cour, puis exécutée conformément à la procédure ordinaire d'exécution des jugements de cette cour (*OGCA*, par. 30(6)). Un régime semblable s'applique aux pipelines (*Pipeline Act*, art. 23 à 26).

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

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

[26] Le titulaire de permis qui contrevient ou ne se conforme pas à une ordonnance de l'organisme de réglementation, ou qui a une dette impayée envers ce dernier relativement aux frais d'abandon ou de remise en état, est assujetti à un certain nombre de mesures d'exécution potentielles. L'organisme de réglementation peut suspendre les activités, refuser d'étudier des demandes de permis ou de transfert de permis (*OGCA*, al. 106(3)(a), (b) et (c)), ou exiger le paiement des dépôts de garantie, de façon générale ou comme condition à l'octroi d'autres permis, approbations ou transferts (*OGCA*, al. 106(3)(d) et (e)). Lorsqu'un titulaire de permis contrevient à la Loi, aux règlements ou aux règles, à toute ordonnance ou directive de l'organisme de réglementation ou à toute condition d'un permis, l'organisme de réglementation peut intenter une poursuite contre le titulaire de permis pour infraction réglementaire, et ce dernier est passible d'une amende en guise de pénalité, bien qu'il puisse invoquer la défense de diligence raisonnable (*OGCA*, art. 108 et 110). Un régime semblable s'applique aux pipelines (*Pipeline Act*, art. 51 à 54). L'*EPEA* contient elle aussi des dispositions similaires relatives à la création de dettes et afférentes aux ordonnances de protection de l'environnement, en plus de prévoir la poursuite d'infractions réglementaires en cas d'inobservation, avec la possibilité d'invoquer une défense de diligence raisonnable. Toutefois, comme il a été mentionné, la responsabilité du syndic en ce qui concerne les ordonnances de protection de l'environnement se limite aux éléments de l'actif, sauf s'il est responsable de négligence flagrante ou d'inconduite délibérée (*EPEA*, art. 227 à 230, 240 et 245).

[27] Le second pouvoir en cause dans le présent pourvoi est celui que possède l'organisme de réglementation d'imposer des conditions au transfert, par un titulaire, d'un ou de plusieurs de ses permis. Tout comme au moment où il octroie un permis au départ, l'organisme de réglementation jouit de vastes pouvoirs pour consentir au transfert d'un permis sous réserve de conditions, restrictions et stipulations, ou pour rejeter le transfert (*OGCA*, par. 24(2)). Suivant la Directive 006 et le texte qui l'a remplacée en 2016, l'organisme peut rejeter un transfert, même si les deux parties auraient la CGR requise après le transfert, ou même quand un dépôt de garantie

approve the licence transfer based on the compliance history of one or both parties or their directors, officers or security holders, or based on the risk posed by the transfer to the orphan fund.

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

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

peut être versé conformément aux exigences relatives à la CGR. Plus particulièrement, l'organisme de réglementation peut décider qu'il n'est pas dans l'intérêt public d'approuver le transfert de permis compte tenu des antécédents de conformité de l'une des parties, ou des deux, ou de leurs administrateurs, dirigeants ou détenteurs de titres, ou encore du risque que présenterait le transfert à l'égard du fonds pour les puits orphelins.

[28] Lorsqu'une transaction proposée entraînerait une détérioration de la CGR du cédant en deçà de 1,0 (ou simplement une détérioration dans le cas d'un cédant insolvable), l'organisme de réglementation insiste sur le respect d'une des conditions suivantes avant d'approuver la transaction : (i) que le cédant effectue les processus d'abandon et/ou de remise en état, réduisant ainsi ses passifs réputés; (ii) que le cédant verse un dépôt de garantie, augmentant ainsi ses biens réputés. La transaction pourrait également être structurée de manière à éviter toute détérioration de la CGR du cédant par le « regroupement » des permis relatifs aux puits épuisés et de ceux liés aux puits productifs. Une transaction au cours de laquelle on conserve les permis des puits épuisés tandis que les permis des puits productifs sont transférés entraînerait presque toujours une détérioration considérable de la CGR d'une société.

[29] Au cours du présent pourvoi, il a été beaucoup question d'autres régimes de réglementation que l'Alberta aurait *pu* adopter pour éviter que les coûts environnementaux associés à l'industrie pétrolière et gazière ne soient passés au public. Ce que l'Alberta *a* choisi, c'est un régime de permis qui fait de ces coûts une partie inhérente de la valeur des biens visés par les permis. Ce régime a l'avantage de s'accorder avec le principe du pollueur-payeur, un précepte bien reconnu du droit canadien de l'environnement. Ce principe attribue aux pollueurs la charge de réparer les dommages environnementaux dont ils sont responsables, ce qui incite les sociétés à se soucier de l'environnement dans le cadre de leurs activités économiques (*Cie pétrolière Impériale ltée c. Québec (Ministre de l'Environnement)*, 2003 CSC 58, [2003] 2 R.C.S. 624, par. 24). Le Programme d'évaluation de la responsabilité des titulaires de permis exige essentiellement que les titulaires de permis

the assets to the inevitable cost of abandoning those assets and reclaiming their sites at the end of those life cycles.

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

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

appliquent la valeur dérivée des biens pétroliers et gaziers pendant les parties productives du cycle de vie des biens au coût inévitable de l'abandon de ces biens et de la remise en état de leurs sites à la fin de ce cycle de vie.

[30] En fin de compte, il ne revient pas à notre Cour de décider de la meilleure approche réglementaire pour l'industrie pétrolière et gazière. Ce qui n'est pas contesté, c'est qu'en adoptant son régime de réglementation actuel, l'Alberta a agi dans les limites de sa compétence constitutionnelle en matière de propriété et de droits civils dans la province ainsi que dans le domaine de l'« exploitation, [de la] conservation et [de la] gestion des ressources naturelles non renouvelables [. . .] de la province » (*Loi constitutionnelle de 1867*, par. 92(13) et al. 92A(1)c)). L'Alberta a mis au point un appareil réglementaire complexe pour régler d'importantes questions de politique concernant le moment où, par qui et de quelle manière les coûts environnementaux inévitables associés à l'extraction du pétrole et du gaz doivent être payés. Sa solution est un régime d'octroi de permis qui fait baisser la valeur des principaux éléments d'actif de l'industrie pour refléter les coûts environnementaux, lequel est soutenu par une redevance sur l'industrie sous forme de fonds pour les puits orphelins. L'Alberta voulait que cet appareil continue à fonctionner lorsqu'une société pétrolière et gazière fait l'objet d'une procédure d'insolvabilité.

[31] Par contre, l'insolvabilité d'une société pétrolière et gazière autorisée à exercer ses activités en Alberta met aussi en jeu la *LFI*, une loi fédérale qui régit l'administration de l'actif d'un failli ainsi que la répartition ordonnée et équitable des biens entre ses créanciers. Elle a été valablement promulguée dans l'exercice de la compétence constitutionnelle du Parlement en matière de banqueroute et de faillite (*Loi constitutionnelle de 1867*, par. 91(21)). Tout comme le régime de réglementation de l'Alberta témoigne de son choix réfléchi quant à la façon d'aborder les questions de politique importantes soulevées par les risques environnementaux liés à l'extraction du pétrole et du gaz, la *LFI* témoigne du choix réfléchi du Parlement concernant la manière d'équilibrer des objectifs de politique importants lorsque les biens d'un failli sont, de par leur nature, insuffisants

BIA, or that the Alberta regulatory regime frustrates the purpose of the *BIA*, the doctrine of paramountcy dictates that the *BIA* must prevail.

B. *The Relevant Provisions of the BIA*

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

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

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

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

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

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

[36] A claim may be provable in a bankruptcy proceeding even if it is a contingent claim. A "contingent claim is 'a claim which may or may not ever ripen into a debt, according as some future event does or does not happen'" (*Peters v. Remington*, 2004 ABCA

pour satisfaire à toutes ses obligations diverses. Et, pour autant qu'il y ait un conflit d'application entre le régime de réglementation de l'Alberta et la *LFI*, ou que le régime de réglementation de l'Alberta entrave la réalisation de l'objet de la *LFI*, la doctrine de la prépondérance commande que la *LFI* l'emporte.

B. *Les dispositions applicables de la Loi sur la faillite et l'insolvabilité*

[32] À ce stade-ci, je tiens simplement à souligner les articles de la *LFI* qui sont en cause dans le présent pourvoi. Ce sont ces articles qui détermineront si la doctrine de la prépondérance s'applique. J'analyserai plus en détail ci-après les objets de la *LFI* ainsi que les différentes questions soulevées par l'art. 14.06.

[33] Le concept central de la *LFI* est celui d'une « réclamation prouvable en matière de faillite ». Plusieurs dispositions de la *LFI* servent de fondement pour circonscrire la portée des réclamations prouvables. La première est la définition que l'on trouve à l'art. 2 :

réclamation prouvable en matière de faillite *ou* ***réclamation prouvable*** *Toute réclamation ou créance pouvant être prouvée dans des procédures intentées sous l'autorité* de *la présente loi par un créancier.*

[34] Le terme « créancier » est défini à l'art. 2 comme une « [p]ersonne titulaire d'une réclamation prouvable à ce titre sous le régime de la présente loi ».

[35] La définition de « réclamation prouvable » se termine au par. 121(1) :

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

[36] Une réclamation peut être prouvable dans une procédure de faillite même s'il s'agit d'une réclamation éventuelle. Une [TRADUCTION] « réclamation éventuelle est "une réclamation qui peut ou non se transformer en une créance, selon qu'un événement

5, 49 C.B.R. (4th) 273, at para. 23, quoting *Garner v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.), at p. 281). Sections 121(2) and 135(1.1) provide guidance on when a contingent claim will be a provable claim:

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

. . .

135 (1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

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

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

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

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

futur se produit ou non" » (*Peters c. Remington*, 2004 ABCA 5, 49 B.C.R. (4th) 273, par. 23, citant *Garner c. Newton* (1916), 29 D.L.R. 276, (B.R. Man.), p. 281. Les paragraphes 121(2) et 135(1.1) donnent des indications sur le moment où une réclamation éventuelle deviendra une réclamation prouvable :

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

. . .

135 (1.1) Le syndic décide si une réclamation éventuelle ou non liquidée est une réclamation prouvable et, le cas échéant, il l'évalue; sous réserve des autres dispositions du présent article, la réclamation est dès lors réputée prouvée pour le montant de l'évaluation.

[37] Dans l'arrêt *Terre-Neuve-et-Labrador c. AbitibiBowater Inc.*, 2012 CSC 67, [2012] 3 R.C.S. 443 (« *Abitibi* »), par. 26, notre Cour a interprété les dispositions précédentes de la *LFI* et a formulé un critère tripartite afin de décider quand une obligation environnementale imposée par un organisme de réglementation sera une réclamation prouvable pour l'application de la *LFI* et de la *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985, c. C-36 (« *LACC* ») :

Premièrement, on doit être en présence d'une dette, d'un engagement ou d'une obligation envers un *créancier*. Deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance *avant que le débiteur ne devienne failli*. Troisièmement, il doit être possible d'attribuer une *valeur pécuniaire* à cette dette, cet engagement ou cette obligation. [En italique dans l'original.]

[38] J'aborderai le critère de l'arrêt *Abitibi* plus en détail ci-dessous.

[39] Une fois la faillite déclarée, les créanciers du failli doivent participer à l'unique procédure collective de faillite s'ils souhaitent faire valoir leurs réclamations prouvables. Le paragraphe 69.3(1) de la *LFI* prévoit donc une suspension automatique de l'exécution des réclamations prouvables en dehors de la procédure de faillite, à compter du premier jour de la faillite.

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

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

[42] Section 14.06(2) reads as follows:

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

(a) before the trustee's appointment; or

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

[40] La *LFI* établit un régime de priorité complet pour l'acquittement des réclamations prouvables présentées contre le failli dans la procédure collective. L'article 141 énonce la règle générale, à savoir que tous les créanciers ont un rang égal et une part proportionnelle des biens du failli. Toutefois, la règle énoncée à l'art. 141 s'applique « [s]ous réserve des autres dispositions de [la *LFI*] ». Le paragraphe 136(1) énumère les réclamations des « créanciers privilégiés » et fixe l'ordre de priorité dans lequel ils doivent recevoir leur paiement. Cet ordre établi par le par. 136(1) l'est « [s]ous réserve des droits des créanciers garantis ». Selon le par. 69.3(2), la suspension des procédures n'empêche pas les créanciers garantis de réaliser leur garantie. La *LFI* instaure donc un régime de priorité pour le versement des réclamations prouvables en matière de faillite, les créanciers garantis étant payés en premier, les créanciers privilégiés en deuxième et les créanciers non garantis en dernier (voir *Alberta (Procureur général) c. Moloney*, 2015 CSC 51, [2015] 3 R.C.S. 327, par. 32-35).

[41] L'article 14.06 de la *LFI*, qui traite de diverses questions environnementales dans le contexte de la faillite, est essentiel pour statuer sur le présent pourvoi. Je vais maintenant reproduire les par. 14.06(2) et 14.06(4), les deux parties du régime prévu à l'art. 14.06 qui sont directement en cause dans le présent pourvoi. Le reste de l'art. 14.06 se trouve en annexe à la fin des présents motifs.

[42] Voici le texte du par. 14.06(2) :

(2) Par dérogation au droit fédéral et provincial, le syndic est, ès qualités, dégagé de toute responsabilité personnelle découlant de tout fait ou dommage lié à l'environnement survenu avant ou après sa nomination, sauf celui causé par sa négligence grave ou son inconduite délibérée ou, dans la province de Québec, par sa faute lourde ou intentionnelle.

[43] Section 14.06(4) reads as follows:

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

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

(i) complies with the order, or

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

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

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

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

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

[44] As I will discuss, a main point of contention between the parties is the very different interpretations they ascribe to s. 14.06(4) of the *BIA*. I note that s. 14.06(4)(a)(ii), which is relied upon by GTL, refers to a trustee who "abandons, disposes of or otherwise releases any interest in any real property".

[43] Voici le texte du par. 14.06(4) :

(4) Par dérogation au droit fédéral et provincial, mais sous réserve du paragraphe (2), le syndic est, ès qualités, dégagé de toute responsabilité personnelle découlant du non-respect de toute ordonnance de réparation de tout fait ou dommage lié à l'environnement et touchant un bien visé par une faillite, une proposition ou une mise sous séquestre administrée par un séquestre, et de toute responsabilité personnelle relativement aux frais engagés par toute personne exécutant l'ordonnance :

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

(i) il s'y conforme,

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

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

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

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

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

[44] Comme je l'expliquerai, un point de discorde important entre les parties tient aux interprétations fort différentes qu'elles donnent au par. 14.06(4) de la *LFI*. Je remarque que le sous-al. 14.06(4)a)(ii), sur lequel s'appuie GTL, parle du syndic qui « abandonne [. . .] tout intérêt sur le bien réel en cause, en dispose

The word "disclaim" is used in these reasons, as it has been throughout this litigation, as a shorthand for these terms.

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

C. *The Events of the Redwater Bankruptcy*

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

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

ou s'en dessaisit ». Dans les présents motifs, le mot « renoncer » sert à raccourcir ces termes, comme cela a été le cas tout au long du litige qui nous occupe.

[45] Je vais maintenant procéder à une brève analyse des faits entourant la faillite de Redwater.

C. *Les faits entourant la faillite de Redwater*

[46] Redwater était une société pétrolière et gazière cotée en bourse. L'organisme de réglementation lui a octroyé ses premiers permis en 2009. Le 31 janvier et le 19 août 2013, ATB a avancé des fonds à Redwater et, en contrepartie, s'est vu accorder une sûreté sur les biens actuels et futurs de Redwater. ATB a prêté des fonds à Redwater en pleine connaissance des obligations de fin de vie associées à ses biens. Au milieu de 2014, Redwater a commencé à éprouver des difficultés financières. Sur demande d'ATB, GTL a été nommé séquestre de Redwater le 12 mai 2015. À cette époque, Redwater devait environ 5,1 millions de dollars à ATB.

[47] Après avoir été informé de la mise sous séquestre, l'organisme de réglementation a envoyé à GTL une lettre datée du 14 mai 2015 exposant sa position. L'organisme de réglementation a fait remarquer que l'*OGCA* et la *Pipeline Act* incluaient à la fois les séquestres et les syndics dans la définition d'un « titulaire de permis ». L'organisme de réglementation a déclaré qu'il n'était pas un créancier de Redwater et qu'il ne faisait pas valoir une [TRADUCTION] « réclamation prouvable dans le cadre de la mise sous séquestre ». Ainsi, malgré la mise sous séquestre, Redwater demeurait tenue de se conformer à toutes les exigences réglementaires, y compris les obligations d'abandon, pour tous les biens visés par des permis. L'organisme de réglementation a déclaré que GTL était légalement tenu de remplir ces obligations avant de distribuer des fonds ou de finaliser toute proposition aux créanciers. L'organisme de réglementation a averti qu'il n'approuverait pas le transfert de l'un ou l'autre permis de Redwater à moins d'être convaincu que le cessionnaire et le cédant seraient en mesure de s'acquitter de toutes les obligations réglementaires. Il a demandé la confirmation que GTL avait pris possession des biens de Redwater visés par des permis et qu'il prenait des mesures pour se conformer à toutes les obligations réglementaires de Redwater.

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

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

[50] In its Second Report to the Alberta Court of Queen's Bench dated October 3, 2015, GTL explained why it had concluded that it could not meet the Regulator's requirements. GTL had concluded that the cost of the end-of-life obligations for the spent wells would likely exceed the sale proceeds for the productive wells. It viewed a sale of the non-producing wells — even if bundled with producing wells — as unlikely. If such a sale were possible, the purchase price would be reduced by the end-of-life obligations, negating the benefit to the estate. Based on this assessment, by letter dated July 3, 2015, GTL informed the Regulator that it was taking possession and control only of Redwater's 17 most productive wells (including a leaking well that was subsequently abandoned), 3 associated facilities and 12 associated

[48] À l'époque où elle a connu des difficultés financières, Redwater avait des permis délivrés par l'organisme de réglementation concernant 84 puits, 7 installations et 36 pipelines, tous situés dans le centre de l'Alberta. La grande majorité de ses éléments d'actif étaient ces biens pétroliers et gaziers. Au moment de la nomination de GTL comme séquestre, 19 des puits ou installations étaient productifs, tandis que les 72 autres étaient inactifs ou taris. Il y avait des participants en participation directe dans plusieurs puits et installations. La CGR de Redwater n'est tombée en dessous de 1,0 qu'après la mise sous séquestre de celle-ci et, en conséquence, Redwater n'a jamais versé de dépôt de garantie à l'organisme de réglementation.

[49] En septembre 2015, la CGR de Redwater avait chuté à 0,93. La valeur nette de ses biens réputés moins ses passifs réputés était égale à un montant négatif de 553 000 $. Les 19 puits et installations productifs pour lesquels Redwater était titulaire de permis avaient une CRG de 2,85 et une valeur nette réputée de 4,152 millions de dollars. Les 72 autres puits ou installations pour lesquels Redwater était titulaire de permis auraient eu une CGR de 0,30 et une valeur nette réputée négative de 4,705 millions de dollars. Puisque Redwater était sous séquestre, l'organisme de réglementation a mentionné qu'il n'approuverait le transfert des permis de Redwater que si cela n'occasionnait pas une détérioration de sa CGR.

[50] Dans son Deuxième rapport à la Cour du Banc de la Reine de l'Alberta daté du 3 octobre 2015, GTL a expliqué pourquoi il avait conclu qu'il ne pouvait pas satisfaire aux exigences de l'organisme de réglementation. D'après GTL, le coût des obligations de fin de vie des puits taris dépasserait probablement le produit de la vente des puits productifs. Il considérait comme improbable la vente des puits inexploités, même s'ils étaient regroupés avec les puits productifs. Si une telle vente était possible, le prix d'achat serait réduit au regard des obligations de fin de vie, annulant ainsi le bénéfice pour l'actif. Sur la base de cette évaluation, par lettre datée du 3 juillet 2015, GTL a informé l'organisme de réglementation qu'il prenait possession et contrôle seulement des 17 puits les plus productifs de Redwater (y compris un puits

pipelines ("Retained Assets"), and that, pursuant to para. 3(a) of the Receivership Order, it was not taking possession or control of any of Redwater's other licensed assets ("Renounced Assets"). GTL's position was that it had no obligation to fulfill any regulatory requirements associated with the Renounced Assets.

[51] In response, on July 15, 2015, the Regulator issued orders under the *OGCA* and the *Pipeline Act* requiring Redwater to suspend and abandon the Renounced Assets ("Abandonment Orders"). The orders required abandonment to be carried out immediately where there were no other working interest participants and, by September 18, 2015, where there were other working interest participants. The Regulator stated that it considered the Renounced Assets an environmental and safety hazard and that s. 3.012(d) of the *Oil and Gas Conservation Rules* required a licensee to abandon wells or facilities so considered. In issuing the Abandonment Orders, the Regulator also relied on ss. 27 to 30 of the *OGCA* and ss. 23 to 26 of the *Pipeline Act*. If the Abandonment Orders were not complied with, the Regulator threatened to abandon the assets itself and to sanction Redwater through the use of s. 106 of the *OGCA*. The Regulator further stated that, once abandonment had taken place, the surface would need to be reclaimed and reclamation certificates obtained in accordance with s. 137 of the *EPEA*.

[52] On September 22, 2015, the Regulator and the OWA filed an application for a declaration that GTL's renunciation of the Renounced Assets was void, an order requiring GTL to comply with the Abandonment Orders, and an order requiring GTL to "fulfill the statutory obligations as licensee in relation to the abandonment, reclamation and remediation" of all of Redwater's licensed properties (A.R., vol. II, at p. 41). The Regulator did not seek to hold GTL

qui fuyait et qui a été abandonné par la suite), ainsi que de 3 installations et de 12 pipelines connexes (« biens conservés »), et qu'en vertu du par. 3a) de l'ordonnance de mise sous séquestre, il ne prenait pas possession ou contrôle de tous les autres éléments d'actif de Redwater visés par des permis (« biens faisant l'objet de la renonciation »). Selon GTL, il n'était aucunement tenu de satisfaire aux exigences réglementaires en lien avec les biens faisant l'objet de la renonciation.

[51] Le 15 juillet 2015, l'organisme de réglementation a réagi en rendant des ordonnances au titre de l'*OGCA* et de la *Pipeline Act* enjoignant à Redwater de suspendre l'exploitation des biens faisant l'objet de la renonciation et de les abandonner (« ordonnances d'abandon »). Les ordonnances exigeaient que l'abandon soit effectué sur-le-champ dans les cas où il n'y avait pas d'autres participants en participation directe, et, au plus tard le 18 septembre 2015, dans ceux où il y avait d'autres participants en participation directe. L'organisme de réglementation a déclaré qu'il considérait les biens faisant l'objet de la renonciation comme un danger pour l'environnement et la sécurité, et que l'al. 3.012(d) des *Oil and Gas Conservation Rules* obligeait le titulaire de permis à abandonner ces puits ou installations. Lorsqu'il a rendu les ordonnances d'abandon, l'organisme de réglementation s'est également fondé sur les art. 27 à 30 de l'*OGCA* et sur les art. 23 à 26 de la *Pipeline Act*. Si les ordonnances d'abandon n'étaient pas respectées, l'organisme de réglementation menaçait d'effectuer lui-même le processus d'abandon des biens et de sanctionner Redwater par l'application de l'art. 106 de l'*OGCA*. L'organisme a ajouté qu'une fois qu'il y avait eu abandon, la surface devait être remise en état et il fallait obtenir des certificats de remise en état conformément à l'art. 137 de l'*EPEA*.

[52] Le 22 septembre 2015, l'organisme de réglementation et l'OWA ont déposé une demande en vue d'obtenir un jugement déclaratoire portant que l'abandon par GTL des biens faisant l'objet de la renonciation était nul, une ordonnance obligeant GTL à se conformer aux ordonnances d'abandon, de même qu'une ordonnance enjoignant à GTL de [TRADUCTION] « remplir les obligations légales en tant que titulaire de permis concernant l'abandon,

liable for these obligations beyond the assets remaining in the Redwater estate. GTL brought a cross-application on October 5, 2015, seeking approval to pursue a sales process excluding the Renounced Assets. GTL sought a court order directing that the Regulator could not prevent the transfer of the licences associated with the Retained Assets on the basis of, *inter alia*, the LMR requirements, failure to comply with the Abandonment Orders, refusal to take possession of the Renounced Assets or any outstanding debts owed by Redwater to the Regulator. GTL did not seek to foreclose the possibility that the Regulator might have some other valid reason to reject a proposed transfer.

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

D. *Judicial History*

(1) Court of Queen's Bench of Alberta

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

la remise en état et la décontamination » de tous les biens de Redwater visés par des permis (A.R., vol. II, p. 41). L'organisme de réglementation n'a pas cherché à tenir GTL responsable de ces obligations au-delà des éléments qui faisaient encore partie de l'actif de Redwater. Le 5 octobre 2015, GTL a présenté une demande reconventionnelle visant à obtenir l'autorisation de poursuivre un processus de vente excluant les biens faisant l'objet de la renonciation. GTL a demandé au tribunal de rendre une ordonnance interdisant à l'organisme de réglementation d'empêcher le transfert des permis associés aux biens conservés en raison, notamment, des exigences relatives à la CGR, du non-respect des ordonnances d'abandon, du refus de prendre possession des biens faisant l'objet de la renonciation ou des dettes en souffrance de Redwater envers l'organisme de réglementation. GTL n'a pas cherché à exclure la possibilité que l'organisme de réglementation ait un autre motif valable de rejeter un transfert proposé.

[53] Le 28 octobre 2015, une ordonnance de faillite a été rendue à l'égard de Redwater, et GTL a été nommé syndic. GTL a envoyé une autre lettre à l'organisme de réglementation le 2 novembre 2015, dans laquelle il invoquait cette fois le sous-al. 14.06(4)a)(ii) de la *LFI* à l'égard des biens faisant l'objet de la renonciation. Les ordonnances d'abandon sont toujours pendantes.

D. *Historique judiciaire*

(1) La Cour du Banc de la Reine de l'Alberta

[54] Le juge siégeant en cabinet a conclu que l'art. 14.06 de la *LFI* visait à permettre aux syndics de renoncer à un bien lorsqu'il s'agissait d'une décision économique rationnelle compte tenu du fait lié à l'environnement et touchant le bien. La responsabilité personnelle du syndic n'était pas une condition préalable au pouvoir de renonciation. Le juge siégeant en cabinet a donc conclu à un conflit d'application entre l'art. 14.06 de la *LFI* et la définition de « titulaire de permis » que l'on trouve dans l'*OGCA* et la *Pipeline Act*. En vertu de l'art. 14.06 de la *LFI*, GTL pouvait renoncer aux biens et ne pas être responsable des obligations environnementales qui y étaient associées. Cependant, aux termes de l'*OGCA*

included receivers and trustees, so GTL remained liable for environmental obligations.

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

[56] The chambers judge approved the sale procedure proposed by GTL. He declared that the *OGCA* and the *Pipeline Act* were inoperative to the extent that they conflicted with the *BIA* by deeming GTL to be the "licensee" of the Renounced Assets; that GTL was entitled to disclaim the Renounced Assets pursuant to s. 14.06(4)(a)(ii) and (c), and was not subject to any obligations in relation to those assets; that the Abandonment Orders were inoperative to the extent that they required GTL to comply or to provide security deposits; and that Directive 006 was inoperative to the extent it conflicted with s. 14.06 of the *BIA*. Lastly, he declared that the Regulator, in exercising its discretion to approve a transfer of the

et de la *Pipeline Act*, GTL ne pouvait renoncer aux biens visés par des permis parce que la définition de « titulaire de permis » comprenait le séquestre et le syndic, si bien que GTL demeurait responsable des obligations environnementales.

[55] Appliquant le critère de l'arrêt *Abitibi*, le juge siégeant en cabinet a conclu que, bien qu'au [TRADUCTION] « sens technique », il n'était pas suffisamment certain que l'organisme de réglementation ou l'OWA exécuteraient les ordonnances d'abandon et feraient valoir une réclamation pécuniaire pour obtenir le remboursement de leurs frais, la situation répondait à l'intention de la Cour dans *Abitibi* car les ordonnances d'abandon étaient « intrinsèquement financières » (par. 173). Forcer GTL en tant que « titulaire de permis » à se conformer aux ordonnances d'abandon irait donc à l'encontre de l'objectif global de la *LFI* de partage équitable des biens du failli, puisque l'organisme de réglementation se verrait accorder, pour sa réclamation, une superpriorité à laquelle il n'avait pas droit, avant les réclamations des créanciers garantis. Cela entraverait aussi la réalisation de l'objet de l'art. 14.06, par lequel le Parlement a légiféré sur les réclamations environnementales en cas de faillite et a expressément fait le choix de ne pas leur accorder une superpriorité. Les conditions imposées par l'organisme de réglementation sur les transferts de permis relatifs aux biens conservés ont contrecarré davantage l'article 14.06 en incluant les biens faisant l'objet de la renonciation dans le calcul pour décider de l'approbation d'une vente.

[56] Le juge siégeant en cabinet a approuvé la procédure de vente proposée par GTL. Il a déclaré que l'*OGCA* et la *Pipeline Act* étaient inopérantes dans la mesure où elles entraient en conflit avec la *LFI*, en considérant GTL comme le « titulaire des permis » relatifs aux biens faisant l'objet de la renonciation, que GTL avait le droit de renoncer à ces biens au titre du sous-al. 14.06(4)a)(ii) et de l'al. 14.06(4)c), et qu'il n'était assujetti à aucune obligation à l'égard de ces biens, que les ordonnances d'abandon étaient inopérantes dans la mesure où elles obligeaient GTL à s'y conformer ou à fournir des dépôts de garantie et que la Directive 006 était inopérante dans la mesure où elle entrait en conflit avec l'art. 14.06 de la *LFI*.

licences for the Retained Assets, could not consider the Renounced Assets for the purpose of calculating Redwater's LMR before or after the transfer, nor could it consider any other issue involving the Renounced Assets.

(2) Court of Appeal of Alberta

(a) *Majority Reasons*

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

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

Enfin, il a déclaré que l'organisme de réglementation, dans l'exercice de son pouvoir discrétionnaire d'approuver un transfert des permis relatifs aux biens conservés, ne pouvait pas tenir compte des biens faisant l'objet de la renonciation pour le calcul de la CGR de Redwater, avant ou après le transfert, ni tenir compte de toute autre question liée aux biens faisant l'objet de la renonciation.

(2) La Cour d'appel de l'Alberta

a) *Les motifs majoritaires*

[57] Le juge Slatter, au nom des juges majoritaires, a rejeté les appels. Il a déclaré que les questions constitutionnelles des appels étaient complémentaires à la question principale, l'interprétation de la *LFI*. L'article 14.06 n'a pas soustrait les réclamations environnementales au régime général de faillite, à l'exception de la superpriorité prévue au par. 14.06(7), qui s'appliquerait rarement, voire jamais, aux puits de pétrole et de gaz. Le paragraphe 14.06(4) n'a pas [TRADUCTION] « limité le pouvoir du syndic de renoncer [. . .] aux biens dans des circonstances où il pourrait s'exposer à une responsabilité personnelle » (par. 68). En outre, il fallait donner un sens large au mot « ordonnance » qui figure au par. 14.06(4).

[58] Le juge Slatter a décidé que la question essentielle était de savoir [TRADUCTION] « si les obligations environnementales de Redwater satisf[aisaient] au critère de la réclamation prouvable » (par. 73). Il était d'accord avec le juge siégeant en cabinet quant au respect du troisième volet du critère d'*Abitibi*, mais il a conclu que ce critère avait été respecté « tant sur le plan technique que sur le fond » (par. 76). Les politiques de l'organisme de réglementation ont essentiellement privé l'actif du failli d'une valeur suffisante pour respecter les obligations environnementales. Exiger le dépôt d'une garantie, ou détourner la valeur de l'actif du failli, répond clairement à la norme de « certitude ». Les politiques de l'organisme de réglementation exigeaient que la pleine valeur des biens du failli soit d'abord appliquée aux engagements environnementaux, créant ainsi une superpriorité pour les réclamations environnementales. Le juge Slatter a estimé que, « [n]onobstant leur effet

assets, all of which [were] governed by the *BIA*" (para. 86).

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

(b) *Dissenting Reasons*

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

prévu en tant que conditions associées aux permis, les politiques de l'organisme de réglementation ont eu un effet direct sur les biens, les priorités et le droit du Syndic de renoncer à des biens, qui étaient tous régis par la *LFI* » (par. 86).

[59] Sur le plan de l'analyse constitutionnelle, le juge Slatter a conclu que le rôle de GTL en tant que « titulaire de permis » au sens de l'*OGCA* et de la *Pipeline Act* était [TRADUCTION] « en conflit d'application avec les dispositions de la *LFI* » qui dégageaient les syndics de toute responsabilité personnelle, qui leur permettaient de renoncer à des biens et qui établissaient la priorité des réclamations environnementales (par. 89). Ce rôle entravait également la réalisation de l'objet de la *LFI* consistant à « gérer la liquidation des sociétés insolvables et à régler la priorité des réclamations à leur encontre » (par. 89). Ainsi, l'organisme de réglementation ne pouvait pas « insister pour que le syndic consacre une partie substantielle de l'actif du failli à l'acquittement des réclamations environnementales, par priorité sur les réclamations du créancier garanti » (par. 91).

b) *Les motifs dissidents*

[60] La juge Martin a exprimé sa dissidence. Contrairement aux juges majoritaires, elle a souligné les dimensions constitutionnelles de l'affaire, en particulier la nécessité d'un fédéralisme coopératif dans le domaine de l'environnement, et a fait remarquer que la doctrine de la prépondérance devait être appliquée avec retenue. Elle a conclu que l'organisme de réglementation ne faisait pas valoir de réclamation prouvable au sens du critère d'*Abitibi*. Il ne suffisait pas qu'une ordonnance réglementaire soit [TRADUCTION] « intrinsèquement financière » pour qu'il s'agisse d'une réclamation prouvable en matière de faillite (par. 185, citant les motifs du juge siégeant en cabinet, par. 173). Il n'était pas suffisamment certain que les travaux d'abandon ordonnés soient accomplis, soit par l'organisme de réglementation soit par l'OWA, et il n'y avait « aucune certitude qu'une demande de remboursement soit présentée » (par. 184). La juge Martin estimait elle aussi que l'organisme de réglementation n'était pas un créancier de Redwater — ou, s'il était un créancier au moment de rendre les ordonnances

a bankruptcy, and there was no reason why such regulatory requirements could not coexist with the distribution of the bankrupt's estate.

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

[62] As there was no entitlement under the *BIA* to renounce the end-of-life obligations imposed by Alberta's regulatory regime, there was no operational conflict in enforcing those obligations under provincial law. Nor was there any frustration of purpose. The Regulator was not asserting any claims provable in bankruptcy: "The continued application of [Alberta's] regulatory regime following bankruptcy did not determine or reorder priorities among creditors, but rather value[d] accurately the assets available for distribution" (para. 240).

d'abandon, il ne l'était pas dans l'application des conditions de transfert des permis. L'organisme de réglementation devait être en mesure de conserver la maîtrise du transfert des permis pendant une faillite, et il n'y avait aucune raison pour que de telles exigences réglementaires ne puissent pas coexister avec le partage de l'actif du failli.

[61] En ce qui concerne l'article 14.06, la juge Martin a retenu l'argument de l'organisme de réglementation selon lequel le par. 14.06(4) permettait à un syndic de renoncer aux biens réels afin d'éviter d'engager sa responsabilité personnelle, mais n'empêchait pas que l'on se serve des éléments de l'actif du failli pour se conformer aux obligations environnementales. Cependant, elle est allée plus loin. Selon elle, les par. 14.06(4) à (8) ont été adoptés ensemble à titre de compromis d'ordre législatif. La juge Martin a conclu que le pouvoir du syndic de renoncer aux biens en vertu de l'art. 14.06 n'était tout simplement pas applicable dans le régime de réglementation de l'Alberta. La faculté de renoncer en vertu du par. 14.06(4) devait être interprétée en corrélation avec l'autre moitié du compromis, la superpriorité de la Couronne sur les biens réels du débiteur établie par le par. 14.06(7). Les conditions relatives aux permis n'étaient pas le genre d'« ordonnance » envisagé par le par. 14.06(4), ni les permis le genre de « bien réel » envisagé par cette disposition. L'équilibre atteint par l'art. 14.06 n'était pas solide lorsqu'il n'y avait pas de [TRADUCTION] « bien réel du débiteur » à l'égard duquel la Couronne pouvait prendre une superpriorité (par. 210).

[62] Comme il n'y avait aucun droit, aux termes de la *LFI*, de renoncer aux obligations de fin de vie imposées par le régime de réglementation [de l'Alberta], aucun conflit d'application ne résultait de l'exécution de ces obligations sous le régime du droit provincial. Et il n'existait pas non plus d'entrave à la réalisation d'un objet fédéral. L'organisme de réglementation ne faisait valoir aucune réclamation prouvable en matière de faillite : [TRADUCTION] « L'application continue du régime de réglementation [de l'Alberta] après la faillite n'a pas fixé ou réarrangé les priorités parmi les créanciers, mais a plutôt donné lieu à une évaluation juste des biens pouvant être répartis » (par. 240).

III. Analysis

A. *The Doctrine of Paramountcy*

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

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

III. Analyse

A. *La doctrine de la prépondérance fédérale*

[63] Comme je l'ai expliqué, la législation albertaine accorde à l'organisme de réglementation des pouvoirs étendus pour s'assurer que les sociétés qui ont obtenu des permis d'exploitation dans l'industrie pétrolière et gazière de l'Alberta abandonneront, de façon appropriée et sécuritaire, les puits de pétrole, installations et pipelines à la fin de leur vie productive, et remettront en état leurs sites. GTL cherche à éviter d'être assujetti à deux de ces pouvoirs : celui d'ordonner à Redwater d'abandonner les biens faisant l'objet de la renonciation et celui de refuser de permettre le transfert des permis relatifs aux biens conservés à cause du non-respect des exigences relatives à la CGR. Il s'agit là sans aucun doute de pouvoirs réglementaires valables accordés à l'organisme de réglementation par une loi albertaine valide. GTL cherche à éviter leur application au cours de la faillite en invoquant la doctrine de la prépondérance fédérale, selon laquelle la loi de l'Alberta habilitant l'organisme de réglementation à utiliser les pouvoirs qui sont en litige dans le cadre du présent pourvoi est inopérante dans la mesure où son exercice de ces pouvoirs pendant la faillite entre en conflit avec la *LFI*.

[64] Les questions en litige dans le présent pourvoi découlent de ce qu'on a appelé [TRADUCTION] l'« intersection désordonnée » de la législation provinciale sur l'environnement et de la législation fédérale sur l'insolvabilité (*Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111, par. 8). Les questions de prépondérance se posent souvent dans le contexte de l'insolvabilité. Étant donné la nature procédurale de la *LFI*, le régime de faillite repose en grande partie sur l'application continue des lois provinciales. Toutefois, le par. 72(1) de la *LFI* confirme qu'en cas de conflit véritable entre les lois provinciales concernant la propriété et les droits civils et la législation fédérale sur la faillite, la *LFI* l'emporte (voir *Moloney*, par. 40). En d'autres termes, la faillite est issue de la propriété et des droits civils, mais elle en fait toujours partie conceptuellement. Les lois provinciales valides d'application générale continuent de s'appliquer dans le domaine de la faillite jusqu'à ce

the provincial law becomes inoperative to the extent of the conflict (see *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 3).

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

[66] Under both branches of paramountcy, the burden of proof rests on the party alleging the conflict. This burden is not an easy one to satisfy, as the doctrine of paramountcy is to be applied with restraint. Conflict must be defined narrowly so that each level of government may act as freely as possible within its respective sphere of constitutional authority. "[H]armonious interpretations of federal and provincial legislation should be favoured over an interpretation that results in incompatibility . . . [i]n the absence of 'very clear' statutory language to the contrary" (*Lemare*, at paras. 21 and 27). "It is presumed that Parliament intends its laws to co-exist with provincial laws" (*Moloney*, at para. 27). As this Court found in *Lemare*, at paras. 22-23, the application of the

que le Parlement légifère en vertu de sa compétence exclusive en matière de faillite et d'insolvabilité. La loi provinciale devient alors inopérante dans la mesure du conflit (voir *Husky Oil Operations Ltd. c. Ministre du Revenu national*, [1995] 3 R.C.S. 453, par. 3).

[65] Au fil du temps, deux formes distinctes de conflit ont été reconnues. La première est le *conflit d'application*, qui survient lorsqu'il est impossible de se conformer en même temps à une loi fédérale valide et à une loi provinciale valide. Il y a conflit d'application lorsqu'« une loi dit "oui" et l'autre dit "non", de sorte que "l'observance de l'une entraîne l'inobservance de l'autre" » (*Saskatchewan (Procureur général) c. Lemare Lake Logging Ltd.*, 2015 CSC 53, [2015] 3 R.C.S. 419, par. 18, citant *Multiple Access Ltd. c. McCutcheon*, [1982] 2 R.C.S. 161, p. 191). La seconde est l'*entrave à la réalisation d'un objet fédéral*, qui se produit lorsque l'application d'une loi provinciale valide est incompatible avec l'objet d'une loi fédérale. L'effet d'une loi provinciale peut contrecarrer la réalisation de l'objet de la loi fédérale, « sans toutefois entraîner une violation directe de ses dispositions » (*Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3, par. 73). La partie qui invoque l'entrave à la réalisation d'un objet fédéral « doit d'abord établir l'objet de la loi fédérale pertinente et ensuite prouver que la loi provinciale est incompatible avec cet objet » (*Lemare*, par. 26, citant *Québec (Procureur général) c. Canadian Owners and Pilots Association*, 2010 CSC 39, [2010] 2 R.C.S. 536, par. 66).

[66] Aux deux volets de la prépondérance, la charge de la preuve incombe à la partie qui allègue l'existence du conflit. Il n'est pas facile de s'en acquitter, puisque la doctrine de la prépondérance doit être appliquée avec retenue. Le conflit doit être défini de façon étroite pour que chaque ordre de gouvernement puisse agir aussi librement que possible dans sa sphère de compétence constitutionnelle respective. « [L]es tribunaux doivent donner aux lois provinciale et fédérale une interprétation harmonieuse plutôt qu'une interprétation qui donne lieu à une incompatibilité [. . .] [e]n l'absence d'un texte législatif "clair" à cet effet » (*Lemare*, par. 21 et 27). « On présume que le Parlement a l'intention de faire coexister ses lois avec les lois provinciales » (*Moloney*, par. 27).

doctrine of paramountcy should also give due weight to the principle of co-operative federalism. This principle allows for interplay and overlap between federal and provincial legislation. While co-operative federalism does not impose limits on the otherwise valid exercise of legislative power, it does mean that courts should avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with provincial legislation.

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

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

[69] The first conflict proposed by GTL results from the inclusion of trustees in the definition of "licensee" in the *OGCA* and the *Pipeline Act*. GTL says that s. 14.06(4) releases it from all environmental liability associated with the Renounced Assets after a valid "disclaimer" is made. But as a "licensee", it can be required by the Regulator to satisfy all of Redwater's statutory obligations and liabilities, which disregards the "disclaimer" of the Renounced Assets. GTL further notes the possibility that it may be held personally liable as a "licensee". In response, the Regulator says that s. 14.06(4) is concerned primarily with protecting trustees from personal liability in relation to environmental orders, and does not affect the ongoing responsibilities of the bankrupt

Comme le conclut notre Cour aux par. 22 et 23 de l'arrêt *Lemare*, l'application de la doctrine de la prépondérance devrait également tenir dûment compte du principe du fédéralisme coopératif. Ce principe permet l'interaction ainsi que le chevauchement entre les lois fédérales et provinciales. Bien que le fédéralisme coopératif n'impose pas de limites à l'exercice par ailleurs valide du pouvoir législatif, cela signifie que les tribunaux devraient éviter de donner à l'objet de la loi fédérale une interprétation large qui le mettrait en conflit avec la loi provinciale.

[67] La jurisprudence a établi que la *LFI* dans son ensemble est censée favoriser l'atteinte de « deux objectifs : le partage équitable des biens du failli entre ses créanciers et la réhabilitation financière du failli » (*Moloney*, par. 32, citant *Husky Oil*, par. 7). En l'espèce, la faillie est une société qui ne s'extirpera jamais de la faillite. Donc, seul le premier objectif est pertinent. Comme je vais l'expliquer ci-dessous, le juge siégeant en cabinet a également affirmé que l'objet de l'art. 14.06 se distinguait des objets plus larges de la *LFI*. Notre Cour a analysé l'objet de certaines dispositions de la *LFI* dans des décisions antérieures (voir, par exemple, *Lemare*, par. 45).

[68] GTL a relevé deux conflits entre la législation albertaine établissant les pouvoirs contestés de l'organisme de réglementation pendant la faillite et la *LFI*, et l'un ou l'autre aurait constitué, selon lui, un fondement suffisant pour l'ordonnance rendue par le juge siégeant en cabinet.

[69] Le premier conflit avancé par GTL découle de l'ajout des syndics à la définition de « titulaire de permis » qui figure dans l'*OGCA* et la *Pipeline Act*. GTL affirme que le par. 14.06(4) le soustrait à tout engagement environnemental associé aux biens faisant l'objet d'une « renonciation » valide. Toutefois, comme il est « titulaire de permis », l'organisme de réglementation peut l'obliger à s'acquitter de toutes les obligations et de tous les engagements légaux de Redwater, faisant ainsi abstraction de la « renonciation » aux biens en cause. GTL souligne en outre la possibilité qu'il soit tenu personnellement responsable en tant que « titulaire de permis ». L'organisme de réglementation réplique que le par. 14.06(4) a pour objectif premier de mettre les syndics à l'abri de toute

estate. Thus, as long as a trustee is protected from personal liability, no conflict arises from its status as a "licensee" or from the fact that the bankrupt estate remains responsible under provincial law for the ongoing environmental obligations associated with "disclaimed" assets.

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

[71] I will consider each alleged conflict in turn.

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

[72] As a statutory scheme, s. 14.06 of the *BIA* raises numerous interpretive issues. As noted by Martin J.A., the only matter concerning s. 14.06 on

responsabilité personnelle à l'égard des ordonnances environnementales et que cette disposition n'a aucune incidence sur les responsabilités continues de l'actif du failli. Ainsi, tant qu'un syndic est à l'abri de toute responsabilité personnelle, son statut de « titulaire de permis » et le fait que l'actif d'un failli demeure responsable, aux termes du droit provincial, des obligations environnementales continues associées aux éléments le composant et faisant l'objet de la renonciation ne sont à l'origine d'aucun conflit.

[70] Le second conflit allégué par GTL est que, même si le par. 14.06(4) ne porte que la responsabilité personnelle d'un syndic, l'exercice par l'organisme de réglementation des pouvoirs que lui confère la loi réarrange de fait les priorités établies par la *LFI* en matière de faillite. Un tel réarrangement serait imputable au fait que l'organisme de réglementation exige la dépense d'éléments d'actif pour respecter les ordonnances d'abandon ainsi que pour libérer ou garantir les engagements environnementaux associés aux biens faisant l'objet de la renonciation avant d'approuver un transfert des permis liés aux biens conservés (conformément aux exigences relatives à la CGR). Ces obligations de fin de vie sont considérées par GTL comme étant une créance ordinaire de l'organisme de réglementation, que la *LFI* ne permet pas d'acquitter de préférence aux réclamations des créanciers garantis de Redwater. L'organisme de réglementation réplique que, si l'on applique correctement le critère d'*Abitibi*, ces obligations réglementaires environnementales ne sont pas des réclamations prouvables en matière de faillite. En conséquence, selon l'organisme de réglementation, les lois provinciales exigeant que l'actif de Redwater satisfasse à ces obligations avant le partage, entre les créanciers garantis, des éléments dont il est composé n'entre pas en conflit avec le régime de priorité de la *LFI*.

[71] J'examinerai chacun des conflits allégués, l'un après l'autre.

B. *Y a-t-il un conflit entre le régime de réglementation albertain et l'art. 14.06 de la LFI?*

[72] En tant que régime législatif, l'art. 14.06 de la *LFI* soulève de nombreuses questions d'interprétation. Comme l'a fait remarquer la juge Martin, le seul

which all the parties to this litigation can agree is that it "is not a model of clarity" (C.A. reasons, at para. 201). Given the confusion caused by attempts to interpret s. 14.06 as a coherent scheme during this litigation, Parliament may very well wish to re-examine s. 14.06 during its next review of the *BIA*.

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

[74] I have concluded that there is no conflict. Various arguments were advanced during this appeal concerning the disparate elements of the s. 14.06 scheme. However, the provision upon which GTL in fact relies in arguing that it is entitled to avoid its responsibilities as a "licensee" under the Alberta legislation is s. 14.06(4). As I have noted, GTL and the Regulator propose very different interpretations of s. 14.06(4). However, s. 14.06(4) is clear and unambiguous when read on its own: where it is invoked by a trustee, the result is that "the trustee is not personally liable" for failure to comply with certain environmental orders or for the costs incurred by any person in carrying out the terms of such orders. The provision says nothing about the liability of the "bankrupt" or the "estate" — distinct concepts referenced many times throughout the *BIA*. Section 14.06(4), on its own wording, does not support the interpretation urged upon this Court by GTL.

point concernant l'art. 14.06 sur lequel toutes les parties au présent litige ont pu s'entendre est le fait que ce [TRADUCTION] « n'est pas un modèle de clarté » (motifs de la Cour d'appel, par. 201). Vu la confusion semée par les tentatives d'interpréter l'art. 14.06 comme un régime cohérent lors du présent litige, le Parlement pourrait fort bien vouloir réexaminer cet article durant sa prochaine étude de la *LFI*.

[73] Fondamentalement, le présent pourvoi porte sur la question de savoir s'il existe un conflit entre une loi albertaine en particulier et la *LFI*. GTL soutient que oui et affirme que, comme il a « renoncé » aux biens faisant l'objet de la renonciation en vertu du par. 14.06(4) de la *LFI*, il peut cesser d'assumer toute responsabilité ou obligation ou tout engagement à l'égard de ces biens. Pourtant, aux dires de GTL, en tant que « titulaire de permis », il reste chargé de les abandonner. De plus, ceux-ci sont toujours inclus dans le calcul de la CGR de Redwater. GTL prétend qu'il y a un autre conflit avec le par. 14.06(2) de la *LFI* du fait que sa responsabilité personnelle comme « titulaire de permis » peut être engagée relativement aux frais d'abandon des biens faisant l'objet de la renonciation.

[74] J'ai conclu à l'absence de conflit. Différents arguments ont été présentés lors du pourvoi au sujet des éléments disparates du régime instauré par l'art. 14.06. Cependant, la disposition qu'invoque en fait GTL pour affirmer avoir le droit d'échapper à ses responsabilités en tant que « titulaire de permis » en application de la législation albertaine est le par. 14.06(4). Rappelons que GTL et l'organisme de réglementation proposent des interprétations fort différentes du par. 14.06(4). Toutefois, à la simple lecture de ses termes, le par. 14.06(4) est clair et sans équivoque : lorsqu'il est invoqué par un syndic, « le syndic est dégagé de toute responsabilité personnelle » découlant du non-respect de certaines ordonnances environnementales ou relativement aux frais engagés par toute personne exécutant ces ordonnances. La disposition ne dit rien à propos de la responsabilité du « failli » ou de l'« actif », des notions distinctes mentionnées à maintes reprises dans la *LFI*. Le texte même du par. 14.06(4) n'étaye pas l'interprétation que GTL nous exhorte à retenir.

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

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

[75] À mon avis, le par. 14.06(4) expose le résultat d'une « renonciation » du syndic à un bien réel en cas d'ordonnance de réparation de tout fait ou dommage lié à l'environnement et touchant ce bien. Que l'on voit la « renonciation » comme un pouvoir reconnu par la common law ou un pouvoir découlant d'une quelconque autre source législative, la « renonciation » d'un syndic à des biens réels en réaction à une ordonnance environnementale visant ces biens dégage le syndic de toute responsabilité personnelle, alors que la responsabilité continue de l'actif du failli n'est pas touchée. L'idée que le par. 14.06(4) vise la responsabilité personnelle du syndic, et non celle de l'actif du failli, est étayée non seulement par le texte clair de l'article, mais également par les débats parlementaires, un arrêt de notre Cour et la version française de l'article. De plus, non seulement le sens ordinaire des mots « responsabilité personnelle » est-il clair, mais on retrouve également le même concept aux par. 14.06(1.2) et (2), lesquels disposent expressément que le syndic est dégagé de toute responsabilité personnelle. En particulier, il me paraît impossible d'interpréter de manière cohérente le par. 14.06(2) comme mentionnant la responsabilité personnelle tout en interprétant le par. 14.06(4) comme renvoyant d'une façon ou d'un autre à la responsabilité de l'actif du failli.

[76] Comme le par. 14.06(4) dispose que la « renonciation » dégage uniquement le syndic de toute responsabilité personnelle, à supposer même que GTL ait « renoncé » avec succès à des biens en l'espèce, l'organisme de réglementation ne cause aucun conflit d'application ni n'entrave la réalisation d'un objet fédéral en exigeant de GTL à titre de « titulaire de permis » qu'il se serve d'éléments de l'actif pour abandonner les biens faisant l'objet de la renonciation. En outre, il n'y a aucun conflit du fait que ces biens soient toujours inclus dans le calcul de la CGR de Redwater. Enfin, vu la retenue avec laquelle il faut appliquer la doctrine de la prépondérance, et vu que l'organisme de réglementation n'a pas tenté de tenir GTL personnellement responsable en tant que « titulaire de permis » des frais d'abandon, aucun conflit avec les par. 14.06(2) ou (4) n'est causé par la simple possibilité théorique de responsabilité personnelle en application de la *OGCA* ou de la *Pipeline Act*.

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

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

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

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

[79] Section 14.06(4) says nothing about the "bankrupt estate" avoiding the applicability of valid provincial law. In drafting s. 14.06(4), Parliament could easily have referred to the liability of the bankrupt estate. Parliament chose instead to refer simply to the personal liability of a trustee. Notably, s. 14.06(7) and s. 14.06(8) both refer to a "debtor in a bankruptcy". Parliament's choice in this regard cannot be ignored. I agree with Martin J.A. that there is no basis on which to read the words "the trustee is not personally liable" in s. 14.06(4) as encompassing the liability of the bankrupt estate. As noted by Martin J.A., it

[77] Dans les paragraphes qui suivent, je vais d'abord interpréter le par. 14.06(4) et expliquer pourquoi, compte tenu de sa formulation claire et d'autres considérations pertinentes, la disposition ne concerne que la responsabilité personnelle du syndic, et non la responsabilité de l'actif du failli. Je vais ensuite expliquer en quoi, malgré leur similitude superficielle, la raison d'être du par. 14.06(4) diffère de celle du par. 14.06(2), et démontrer que, si l'on comprend bien le régime conçu par le Parlement, le par. 14.06(4) n'influe pas sur la responsabilité de l'actif du failli. Pour conclure, je démontrerai qu'il n'y a aucun conflit d'application ni aucune entrave à la réalisation d'un objet fédéral entre la législation albertaine et l'art. 14.06 de la *LFI* dans la présente affaire, particulièrement en ce qui a trait à la protection de GTL contre toute responsabilité personnelle.

(1) L'interprétation juste du par. 14.06(4)

a) *Le paragraphe 14.06(4) s'attache à la responsabilité personnelle du syndic*

[78] J'ai conclu que le par. 14.06(4) s'attache à la responsabilité personnelle du syndic et non à la responsabilité de l'actif du failli. Je souligne ici le principe bien établi selon lequel « [c]haque fois qu'on peut légitimement interpréter une loi fédérale de manière qu'elle n'entre pas en conflit avec une loi provinciale, il faut appliquer cette interprétation de préférence à toute autre qui entraînerait un conflit » (*Banque canadienne de l'Ouest*, par. 75, citant *Procureur général du Canda c. Law Society of British Columbia*, [1982] 2 R.C.S. 307, p. 356).

[79] Le paragraphe 14.06(4) est muet à propos de « l'actif du failli » qui évite l'applicabilité d'une loi provinciale valide. Lorsqu'il a rédigé le par. 14.06(4), le Parlement aurait pu aisément parler de la responsabilité de l'actif du failli. Le Parlement a plutôt choisi de mentionner uniquement la responsabilité personnelle du syndic. Fait à noter, les par. 14.06(7) et (8) parlent tous deux du « débiteur ». Ce choix du Parlement ne peut être ignoré. Je conviens avec la juge d'appel Martin qu'il n'y aucune raison de considérer que les mots « le syndic est [. . .] dégagé de toute responsabilité personnelle » figurant

is apparent from the express language chosen by Parliament that s. 14.06(4) was motivated by and aimed at concerns about the protection of trustees, not the protection of the full value of the estate for creditors. Nothing in the wording of s. 14.06(4) suggests that it was intended to extend to estate liability.

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

> The aim is to provide a better definition of the liability of insolvency professionals and practitioners in order to encourage them to accept mandates where there may be problems related to the environment. It is hoped that this will reduce the number of abandoned sites both for the benefit of the environment and the safeguard of businesses and jobs.

(Standing Committee on Industry, *Evidence*, No. 16, 2nd Sess., 35th Parl., June 11, 1996, at 15:49-15:55, as cited in C.A. reasons, at para. 197.)

Several months later, Mr. Hains stated:

> What Parliament tried to do in 1992 was to provide a relief to insolvency practitioners . . . because they were at risk when they accepted a mandate to liquidate an insolvent business. Under environmental laws, therefore, they could have been subject to personal liability to clean up the environment. I am speaking of personal liability here, meaning "out of their own pockets."

(*Proceedings of the Standing Committee on Banking, Trade and Commerce*, No. 13, 2nd Sess., 35th Parl., November 4, 1996, at p. 15)

Mr. Hains proceeded to explain how the 1997 amendments were intended to improve on the 1992 reforms to the *BIA* that had included the original version of s. 14.06(2) (as discussed further below), but he gave

au par. 14.06(4) visent la responsabilité de l'actif du failli. Comme l'a signalé la juge Martin, il ressort des termes exprès choisis par le Parlement que le 14.06(4) découlait du souci de protéger les syndics et se voulait une réponse à ce souci, et non de protéger la pleine valeur de l'actif au bénéfice des créanciers. Le texte du par. 14.06(4) ne porte aucunement à croire qu'il devait s'étendre à la responsabilité de l'actif.

[80] Les débats parlementaires mènent à la même conclusion. Jacques Hains, directeur de la Direction de la politique des lois commerciales au ministère d'Industrie Canada, a souligné ce qui suit pendant les débats tenus en 1996 avant l'adoption du par. 14.06(4) l'année suivante :

> L'objectif est de mieux définir la responsabilité des professionnels de l'insolvabilité, des praticiens de façon à les encourager à accepter des mandats où il pourrait peut-être y avoir des problèmes en matière d'environnement, de façon à réduire le nombre de sites abandonnés au pays, pour le bénéfice de l'environnement et la sauvegarde des entreprises et des emplois qui en dépendent.

(Comité permanent de l'industrie, *Témoignages*, nº 16, 2e sess., 35e lég., 11 juin 1996, entre 15 h 49 et 15 h 55, cité dans les motifs de la Cour d'appel, par. 197.)

Plusieurs mois plus tard, M. Hains a mentionné que :

> [L]es dispositions [ont été] adoptées par le Parlement en 1992 en vue d'alléger le fardeau de ceux qui travaillent dans le domaine de l'insolvabilité [. . .] parce que le mandat de liquider une entreprise insolvable leur impose des risques. En vertu du droit environnemental, par conséquent, ils auraient pu être tenus personnellement responsables d'un accident environnemental et obligés de verser les dommages-intérêts.

(*Délibérations du comité sénatorial permanent des Banques et du commerce*, nº 13, 2e sess., 35e lég., 4 novembre 1996, p. 16)

M. Hains a ensuite expliqué en quoi les modifications de 1997 visaient à améliorer la réforme de la *LFI* en 1992 qui comprenait la première version du par. 14.06(2) (comme nous le verrons plus loin), mais

no indication that the focus had somehow shifted away from a trustee's "personal liability".

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

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

[83] Similarly, Parliament has also chosen to use the same concept found in both s. 14.06(4) and s. 14.06(2) in a third part of the 14.06 scheme, namely s. 14.06(1.2). This provision states that a trustee carrying on the business of a debtor or continuing the employment of a debtor's employees is

il n'a pas laissé entendre que l'accent n'était plus mis sur la « responsabilité personnelle » du syndic.

[81] Avant l'adoption des modifications de 1997, Gordon Marantz, conseiller juridique au ministère d'Industrie Canada, a fait remarquer qu'elles visaient à « empêcher le syndic d'être poursuivi pour de fortes sommes » (Comité permanent de l'industrie, *Témoignages*, nº 21, 2e sess., 35e lég., 25 septembre 1996, à 17 h 15, cité dans les motifs de la Cour d'appel, par. 198)). Je conviens avec l'organisme de réglementation que les débats législatifs ne donnent aucun indice d'une intention du Parlement de mettre les biens des faillis à l'abri de toute responsabilité environnementale. L'idée que le par. 14.06(4) avait pour objectif d'inciter les syndics de faillite à accepter des mandats, et non de limiter la responsabilité de l'actif, est étayée davantage par l'insertion de la disposition sous la rubrique générale « Nomination et remplacement des syndics ».

[82] De plus, au moment de rédiger le par. 14.06(4), le Parlement a décidé d'utiliser la même notion qu'il avait employé précédemment au par. 14.06(2) : de par leur libellé explicite, lorsque l'une ou l'autre disposition s'applique, le syndic est dégagé de toute « responsabilité personnelle ». Il ne peut s'agir d'une erreur, car le par. 14.06(4) a été inséré dans la *LFI* quelque cinq ans après l'adoption du par. 14.06(2). Puisque les deux dispositions visent expressément à protéger les syndics contre toute « responsabilité personnelle », il est très difficile d'accepter qu'elles puissent concerner différents types de responsabilité. D'après leurs termes, le par. 14.06(2) et le par. 14.06(4) traitent manifestement du même concept. En effet, si l'on considère que le par. 14.06(4) s'étend à la responsabilité de l'actif, il n'y a aucune raison de principe de ne pas donner la même interprétation au par. 14.06(2). Toutefois, personne ne conteste que ce n'était pas l'intention qu'avait le Parlement au moment d'adopter le par. 14.06(2).

[83] Dans le même ordre d'idées, le Parlement a aussi choisi d'utiliser la même notion figurant aux par. 14.06(4) et 14.06(2) dans une troisième partie du régime établi par l'art. 14.06, soit le par. 14.06(1.2). Selon cette disposition, le syndic qui continue l'exploitation de l'entreprise du débiteur ou lui succède

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

comme employeur est dégagé de toute « responsabilité personnelle » à l'égard de certains engagements énumérés, notamment comme successeur de l'employeur. Bien qu'elle n'ait pas été directement soulevée en l'espèce, cette disposition, de par ses propres termes, ne traite manifestement pas et ne peut traiter de la responsabilité de l'actif du failli. Là encore, il est difficile de concevoir comment le Parlement aurait pu préciser qu'un syndic est « dégagé de toute responsabilité personnelle » suivant le sens ordinaire et grammatical de cette expression au par. 14.06(1.2) et au par. 14.06(2), et souhaiter par la suite que l'on donne à cette expression une interprétation tout à fait différente et illogique au par. 14.06(4). Les trois dispositions traitent toutes de la responsabilité personnelle d'un syndic et il faut les interpréter uniformément. En effet, je signale que l'idée selon laquelle le syndic est « dégagé de toute responsabilité personnelle » est aussi reprise systématiquement dans d'autres parties de la *LFI* étrangères au régime de l'art. 14.06, par exemple l'art. 80 et le par. 197(3).

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

[84] L'interprétation qui précède du par. 14.06(4) est également renforcée par la version française de l'art. 14.06. Les versions françaises des par. 14.06(2) et (4) indiquent que le syndic est, « ès qualités », dégagé de toute responsabilité personnelle. Selon le dictionnaire *Le Grand Robert de la langue française* (2e éd. 2001), cette expression française désigne la personne qui agit « à cause d'un titre, d'une fonction particulière »; en anglais, elle désigne la personne agissant « *by virtue of a title or specific role* ». Dans le dictionnaire *Robert & Collins* (en ligne), cette expression décrit la personne qui agit en « *one's official capacity* ». En utilisant cette expression au par. 14.06(4), le Parlement prévoit ainsi qu'en cas de « renonciation » valide, le syndic est, ès qualités, dégagé de toute responsabilité personnelle à l'égard d'ordonnance de réparation de tout fait ou dommage lié à l'environnement et touchant le bien auquel il a été « renoncé ». Ces dispositions ne portent manifestement pas sur la notion de responsabilité de l'actif. Les versions françaises des par. 14.06(2) et (4) emploient donc les mêmes mots pour décrire la limitation de responsabilité qu'elles offrent aux syndics. Il est presque impossible de concevoir que le Parlement emploie les mêmes termes dans deux

official capacity as representative of the bankrupt estate where it invokes s. 14.06(4).

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

[86] Although the dissenting reasons focus on the source of the "disclaimer" power in s. 14.06(4), nothing in this case turns on either the source of the "disclaimer" power or on whether GTL successfully "disclaimed" the Renounced Assets. I would note that, while the dissenting reasons rely on a purported common law power of "disclaimer", the Court has been referred to no cases — and the dissenting reasons have cited none — demonstrating the existence of a common law power allowing trustees to "disclaim" *real property*. In any case, regardless of the source of the "disclaimer" power, nothing in s. 14.06(4) suggests that, where a trustee does "disclaim" real property, the result is that it is simply free to walk away from the environmental orders applicable to it. Quite the contrary — the provision is clear that, where an environmental order has been made,

dispositions aussi intimement liées et leur attribue pourtant des sens différents. En conséquence, le syndic est dégagé de toute responsabilité personnelle en sa qualité officielle de représentant de l'actif du failli lorsqu'il invoque le par. 14.06(4).

[85] Avant le présent litige, la jurisprudence sur l'art. 14.06 était relativement peu abondante. Notre Cour a cependant examiné le régime de l'art. 14.06 une fois auparavant, dans *Société de crédit commercial GMAC — Canada c. T.C.T. Logistics Inc.*, 2006 CSC 35, [2006] 2 R.C.S. 123. Dans cet arrêt, les commentaires de la majorité et de la juge dissidente étayent ma conclusion selon laquelle le par. 14.06(4) ne porte que sur la responsabilité personnelle des syndics. La juge Abella a expliqué, au nom des juges majoritaires, que « lorsque le législateur a voulu protéger les syndics ou les séquestres contre certains recours, il l'a fait explicitement » (par. 67). À titre d'exemples de manifestation de ce principe, elle a cité le par. 14.06(1.2) et, notamment pour les fins qui nous occupent, le par. 14.06(4), qu'elle a décrits ainsi : « protection du syndic dans certaines circonstances contre les ordonnances en matière environnementale » (par. 67). Dans ses motifs dissidents, la juge Deschamps a expliqué que le « [syndic] n'est pas tenu personnellement aux obligations du failli » (par. 91). Elle a signalé que les syndics étaient protégés par les dispositions qui leur conférait une immunité, dont les par. 14.06 (1.2), (2) et (4).

[86] Bien que les motifs dissidents mettent l'accent sur la source du pouvoir de « renonciation » prévu au par. 14.06(4), la présente affaire ne porte aucunement sur la source de ce pouvoir ou sur la question de savoir si GTL a « renoncé » avec succès aux biens faisant l'objet de la renonciation. Je me contente de signaler brièvement que, même si les juges dissidents s'appuient sur un supposé pouvoir de « renonciation » en common law, les parties n'ont renvoyé à la Cour aucune décision — et les juges dissidents n'en ont cité aucune — attestant l'existence d'un pouvoir en common law qui permet au syndic de « renoncer » à un *bien réel*. Quoi qu'il en soit, peu importe la source de ce pouvoir, rien dans le par. 14.06(4) ne donne à penser que le syndic « renonçant » à des biens réels peut tout simplement se soustraire aux ordonnances

the result of an act of "disclaimer" is the cessation of personal liability. No effect of "disclaimer" on the liability of the bankrupt estate is specified. Had Parliament intended to empower trustees to walk away entirely from assets subject to environmental liabilities, it could easily have said so.

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

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

environnementales qui s'appliquent à eux. Bien au contraire, la disposition prévoit clairement que, si une ordonnance environnementale a été rendue, la « renonciation » emporte la cessation de la responsabilité personnelle. On ne fait état d'aucun effet de la renonciation sur la responsabilité de l'actif du failli. Si le Parlement avait voulu investir les syndics du pouvoir de délaisser entièrement les biens visés par des engagements environnementaux, il aurait pu le faire aisément.

[87] En outre, comme je l'ai mentionné, le par. 14.06(4) ne vise pas uniquement la « renonciation » au sens formel. D'après le sous-al. 14.06(4)(a)(ii), le syndic est dégagé de toute responsabilité personnelle à l'égard d'une ordonnance environnementale lorsqu'il « abandonne [. . .] tout intérêt sur le bien réel en cause, en dispose ou s'en dessaisit ». Le présent pourvoi ne nous oblige cependant pas à décider ce qui constitue l'abandon, la disposition ou le dessaisissement d'un bien réel pour l'application du par. 14.06(4), et je remets le règlement de ce point à une autre occasion. Le pourvoi ne nous oblige pas non plus à décider des effets d'une renonciation réussie en vertu de l'art. 20 de la LFI. GTL n'a pas invoqué cet article ni soutenu qu'il lui accordait le pouvoir d'abandonner toute responsabilité ou obligation ou tout engagement applicable aux biens faisant l'objet de la renonciation.

[88] D'après les juges dissidents, d'autres parties du régime de l'art. 14.06 sont plus sensées si le par. 14.06(4) limite la responsabilité de l'actif. À l'exception du par. 14.06(2), aucune de ces dispositions n'était en litige dans la présente affaire et aucune d'elles n'a été invoquée par GTL. Quoi qu'il en soit, étant donné le libellé clair et sans équivoque de ce paragraphe, le poids à accorder à son contexte législatif est amoindri. Cela est d'autant plus vrai que l'autre interprétation proposée obligerait la Cour à écarter des mots comme « personnelle » du paragraphe. Tel qu'il a été mentionné, lorsque le libellé d'une disposition est précis et sans équivoque, le sens ordinaire des mots joue un rôle primordial dans le processus d'interprétation (*Hypothèques Trustco Canada c. Canada*, 2005 CSC 54, [2005] 2 R.C.S. 601, par. 10). En dernière analyse, les conséquences de la « renonciation » du syndic sont claires : l'immunité contre la responsabilité personnelle, et non celle de l'actif.

option other than to accede to the clear intention of Parliament.

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

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

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

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

[92] First, the Regulator submits that the protection offered by s. 14.06(4) should be distinguished from that offered by s. 14.06(2) on the basis that the former is concerned with orders while the latter is concerned with environmental obligations generally. I agree with the dissenting reasons that a persuasive distinction cannot be drawn between liability for an environmental condition or environmental damage

Le paragraphe 14.06(4) ne souffre à première vue d'aucune ambiguïté. Notre Cour n'a d'autre choix que d'accéder à l'intention manifeste du Parlement.

[89] Je passe maintenant au rapport entre les par. 14.06(2) et (4).

b) *La manière dont le par. 14.06(4) se distingue du par. 14.06(2)*

[90] En l'espèce, GTL s'est fondé uniquement sur le par. 14.06(4) pour prétendre « renoncer » aux biens faisant l'objet de la renonciation. Or, comme je l'expliquerai, que l'on considère ou non que GTL a « renoncé » aux biens en question, il est entièrement protégé contre toute responsabilité personnelle à l'égard des engagements environnementaux associés à ces biens. Toutefois, il ne peut tout simplement pas les « délaisser » dans un cas comme dans l'autre.

[91] Que GTL puisse ou non se prévaloir du par. 14.06(4) (autrement dit, qu'il ait « renoncé » ou non aux biens en question), il est déjà entièrement à l'abri de toute responsabilité personnelle en matière environnementale par application du par. 14.06(2). Ce paragraphe dégage les syndics de toute responsabilité personnelle découlant de « tout fait ou dommage lié à l'environnement », sauf celui causé par sa négligence grave ou son inconduite délibérée après sa nomination. En l'espèce, personne ne conteste que le fait ou dommage lié à l'environnement à l'origine des ordonnances d'abandon est survenu avant la nomination de GTL. Le paragraphe 14.06(2) offre aux syndics une protection contre toute responsabilité personnelle aussi large que celle fournie par le par. 14.06(4). Bien qu'à la lecture des dispositions, le par. 14.06(4) semble offrir de deux manières une protection plus large, aucune d'entre elles ne résiste à un examen plus approfondi.

[92] En premier lieu, l'organisme de réglementation soutient qu'il y a lieu de distinguer la protection offerte par le par. 14.06(4) de celle accordée par le par. 14.06(2) car le premier concerne les « ordonnances » tandis que le deuxième intéresse les obligations environnementales en général. Je conviens avec les juges dissidents qu'il est impossible d'établir une distinction convaincante entre la responsabilité d'un

(purportedly covered by s. 14.06(2)) and liability for failure to comply with an order to remedy such a condition or such damage (purportedly covered by s. 14.06(4)). As the dissenting reasons note, "[t]his distinction is entirely artificial" (para. 212). The underlying liability addressed through environmental orders is the liability provided for in s. 14.06(2): an "environmental condition that arose or environmental damage that occurred". Second, on the face of s. 14.06(4), no exceptions are carved out for gross negligence or wilful misconduct post-appointment, unlike in s. 14.06(2). However, s. 14.06(4) is expressly made "subject to subsection (2)". I agree with the dissenting reasons that the only possible interpretation of this proviso is that, where the trustee has caused an environmental condition or environmental damage through its wilful misconduct or gross negligence, the trustee will still be personally liable, regardless of its reliance on s. 14.06(4).

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

fait ou dommage lié à l'environnement (prétendument visé par le par. 14.06(2)) et celle découlant du non-respect d'une ordonnance de réparation du fait ou dommage en question (prétendument visé par le par. 14.06(4)). Comme l'indiquent les motifs dissidents, « [c]ette distinction est tout à fait artificielle » (par. 212). La responsabilité sous-jacente sur laquelle portent les ordonnances environnementales découle du « fait ou dommage lié à l'environnement » et est prévue au par. 14.06(2). En second lieu, à la lecture du par. 14.06(4), celui-ci ne prévoit aucune exception pour négligence grave ou inconduite délibérée après la nomination, contrairement au par. 14.06(2). Le paragraphe 14.06(4) s'applique toutefois expressément « sous réserve du paragraphe (2) ». Je suis d'accord avec les juges dissidents pour dire que, d'après la seule interprétation que l'on peut donner à cette disposition, le syndic ayant causé un fait ou un dommage lié à l'environnement par son inconduite délibérée ou sa négligence grave engagerait toujours sa responsabilité personnelle même s'il invoque le par. 14.06(4).

[93] Ainsi, le par. 14.06(4) n'offre pas aux syndics une protection contre la responsabilité personnelle plus large que celle fournie par le par. 14.06(2). Malgré cela, j'estime que le Parlement avait de bonnes raisons d'adopter le par. 14.06(4) en 1997. La première était de préciser aux syndics qu'ils étaient entièrement dégagés de toute responsabilité personnelle à l'égard des faits et dommages liés à l'environnement (en l'absence d'inconduite délibérée ou de négligence grave), surtout dans des cas où ils ont « renoncé » à des biens. Les débats parlementaires indiquent que la réforme de 1997 prenait sa source notamment dans le vœu des syndics d'obtenir une certitude accrue. La réforme visait aussi à clarifier l'effet qu'a la « renonciation » d'un syndic sur la responsabilité de l'*actif du failli* relativement aux ordonnances de réparation d'un fait ou dommage lié à l'environnement. En d'autres termes, il ressort du par. 14.06(4) non seulement que le syndic « renonçant » à des biens réels échappe à toute responsabilité personnelle à l'égard des ordonnances environnementales qui visent ces biens, mais aussi que pareille renonciation n'a aucune incidence sur la responsabilité de l'actif du failli.

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

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

[94] En 1992, le Parlement s'est penché sur la responsabilité potentielle des syndics en matière environnementale et a édicté le par. 14.06(2). Cette disposition prévoyait au départ que le syndic était dégagé de toute responsabilité personnelle découlant d'un fait ou dommage lié à l'environnement survenu « a) avant sa nomination [. . .]; ou b) après sa nomination, sauf d'un fait ou dommage causé par son omission d'agir avec la prudence voulue ». Il appert des débats parlementaires que les syndics étaient insatisfaits du libellé initial du par. 14.06(2). Comme l'explique M. Hains, ils se sont plaints que la norme de diligence raisonnable était « trop vague. Nul ne sait comment l'interpréter, et les interprétations peuvent varier d'une affaire à l'autre. Étant donné le libellé trop vague de la norme, le fait que l'on ignore ce qu'il faut faire pour y satisfaire et le risque de responsabilité personnelle, les syndics ne cherchaient même pas à savoir de quelle manière ils pourraient faire preuve de diligence raisonnable. » (*Délibérations du comité sénatorial permanent des Banques et du commerce*, nº 13, 2e sess., 35e lég., 4 novembre 1996, p. 15-16).

[95] En conséquence, le Parlement a réformé la *LFI* en 1997. Cette réforme a non seulement modifié la norme visant la protection que le par. 14.06(2) offre aux syndics par l'adoption du texte actuel, mais elle a aussi introduit le par. 14.06(4). Comme le montrent à l'évidence les termes qu'ils ont en commun, les dispositions étaient censées s'appliquer ensemble pour clarifier l'immunité de responsabilité personnelle dont bénéficient les syndics à l'égard de tout fait ou dommage lié à l'environnement. Le paragraphe 14.06(4) leur offre la certitude qu'ils recherchaient avant 1997. Pour la première fois, il établissait en termes exprès un lien entre la notion de « renonciation » et le régime dégageant les syndics de toute responsabilité environnementale. Qu'on le voit comme un pouvoir de common law ou un renvoi à d'autres dispositions légales, le concept de « renonciation » précède le par. 14.06(4) lui-même ainsi que la version de 1992 du par. 14.06(2). Il peut aussi y avoir « renonciation » dans différents contextes, tel celui des contrats exécutoires étudiés dans *New Skeena Forest Products Inc. c. Don Hull & Sons Contracting Ltd.*, 2005 BCCA 154, 251 D.L.R. (4th) 328.

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

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

[96] Avant 1997, on ne savait pas quels effets la « renonciation » à des biens réels avait sur la responsabilité environnementale. Plus précisément, on ne connaissait pas l'effet que pouvait avoir la renonciation sur la responsabilité de l'actif du failli, vu que la législation environnementale imposait une responsabilité fondée sur l'acquisition du statut de propriétaire, de partie en possession du bien ou de titulaire de permis (voir J. Klimek, *Insolvency and Environment Liability* (1994), p. 4-19). En adoptant le par. 14.06(4), le Parlement a précisé que la « renonciation » à des biens réels avait pour effet de limiter la responsabilité personnelle du syndic, et non celle de l'actif du failli, aux ordonnances de réparation de tout fait ou dommage lié à l'environnement. Le Parlement aurait pu se contenter d'actualiser le texte du par. 14.06(2) en 1997, mais cela aurait laissé en suspens la question de la « renonciation » et de la responsabilité de l'actif. La connaissance de l'incidence de la « renonciation » pourrait avoir de l'importance pour le syndic qui décide d'accepter ou non un mandat. Le paragraphe 14.06(4) a donc dissipé considérablement l'imprécision dont se plaignaient les syndics avant 1997.

[97] Un aspect digne de mention du régime conçu par le Parlement est l'application du par. 14.06(4) « [p]ar dérogation au droit fédéral et provincial ». En adoptant ce paragraphe, le Parlement a précisé l'effet de la « renonciation » à des biens réels uniquement dans le contexte des *ordonnances environnementales*. L'effet de la « renonciation » sur la responsabilité dans d'autres contextes n'a pas été abordé. Le Parlement se souciait des ordonnances de réparation de tout fait ou dommage lié à l'environnement où la responsabilité est fréquemment engagée en raison du statut de propriétaire, de partie ayant le contrôle du bien ou de titulaire de permis. Le Parlement ne voulait pas que les syndics croient pouvoir échapper à la responsabilité environnementale de l'actif par la « renonciation ». Il a donc utilisé des termes précis pour indiquer que le seul effet de la « renonciation » à des biens réels sur des ordonnances de réparation d'un fait ou dommage lié à l'environnement est que le syndic est dégagé de toute responsabilité personnelle. Il se peut que la « renonciation » ait un effet différent sur la responsabilité de l'actif du failli dans d'autres contextes.

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

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

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

[101] I offer the following brief comment on the balance of the s. 14.06 scheme, although, as mentioned, none of those provision is actually in issue before this Court. The dissenting reasons argue that interpreting s. 14.06(4) as being concerned solely with the personal liability of trustees creates interpretive issues with the balance of the s. 14.06 scheme.

[98] Le paragraphe 14.06(4) établit donc clairement que la « renonciation » du syndic n'a aucun effet sur la responsabilité continue de l'*actif du failli* pour ce qui est des ordonnances de réparation de tout fait ou dommage lié à l'environnement. Bien entendu, il n'est absolument pas question de la responsabilité de l'actif du failli au par. 14.06(2). Ainsi, on constate que les par. 14.06(4) et (2) sont effectivement différents : ils fournissent peut-être aux syndics la même protection contre la responsabilité personnelle, mais seul le premier se rapporte à la responsabilité de l'actif. Le paragraphe 14.06(2) protège les syndics sans qu'ils aient à l'invoquer; il est muet sur les résultats de la « renonciation » d'un syndic.

[99] Le syndic ayant « renoncé » à des biens réels est dégagé de toute responsabilité personnelle à l'égard d'une ordonnance environnementale applicable à ces biens, mais l'actif du failli lui-même demeure responsable. Bien sûr, le fait que la responsabilité de l'actif du failli demeure engagée même lorsque le syndic invoque le par. 14.06(4) ne veut pas nécessairement dire que le syndic doit respecter les obligations environnementales et qu'elles ont priorité sur toutes les autres réclamations. La priorité d'une réclamation environnementale dépend de la bonne application du critère d'*Abitibi*, comme je l'expliquerai plus loin.

[100] En conséquence, peu importe si l'on considère que GTL a « renoncé » ou non à des biens, le résultat est le même. Puisque le fait ou dommage lié à l'environnement est survenu avant la nomination de GTL, ce dernier est entièrement protégé contre toute responsabilité personnelle par le par. 14.06(2). En revanche, la « renonciation » n'habilite pas le syndic à tout simplement délaisser les biens faisant l'objet de la renonciation quand on l'enjoint à réparer un fait ou dommage lié à l'environnement. La responsabilité environnementale de l'actif du failli demeure inchangée.

[101] J'aimerais faire de brèves observations sur le reste du régime de l'art. 14.06 même si, comme je l'ai mentionné, aucune de ces dispositions n'est de fait en litige devant notre Cour. Les juges dissidents soutiennent que l'on créerait des problèmes d'interprétation avec le reste du régime de l'art. 14.06 si on interprétait le par. 14.06(4) comme visant uniquement

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

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

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

[103] Thus, regardless of whether it has effectively "disclaimed", s. 14.06(2) fully protects GTL from personal liability in respect of environmental matters affecting the Redwater estate. GTL notes that, on the face of the *OGCA* and the *Pipeline Act*, there is nothing specifically preventing the Regulator from holding it personally liable as a "licensee" for the costs of carrying out the Abandonment Orders. GTL submits that the mere possibility that it may

la responsabilité personnelle des syndics. À mon avis, ces difficultés ne justifient pas que l'on fasse abstraction du sens clair du par. 14.06(4). Aucun principe d'interprétation législative ne requiert que l'on déforme le sens clair d'une disposition pour en rendre le régime plus cohérent. Notre Cour s'est vu confier la tâche d'interpréter le par. 14.06(4) et j'estime que son libellé ne permet qu'une seule interprétation.

(2) Il n'y a pas de conflit d'application ni d'entrave à la réalisation d'un objet fédéral entre les par. 14.06(2) et (4) de la *LFI* et le régime de réglementation de l'Alberta

[102] Les conflits d'application entre la *LFI* et la législation albertaine allégués par GTL résultent de sa qualité de « titulaire de permis » au sens de l'*OGCA* et de la *Pipeline Act*. Comme je viens de le démontrer, le par. 14.06(4) n'investit pas le syndic du pouvoir de se soustraire à l'ensemble des responsabilités, obligations ou engagements à l'égard de biens auxquels il a été « renoncé ». Il clarifie plutôt l'exonération de responsabilité personnelle dont jouit le syndic et précise que sa « renonciation » n'a aucune incidence sur la responsabilité environnementale de l'actif du failli. Que GTL ait bel et bien « renoncé » ou non aux biens faisant l'objet de la renonciation, il ne peut les délaisser. Vu l'interprétation qu'il convient de donner au par. 14.06(4), aucun conflit d'application n'est imputable au fait que, suivant le droit albertain, GTL demeure, en qualité de « titulaire de permis », tenu d'abandonner les biens faisant l'objet de la renonciation et d'utiliser les autres éléments de l'actif de Redwater. De même, le fait que les obligations de fin de vie associées aux biens faisant l'objet de la renonciation sont toujours prises en compte dans le calcul de la CGR de Redwater ne donne lieu à aucun conflit d'application.

[103] Donc, qu'il ait « renoncé » effectivement ou non aux biens, GTL est entièrement protégé par le par. 14.06(2) contre toute responsabilité personnelle à l'égard de questions environnementales touchant l'actif de Redwater. GTL signale qu'à première vue, l'*OGCA* et la *Pipeline Act* n'empêchent aucunement en termes exprès l'organisme de réglementation de le tenir personnellement responsable, à titre de « titulaire de permis », du coût d'exécution

be held personally liable for abandonment under the Alberta legislation creates an operational conflict with the protection from personal liability provided by s. 14.06(2) of the *BIA*.

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

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

des ordonnances d'abandon. Toujours selon GTL, la simple possibilité que la législation albertaine l'oblige à effectuer l'abandon crée un conflit d'application avec l'exonération de responsabilité personnelle qu'accorde le par. 14.06(2) de la *LFI*.

[104] Les syndics ne peuvent être personnellement tenus de remplir des obligations de remise en état ou de décontamination — ils sont expressément exonérés de cette responsabilité par l'*EPEA* en l'absence d'inconduite délibérée ou de négligence grave de leur part. GTL a raison de dire que son éventuelle obligation, en tant que « titulaire de permis », de procéder à l'abandon n'est pas, de façon similaire, limitée aux éléments de l'actif en application de l'*OGCA* et de la *Pipeline Act.* L'organisme de réglementation fait valoir que, [TRADUCTION] « [b]ien que la définition de "titulaire de permis" ne prévoit pas explicitement que la responsabilité du séquestre se limite aux éléments de l'actif du failli, cette exigence fédérale figure manifestement par interprétation dans la disposition et est explicitement prévue dans une autre loi, à savoir [l'*EPEA*], qu'applique [l'organisme de réglementation] » (m.a., par. 104 (note en bas de page omise)). Pour sa part, GTL affirme que la pratique de l'organisme de réglementation de n'imposer une responsabilité que jusqu'à concurrence de la valeur de l'actif ne constitue pas une réponse valable, étant donné que, comme le prétend ATB, faute d'une disposition légale expresse, [TRADUCTION] « [l]es pratiques peuvent changer sans préavis » (mémoire d'ATB, par. 106).

[105] Je rejette la proposition selon laquelle l'ajout des syndics à la définition de « titulaire de permis » dans l'*OGCA* et la *Pipeline Act* devrait être déclaré inopérant en raison de la simple possibilité théorique de conflit avec le par. 14.06(2). Une telle issue serait incompatible avec le principe de la retenue qui sous-tend celui de la prépondérance fédérale, ainsi qu'avec le principe du fédéralisme coopératif. L'ajout des syndics à la définition de « titulaire de permis » constitue un aspect important du régime de réglementation albertain. Il leur confère le privilège d'exploiter les biens des faillis qui sont visés par des permis, tout en s'assurant que les professionnels de l'insolvabilité sont encadrés au cours des longues périodes pendant lesquelles ils gèrent les biens pétroliers et gaziers.

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

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

[106] Fait important, la situation en l'espèce est complètement différente de celle dont a été saisie notre Cour dans *Moloney*. Dans cette affaire, le juge Gascon a rejeté l'argument selon lequel il n'y avait pas de conflit d'application parce que le failli pouvait volontairement payer une dette provinciale postérieure à la libération ou choisir de ne pas conduire. Le juge Gascon a signalé que « l'analyse relative au conflit d'application ne saurait se limiter à la question de savoir si l'intimé peut se conformer aux deux lois en renonçant soit à la protection que lui offre la loi fédérale, soit au droit dont il bénéficie en vertu de la loi provinciale » (par. 60). Dans l'affaire qui nous occupe, GTL conserve à la fois la protection que lui confère la loi fédérale (aucune responsabilité personnelle) et le privilège auquel il a droit en vertu de la loi provinciale (faculté d'exploiter l'actif du failli dans une industrie réglementée). On ne demande pas à GTL de renoncer à faire quelque chose ni de payer volontairement quoi que ce soit. On ne soutient pas non plus que l'organisme de réglementation puisse éviter le conflit en refusant d'appliquer les mesures législatives contestées pendant la faillite (comme dans *Moloney*, par. 69). Nous ne sommes pas en présence d'une situation où l'organisme de réglementation pourrait refuser d'appliquer la loi provinciale, mais d'une situation où la loi provinciale peut être appliquée — et l'a été — pendant la faillite sans qu'il y ait de conflit.

[107] Selon la preuve produite en l'espèce, les définitions de « titulaire de permis » dans l'*OGCA* et la *Pipeline Act* incluent depuis une vingtaine d'années les syndics et, durant cette période, l'organisme de réglementation n'a jamais essayé d'engager la responsabilité personnelle d'un syndic. L'organisme de réglementation ne va pas au-delà des éléments qui font encore partie de l'actif du failli en recherchant le respect de ses obligations environnementales. Si l'organisme de réglementation devait tenter d'obliger personnellement GTL à se conformer aux ordonnances d'abandon, cela engendrerait un conflit d'application entre, d'une part, l'*OGCA* et la *Pipeline Act* et, d'autre part, le par. 14.06(2) de la *LFI*, ce qui rendrait les deux premières lois inopérantes dans la mesure de ce conflit. Or, à l'heure actuelle, GTL peut à la fois être dégagé de toute responsabilité personnelle en vertu du par. 14.06(2) et respecter le régime albertain en administrant l'actif de Redwater à titre de « titulaire de permis ».

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

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

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

[108] La suggestion faite dans les motifs dissidents selon laquelle l'organisme de réglementation tente d'engager la responsabilité personnelle de GTL est inexacte. Personne ne conteste que l'actif de Redwater a toujours une grande valeur. Bien que le droit de l'organisme de réglementation soit naturellement tributaire des priorités établies par la *LFI*, l'historique du régime de réglementation en cause démontre que l'organisme de réglementation dispose de moyens pour obtenir cette valeur sans engager la responsabilité personnelle de GTL. Il n'appartient pas à notre Cour de prescrire un mécanisme en particulier à cette fin. Même si ce n'était pas le cas, le fait que les biens de Redwater ont déjà été vendus et qu'ils sont actuellement détenus en fiducie signifie que la responsabilité personnelle ne pose plus problème. Il n'y a pas de conflit d'application.

[109] Je me penche maintenant sur l'entrave à la réalisation d'un objet fédéral. Le juge siégeant en cabinet a relevé dans ses motifs un certain nombre d'objets de l'art. 14.06. GTL s'appuie sur trois d'entre eux, à savoir : [TRADUCTION] « limiter la responsabilité des professionnels de l'insolvabilité, afin qu'ils acceptent des mandats en dépit des problèmes environnementaux »; « réduire le nombre de sites délaissés dans le pays »; et « permettre aux séquestres et aux syndics de procéder à des évaluations économiques rationnelles des coûts de réparation des faits liés à l'environnement, et donner aux séquestres ainsi qu'aux syndics le pouvoir discrétionnaire de déterminer s'il y a lieu de se conformer aux ordonnances de décontamination des biens touchés par ces faits » (motifs du juge siégeant en cabinet, par. 128-129).

[110] Il incombe à GTL d'établir les objectifs précis des par. 14.06(2) et (4) s'il souhaite démontrer qu'il y a conflit. Notre Cour a qualifié ce fardeau d'« élevé » et ajouté qu'il faut « une preuve claire de l'objet » (*Lemare*, par. 26). À mon avis, compte tenu du libellé clair des par. 14.06(2) et (4) (« le syndic est, ès qualité, dégagé de toute responsabilité personnelle ») et des débats parlementaires, l'objectif de ces dispositions est manifestement de dégager les syndics de toute responsabilité personnelle à l'égard de questions environnementales touchant l'actif qu'ils administrent.

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

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

[113] Regardless, even if it is assumed that such broader goals are part of the purpose of s. 14.06(2) and s. 14.06(4), the evidence does not show that they are frustrated by the inclusion of trustees in the statutory definition of "licensee". Relying on statements made by GTL in the Second Report, ATB asserts that, if trustees continue to be considered licensees and if environmental claims continue to be binding on estates, then, in situations akin to that of the Redwater insolvency, trustees will refuse to accept appointments. The fact that, prior to this litigation, it had been settled in Alberta since at least

[111] Cet objectif n'est pas été entravé par l'ajout des syndics à la définition de « titulaire de permis » dans l'*OGCA* et la *Pipeline Act*. L'organisme de réglementation a soutenu qu'il n'essaierait jamais d'engager la responsabilité personnelle d'un syndic. Les syndics sont considérés comme des « titulaires de permis » dans ces lois depuis plus de 20 ans et ils n'ont pas encore été confrontés au fléau de la responsabilité personnelle. Déclarer inopérante une partie essentielle du régime de réglementation de l'Alberta en raison de la possibilité théorique d'entrave à un objectif fédéral irait à l'encontre des principes de la prépondérance fédérale et du fédéralisme coopératif. Jusqu'à présent, le régime de réglementation albertain fonctionne de la manière prévue sans entraver l'objectif des par. 14.06(2) ou (4) de la *LFI*.

[112] Pour soutenir que l'art. 14.06 a comme objectif général de réduire le nombre de sites abandonnés (au sens non technique du terme) et d'encourager les syndics à accepter des mandats, GTL se fonde sur ce qu'il appelle [TRADUCTION] « la preuve extrinsèque disponible et le libellé de cette disposition » (mémoire de GTL, par. 91). À mon avis, les arguments qu'il avance ne lui permettent pas de s'acquitter du fardeau élevé qui lui incombe et de démontrer que l'objectif des par. 14.06(2) et (4) devrait être défini de manière à inclure ces objectifs généraux. Réduire le nombre de sites délaissés et encourager les syndics à accepter des mandats peuvent être des effets secondaires positifs des par. 14.06(2) et (4), mais il serait exagéré de dire qu'il s'agit des objectifs de ces dispositions. Comme dans le cas de la disposition en litige dans *Lemare*, il est plus plausible que ces dispositions aient un « simple et restreint » (par. 45).

[113] Quoi qu'il en soit, même si l'on tient pour acquis que les par. 14.06(2) et (4) ont de tels objectifs généraux, la preuve ne démontre pas que la réalisation de ces objectifs est entravée par l'ajout des syndics à la définition légale de « titulaire de permis ». S'appuyant sur des affirmations de GTL dans le Deuxième rapport, ATB prétend que, si les syndics sont toujours considérés comme des « titulaires de permis » et les réclamations environnementales continuent de lier l'actif, les syndics refuseront la nomination dans des situations semblables à celle de l'insolvabilité de Redwater. À cette prétention

Northern Badger that certain ongoing environmental obligations in the oil and gas industry continue to be binding on bankrupt estates must be weighed against this bald allegation. It was also well established that the Regulator would never attempt to hold insolvency professionals personally liable for such obligations. As noted by the Canadian Association of Petroleum Producers, there is nothing to suggest that this well-established state of affairs has led insolvency professionals to refuse to accept appointments or has increased the number of orphaned sites. There is no reason why the Regulator and trustees cannot continue to work together collaboratively, as they have for many years, to ensure that end-of-life obligations are satisfied, while at same time maximizing recovery for creditors.

sommaire il faut opposer le fait qu'avant le présent litige, il était établi en Alberta, depuis au moins l'arrêt *Northern Badger*, que certaines obligations environnementales continues dans l'industrie pétrolière et gazière liaient toujours l'actif du failli. Il était aussi bien établi que l'organisme de réglementation n'aurait jamais essayé de tenir les professionnels de l'insolvabilité personnellement responsables de telles obligations. Comme l'a fait remarquer l'Association canadienne des producteurs pétroliers, rien n'indique que cet état de fait bien établi a conduit les professionnels de l'insolvabilité à refuser la nomination ou augmenté le nombre de sites orphelins. Il n'y a aucune raison pour laquelle l'organisme de réglementation et les syndics ne peuvent pas poursuivre leur collaboration, comme ils le font depuis de nombreuses années, pour assurer le respect des obligations de fin de vie tout en maximisant le recouvrement au profit des créanciers.

(3) Conclusion on Section 14.06 of the *BIA*

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

(3) Conclusion sur l'art. 14.06 de la *LFI*

[114] Il n'y a aucun conflit entre la législation albertaine et l'art. 14.06 de la *LFI* par suite duquel la définition de « titulaire de permis » dans la première est inapplicable dans la mesure où elle vise GTL. Ce dernier conserve les responsabilités et obligations d'un « titulaire de permis » tant qu'il reste des éléments dans l'actif de Redwater. GTL plaide néanmoins que, même s'il ne peut délaisser les biens faisant l'objet de la renonciation en invoquant le par. 14.06(4), les obligations environnementales qui y sont associés sont des réclamations non garanties de l'organisme de réglementation pour l'application de la *LFI*. GTL affirme que l'ordre de priorités fixé dans la *LFI* l'oblige à acquitter les réclamations des créanciers garantis de Redwater avant celles de l'organisme de réglementation, lesquelles occupent le même rang que les réclamations des autres créanciers ordinaires. D'après GTL, les tentatives de l'organisme de réglementation d'utiliser les pouvoirs que lui accorde la loi pour faire primer ses réclamations environnementales entrent en conflit avec la *LFI*. Je vais maintenant me pencher sur ce conflit allégué, qui fait intervenir le critère d'*Abitibi*.

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

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

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

[117] GTL says that this is precisely the effect of the obligations imposed on the Redwater estate by the Regulator through the use of its statutory powers, even if it cannot walk away from the Renounced Assets by invoking s. 14.06(4). Parliament has assigned a particular rank to environmental claims

C. *Le critère d'Abitibi : L'organisme de réglementation fait-il valoir des réclamations prouvables en matière de faillite?*

[115] La répartition équitable des biens du failli est l'un des objectifs de la *LFI*. Elle est réalisée par le truchement du modèle de la procédure collective. Les créanciers du failli souhaitant faire valoir une réclamation prouvable en matière de faillite doivent participer à la procédure collective. Leurs réclamations recevront en fin de compte la priorité qui leur a été attribuée par la *LFI*. Cela assure la répartition équitable des biens du failli. Ce modèle évite l'inefficacité et le chaos, maximisant ainsi le recouvrement global au profit de tous les créanciers. Pour que le modèle de la procédure collective soit viable, les créanciers ayant des réclamations prouvables ne doivent pas être autorisés à les faire valoir en dehors de la procédure collective.

[116] Il est bien établi qu'une loi provinciale devient inopérante dans le contexte d'une faillite si elle a pour effet d'entrer en conflit avec l'ordre de priorité établi par la *LFI*, de le réarranger ou de le modifier. La juge Martin et le juge siégeant en cabinet ont tous les deux traité de la modification des priorités en matière de faillite en fonction du volet « entrave à la réalisation d'un objet fédéral » de la doctrine de la prépondérance. À mon avis, il pourrait aussi être plausiblement avancé qu'une loi provinciale ayant pour effet de réarranger les priorités en matière de faillite est en conflit d'application avec la *LFI*; telle était la conclusion dans *Husky Oil*, au par. 87. Pour les besoins du présent pourvoi, il n'est pas nécessaire de décider quel serait le bon volet de l'analyse relative à la prépondérance. Dans l'un ou l'autre volet, la loi albertaine autorisant l'organisme de réglementation à exercer ses pouvoirs contestés sera inopérante, dans la mesure où l'exercice de ces pouvoirs pendant la faillite modifie ou réarrange les priorités établies par la *LFI*.

[117] GTL affirme que, même si le fait d'invoquer le par. 14.06(4) ne lui permet pas de délaisser les biens faisant l'objet de la renonciation, les obligations imposées à l'actif de Redwater par l'organisme de réglementation au moyen de l'exercice des pouvoirs que lui confère la loi font exactement cela. Le

that are provable in bankruptcy. It is accepted that the limited super priority for environmental claims created by s. 14.06(7) of the *BIA* does not apply here, and accordingly, says GTL, the Regulator is an ordinary creditor as regards its environmental claims — in other words, neither a secured nor a preferred creditor. The Regulator's environmental claims are thus to be paid rateably with those of Redwater's other ordinary creditors under s. 141 of the *BIA*. GTL argues that, to comply with the Abandonment Orders or LMR requirements, the Redwater estate will have to expend funds prior to distributing its assets to the secured creditors, and that this amounts to the Regulator using its statutory powers to create for itself a priority in bankruptcy to which it is not entitled.

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

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

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

Parlement a attribué un rang donné aux réclamations environnementales qui sont prouvables en matière de faillite. Il est admis que la superpriorité limitée créée par le par. 14.06(7) de la *LFI* pour les réclamations de cette nature ne s'applique pas en l'espèce et, en conséquence, affirme GTL, l'organisme de réglementation est un créancier ordinaire à l'égard de ces réclamations, c'est-à-dire qu'il n'est ni un créancier garanti ni un créancier privilégié. Les réclamations environnementales de l'organisme de réglementation doivent donc être acquittées au prorata avec celles des autres créanciers ordinaires de Redwater en application de l'art. 141 de la *LFI*. GTL soutient que, pour respecter les ordonnances d'abandon ou les exigences relatives à la CGR, il devra dépenser des fonds avant de partager ses biens entre les créanciers garantis. Cela équivaut, pour l'organisme de réglementation, à utiliser les pouvoirs que lui confère la loi pour se créer une priorité en matière de faillite à laquelle il n'a pas droit.

[118] Toutefois, on doit faire valoir uniquement les réclamations prouvables en matière de faillite dans le cadre de la procédure unique. Les réclamations non prouvables ne sont pas suspendues à la faillite et elles lient toujours l'actif. Dans l'arrêt *Abitibi*, notre Cour a clairement déclaré que les obligations environnementales appliquées par un organisme de réglementation ne sont pas toutes des réclamations prouvables en matière de faillite. En principe, la faillite n'équivaut pas à une autorisation de faire fi des règles. L'organisme de réglementation dit qu'il ne fait valoir aucune réclamation prouvable dans la faillite et que l'actif de Redwater doit respecter ses obligations environnementales dans la mesure des biens dont il dispose.

[119] Le règlement de cette question requiert que l'on applique correctement le critère d'*Abitibi* pour déterminer si une obligation réglementaire précise équivaut à une réclamation prouvable en matière de faillite. Il y a lieu de réitérer ce critère :

> Premièrement, on doit être en présence d'une dette, d'un engagement ou d'une obligation envers un *créancier*. Deuxièmement, la dette, l'engagement ou l'obligation doit avoir pris naissance *avant que le débiteur ne devienne failli*. Troisièmement, il doit être possible d'attribuer une *valeur pécuniaire* à cette dette, cet engagement ou cette obligation. [En italique dans l'original; par. 26.]

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

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

[122] In my view, both concerns raised by the Regulator have merit. As I will demonstrate, *Abitibi* should not be taken as standing for the proposition that a regulator is always a creditor when it exercises its statutory enforcement powers against a debtor. On a proper understanding of the "creditor" step, it is clear that the Regulator acted in the public interest and for the public good in issuing the Abandonment Orders and enforcing the LMR requirements and that it is, therefore, not a creditor of Redwater. It is the public, not the Regulator or the General Revenue Fund, that is the beneficiary of those environmental obligations; the province does not stand to gain

[120] Il est incontestable que, dans le présent pourvoi, la deuxième partie du critère est respectée. En conséquence, je ne traiterai que des première et troisième parties.

[121] Devant notre Cour, l'organisme de réglementation, avec l'appui de divers intervenants, a soulevé deux préoccupations quant à la façon dont le critère d'*Abitibi* avait été appliqué, tant par les tribunaux d'instance inférieure que par les cours en général. La première préoccupation concerne le fait que l'étape « créancier » du critère a reçu une interprétation trop large dans des affaires analogues à celle en l'espèce et *Nortel Networks Corp., Re*, 2013 ONCA 599, 368 D.L.R. (4th) 122 (« *Nortel* CA ») et qu'en réalité, cette étape du critère est si aisément franchie qu'elle n'est appliquée que pour la forme et qu'elle n'a pratiquement plus de sens. La seconde préoccupation a trait à l'application de l'étape « valeur pécuniaire » du critère d'*Abitibi* par le juge siégeant en cabinet et le juge Slatter. Cette étape reçoit généralement le nom de « certitude suffisante », compte tenu des directives données dans *Abitibi*. On soutient par là que les tribunaux d'instance inférieure sont allés au-delà du critère établi dans l'arrêt *Abitibi* en se concentrant sur la question de savoir si les obligations réglementaires de Redwater étaient « intrinsèquement financières ». Suivant l'arrêt *Abitibi*, l'analyse de la certitude suffisante aurait dû être axée sur la question de savoir si l'organisme de réglementation effectuerait lui-même, au bout du compte, les travaux environnementaux et ferait valoir une réclamation pécuniaire pour le remboursement.

[122] Les deux préoccupations exprimées par l'organisme de réglementation me paraissent fondées. Comme je vais le démontrer, l'arrêt *Abitibi* ne doit pas être considéré comme soutenant la thèse qu'un organisme de réglementation est toujours un créancier lorsqu'il exerce les pouvoirs d'application qui lui sont dévolus par la loi à l'encontre d'un débiteur. D'après le sens qu'il convient de donner à l'étape « créancier », il est clair que l'organisme de réglementation a agi dans l'intérêt public et pour le bien public en rendant les ordonnances d'abandon et en assurant le respect des exigences relatives à la CGR, et qu'il n'est donc pas un créancier de Redwater.

financially from them. Although this conclusion is sufficient to resolve this aspect of the appeal, for the sake of completeness, I will also demonstrate that the chambers judge erred in finding that, on these facts, there is sufficient certainty that the Regulator will ultimately perform the environmental work and assert a claim for reimbursement. To conclude, I will briefly comment on why the *effects* of the end-of-life obligations do not conflict with the priority scheme in the *BIA*.

C'est le public, et non l'organisme de réglementation ou le fonds d'administration du gouvernement, qui bénéficie de ces obligations environnementales; la province n'est pas en mesure d'en bénéficier financièrement. Bien que cette conclusion suffise pour trancher cet aspect du pourvoi, par souci d'exhaustivité, je vais aussi démontrer que le juge siégeant en cabinet a eu tort de conclure qu'au vu des faits de l'espèce, il est suffisamment certain que l'organisme de réglementation exécutera au bout du compte les travaux environnementaux et présentera une demande de remboursement. Pour conclure, je me prononcerai brièvement sur les raisons pour lesquelles les *effets* des obligations de fin de vie n'entrent pas en conflit avec le régime de priorité établi dans la *LFI*.

(1) The Regulator Is Not a Creditor of Redwater

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

[124] GTL submits that these lower courts have correctly interpreted and applied the "creditor" step.

(1) L'organisme de réglementation n'est pas un créancier de Redwater

[123] L'organisme de réglementation et les intervenants qui l'appuient ne sont pas les premiers à cerner des problèmes relativement à l'étape « créancier » du critère d'*Abitibi*. Pendant les six années qui ont suivi l'arrêt *Abitibi*, des problèmes au sujet de cette étape et le fait que, dans son acception courante, cette étape sera toujours — ou presque toujours — franchie ont aussi été énoncés par des commentateurs universitaires tels que A. J. Lund, « Lousy Dentists, Bad Drivers, and Abandoned Oil Wells : A New Approach to Reconciling Provincial Regulatory Regimes with Federal Insolvency Law » (2017), 80 *Sask L. Rev.* 157, p. 178, et M. Stewart. Notre Cour n'a pas eu l'occasion de commenter l'arrêt *Abitibi* depuis qu'il a été rendu. Par contre, l'interprétation de l'étape « créancier » retenue par des juridictions inférieures, notamment la majorité de la Cour d'appel en l'espèce, a mis l'accent sur certaines remarques faites au par. 27 de l'arrêt *Abitibi*. Sur cette base, ces tribunaux ont conclu que l'étape « créancier » est franchie chaque fois qu'un organisme de réglementation exerce à l'encontre d'un débiteur son pouvoir d'appliquer la loi (voir, par exemple, les motifs de la Cour d'appel, par. 60; *Nortel* CA, par. 16).

[124] Selon GTL, les juridictions inférieures susmentionnées ont bien interprété et appliqué l'étape

It further submits that, because of *Abitibi*, the 1991 Alberta Court of Appeal decision in *Northern Badger* is of no assistance in analyzing the creditor issue. Conversely, the Regulator forcefully argues that *Abitibi* must be understood in the context of its own unique facts and that it did not overrule *Northern Badger*. Relying on *Northern Badger*, the Regulator argues that a regulator exercising a power to enforce a public duty is not a creditor of the individual or corporation subject to that duty. Like Martin J.A., I agree with the Regulator on this point. If, as GTL urges and the majority of the Court of Appeal concluded, the "creditor" step is satisfied whenever a regulator exercises its enforcement powers against a debtor, then it is hard to imagine a situation in which the "creditor" step would not be satisfied by the actions of an environmental regulator. Stewart was correct to suppose that "[s]urely, the Court did not intend this result" (p. 189). For the "creditor" step to have meaning, "there must be situations where the other two steps could be met . . . but the order [or obligation] is still not a provable claim because the regulator is not a creditor of the bankrupt" (Attorney General of Ontario's factum, at para. 39).

[125] Before further explaining my conclusion on this point, I must address a preliminary issue: the fact that the Regulator conceded in the courts below that it was a creditor. It is well established that concessions of law are not binding on this Court: see *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781, at para. 44; *M. v. H.*, [1999] 2 S.C.R. 3, at para. 45; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686, at para. 62. As noted by L'Heureux-Dubé J., in dissent, but not on this point, in *R. v. Elshaw*, [1991] 3 S.C.R. 24, at p. 48, "the fact that an issue is conceded below means nothing in and of itself". Although concessions by the parties are often relied upon, it is ultimately for

« créancier ». Il ajoute qu'à la suite de l'arrêt *Abitibi*, l'arrêt *Northern Badger* rendu en 1991 par la Cour d'appel de l'Alberta n'est d'aucun secours pour analyser la question du créancier. À l'inverse, l'organisme de réglementation soutient avec vigueur qu'il faut situer l'arrêt *Abitibi* dans le contexte des faits qui lui sont propres, et qu'il n'a pas infirmé *Northern Badger*. Se fondant sur cet arrêt, l'organisme de réglementation plaide qu'un organisme de réglementation exerçant un pouvoir pour faire respecter un devoir public n'est pas un créancier de la personne ou de la société assujettie à ce devoir. À l'instar de la juge Martin, je partage l'avis de l'organisme de réglementation sur ce point. Si, comme l'exhorte GTL et le concluent les juges majoritaires de la Cour d'appel, l'étape « créancier » est franchie chaque fois qu'un organisme de réglementation exerce ses pouvoirs d'application à l'encontre d'un débiteur, il est difficile d'imaginer une situation où les actes d'un organisme de réglementation ne franchiraient pas l'étape « créancier ». Monsieur Stewart avait raison de supposer que [TRADUCTION] « la Cour ne souhaitait sûrement pas ce résultat » (p. 189). Pour que l'étape « créancier » ait un quelconque sens [TRADUCTION] « il doit y avoir des situations dans lesquelles les deux autres étapes du critère d'*Abitibi* sont franchies […], mais l'ordonnance [ou l'obligation] environnementale n'est toujours pas une réclamation prouvable car l'organisme de réglementation n'est pas un créancier du failli » (mémoire de la procureure générale de l'Ontario, par. 39).

[125] Avant d'expliquer davantage ma conclusion sur ce point, je dois traiter d'une question préliminaire : l'organisme de réglementation a concédé devant les juridictions inférieures qu'il était un créancier. Il est bien établi que les concessions de droit ne lient pas notre Cour : voir *Ocean Port Hotel Ltd. c. Colombie-Britannique (General Manager, Liquor Control & Licensing Branch)*, 2001 CSC 52, [2001] 2 R.C.S. 781, par. 44; *M. c. H.*, [1999] 2 R.C.S. 3, par. 45; *R. c. Sappier*, 2006 CSC 54, [2006] 2 R.C.S. 686, par. 62). Comme l'a fait remarquer la juge L'Heureux-Dubé (dissidente, mais non sur ce point) dans *R. c. Elshaw*, [1991] 3 R.C.S. 24, p. 48, « un aveu fait devant une instance inférieure ne signifie rien en soi ». Bien que l'on se fonde souvent

this Court to determine points of law. For several reasons, no fairness concerns are raised by disregarding the Regulator's concession in this case.

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

[127] Returning to the analysis, I note that the unique factual matrix of *Abitibi* must be kept in mind. In that case, Newfoundland and Labrador expropriated most of AbitibiBowater's property in the province without compensation. Subsequently,

sur les concessions des parties, il revient en fin de compte à notre Cour de statuer sur des points de droit. Pour plusieurs raisons, on ne suscite aucune préoccupation en matière d'équité en ne tenant pas compte de la concession faite par l'organisme de réglementation en l'espèce.

[126] Premièrement, dans une lettre adressée à GTL en date du 14 mai 2015, l'organisme de réglementation soutient qu'il était [TRADUCTION] « non pas un créancier de [Redwater] », mais avait plutôt « pour mandat légal de réglementer l'industrie pétrolière et gazière de l'Alberta » (dossier de GTL, vol. 1, p. 78). Je constate qu'il s'agissait de la première communication entre l'organisme de réglementation et GTL et qu'elle est survenue seulement deux jours après la nomination de ce dernier comme séquestre des biens de Redwater. Deuxièmement, les parties ont traité dans leurs mémoires de la question de savoir si l'organisme de réglementation est un créancier. Troisièmement, au cours de sa plaidoirie devant notre Cour, l'organisme de réglementation a été interrogé à propos de sa concession. L'avocate a signalé le point non contesté que les tribunaux supérieurs ne sont pas liés par de telles concessions, et a soutenu que, si l'on interprète correctement l'arrêt *Abitibi*, l'organisme de réglementation n'était pas un créancier. Quatrièmement, quand le statut de l'organisme de réglementation en tant que créancier a été évoqué devant notre Cour, les avocats des parties adverses n'ont pas prétendu qu'ils auraient présenté des éléments de preuve supplémentaires sur ce point s'il avait été soulevé devant les juridictions inférieures. Enfin, le sens qu'il convient de donner à l'étape « créancier » du critère d'*Abitibi* est d'une importance fondamentale pour le bon fonctionnement du régime national de faillite et des régimes environnementaux provinciaux partout au Canada. Je conclus qu'il est indiqué en l'espèce de ne pas tenir compte de la concession faite par l'organisme de réglementation devant les juridictions inférieures.

[127] Pour revenir à l'analyse, je signale qu'il ne faut pas oublier la matrice factuelle unique de l'arrêt *Abitibi*. Dans cette affaire, Terre-Neuve-et-Labrador a exproprié la plupart des biens d'AbitibiBowater dans la province, sans indemnisation. Par la suite,

AbitibiBowater was granted a stay under the *CCAA*. It then filed a notice of intent to submit a claim to arbitration under the *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, Can. T.S. 1994 No. 2 ("NAFTA"), for losses resulting from the expropriation. In response, Newfoundland's Minister of Environment and Conservation ordered AbitibiBowater to remediate five sites pursuant to the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("*EPA*"). Three of the five sites had been expropriated by Newfoundland and Labrador. The evidence led to the conclusion that "the Province never truly intended that Abitibi was to perform the remediation work", but instead sought a claim that could be used as an offset in connection with AbitibiBowater's NAFTA claim (*Abitibi*, at para. 54). In other words, the Province sought a financial benefit from the remediation orders.

AbitibiBowater s'est vu accorder une suspension en vertu de la LACC. Elle a ensuite déposé un avis d'intention de soumettre une réclamation à l'arbitrage au titre de l'*Accord de libre-échange nord-américain entre le gouvernement du Canada, le gouvernement des États-Unis mexicains et le gouvernement des États-Unis d'Amérique*, R.T. Can. 1994 nº 2 (« ALENA »), pour les pertes résultant de l'expropriation. En réponse, le ministre de l'Environnement et de la Conservation de Terre-Neuve a ordonné à AbitibiBowater de décontaminer cinq sites conformément à l'*Environmental Protection Act*, S.N.L. 2002, c. E-14.2 (« *EPA* »). Trois des cinq sites avaient été expropriés par la province. La preuve a mené à la conclusion que « la province n'avait jamais vraiment eu l'intention qu'Abitibi exécute les travaux [de décontamination] » (*Abitibi*, par. 54) et qu'elle cherchait plutôt à faire valoir une réclamation qui pourrait être utilisée à titre compensatoire au regard de la demande d'indemnisation d'AbitibiBowater fondée sur l'ALENA. Autrement dit, la province voulait tirer un avantage financier des ordonnances de décontamination.

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

[128] En l'espèce, personne ne conteste qu'en cherchant à assurer le respect des obligations de fin de vie incombant à Redwater, l'organisme de réglementation agit de bonne foi à titre d'autorité de réglementation et il n'est pas en mesure d'obtenir un avantage financier. L'objectif ultime de l'organisme de réglementation est de faire exécuter les travaux environnementaux au profit des tiers propriétaires terriens et de la population en général. L'organisme de réglementation n'a pas fait de tentative déguisée de recouvrer une créance et il n'y avait pas de motif oblique de sa part, comme c'était le cas dans *Abitibi*. La distinction entre les faits du présent pourvoi et ceux de l'affaire *Abitibi* ressort encore plus clairement lorsqu'on examine les motifs exhaustifs du juge siégeant en cabinet dans *Abitibi*. Le cœur des conclusions du juge Gascon (maintenant juge de notre Cour) se trouve aux par. 173-176 :

. . . the Province stands as the direct beneficiary, from a monetary standpoint, of Abitibi's compliance with the EPA Orders. In other words, the execution in nature of the EPA Orders would result in a definite credit to the Province's

[TRADUCTION] . . . la province bénéficie directement, d'un point de vue financier, du respect par Abitibi des ordonnances fondées sur l'EPA. En d'autres termes, l'exécution en nature des ordonnances fondées sur l'EPA se traduirait

own "balance sheet". Abitibi's liability in that regard is an asset for the Province itself.

With all due respect, this is not regulatory in nature; it is rather purely financial in reality. This is, in fact, closer to a debtor-creditor relationship than anything else.

This is quite far from the situation of the detached regulator or public enforcer issuing order for the public good. Here, the Province itself derives the direct pecuniary benefit from the required compliance of Abitibi to the EPA Orders. The Province stands to directly gain in the outcome. None of the cases submitted by the Province bear any similarity to the fact pattern in the present proceedings.

From this perspective, it is the hat of a creditor that best fits the Province, not that of a disinterested regulator.

(*AbitibiBowater Inc., Re*, 2010 QCCS 1261, 68 C.B.R. (5th) 1)

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

par un crédit certain au propre « bilan » de la province. Le passif d'Abitibi à cet égard constitue un actif de la province elle-même.

Soit dit en tout respect, il ne s'agit pas d'une affaire de nature réglementaire; il s'agit plutôt en fait d'une affaire purement financière. Cela s'apparente effectivement davantage à une relation créancier-débiteur qu'à autre chose.

Nous sommes assez loin du cas de l'organisme de réglementation ou d'application de la loi qui a rendu de manière objective une ordonnance dans l'intérêt public. En l'espèce, la province elle-même tire directement l'avantage pécunaire du respect obligatoire, par Abitibi, des ordonnances EPA. La province peut tirer profit du résultat. Aucune des affaires soumises par la province ne ressemble un tant soit peu aux faits à l'origine de la présente instance.

Sous cet angle, la province a agi plus comme un créancier que comme un organisme de réglementation désintéressé.

(*AbitibiBowater Inc., Re*, 2010 QCCS 1261, 68 C.B.R. (5th) 1)

[129] Notre Cour a reconnu dans *Abitibi* qu'il était « facile [pour la province] de répondre » à l'exigence relative au créancier (par. 49). Il n'était donc pas nécessaire d'analyser en profondeur le sens de l'étape « créancier » ou la manière dont elle s'appliquerait dans d'autres situations factuelles. Or, même au par. 27 de l'arrêt *Abitibi*, le paragraphe sur lequel se fondent les juges majoritaires de la Cour d'appel, la juge Deschamps a pris soin de souligner que « [l]a plupart des organismes administratifs *peuvent agir* à titre de créanciers en relation avec les obligations pécuniaires ou non pécuniaires imposées par ces lois » (italiques ajoutés). L'interprétation de l'étape « créancier » qu'ont retenue les juges majoritaires de la Cour d'appel et que GTL nous a exhortés à faire nôtre exclut la possibilité qu'un organisme de réglementation faisant respecter des obligations ne soit pas un créancier, alors que cette possibilité a été clairement envisagée au par. 27 de l'arrêt *Abitibi*. Comme je l'ai mentionné ci-dessus, l'interprétation de GTL prive l'étape « créancier » de toute fonction indépendante.

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

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

[130] L'arrêt *Northern Badger* a établi qu'un organisme de réglementation faisant respecter un devoir public au moyen d'une ordonnance non pécuniaire n'est pas un créancier. Je rejette la prétention faite dans les motifs dissidents selon laquelle *Northern Badger* devrait recevoir une interprétation différente. Premièrement, je souligne que le point de savoir si l'organisme de réglementation a une réclamation éventuelle relève du critère de la certitude suffisante, lequel suppose au préalable que l'organisme de réglementation est un créancier. Je ne peux accepter la proposition énoncée dans les motifs dissidents selon laquelle *Northern Badger* porte sur ce qui allait devenir le troisième volet du critère d'*Abitibi*. Dans *Northern Badger*, après avoir reconnu que l'abandon constituait une responsabilité, le juge d'appel Laycraft a dit qu'il s'agissait de savoir [TRADUCTION] « si cette responsabilité appartient à l'Office, ce qui fait de lui le créancier » (par. 32). Deuxièmement, le scénario sous-jacent en l'espèce quant aux obligations de fin de vie qui incombent à Redwater est exactement le même que dans *Northern Badger* : un organisme de réglementation ordonne à une entité de se conformer à ses obligations légales pour le bien public. Ce raisonnement exact tiré de *Northern Badger* a été adopté par la suite dans des décisions telles *Strathcona (County) c. Fantasy Construction Ltd. (Trustee of)*, 2005 ABQB 794, 261 D.L.R. (4th) 221, par. 23-25, et *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534.

[131] Je ne puis souscrire à l'opinion des juges majoritaires de la Cour d'appel en l'espèce selon laquelle *Northern Badger* [TRADUCTION] « n'est guère utile » dans l'application du critère d'*Abitibi* (par. 63). Je partage plutôt l'avis de la juge Martin voulant que l'arrêt *Abitibi* n'ait pas infirmé le raisonnement de *Northern Badger*, et qu'il ait au contraire « mis en relief le besoin de prendre en considération la teneur du règlement provincial pour déterminer s'il crée une réclamation prouvable en matière de faillite » (par. 164). Comme l'a signalé la juge Martin, même depuis l'arrêt *Abitibi*, l'état du droit reste inchangé : « les obligations publiques ne sont pas des réclamations prouvables qui peuvent être comptabilisées ou compromises dans la faillite » (par. 174). L'arrêt *Abitibi* a éclairci la

proposition that a regulator exercising its enforcement powers is always a creditor. The reasoning in *Northern Badger* was simply not applicable on the facts of *Abitibi*, given the actions of the Province as outlined above.

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

[133] The conclusion that the reasoning in *Northern Badger* continues to be relevant since *Abitibi* and the amendments to insolvency legislation also finds support in the writings of academic commentators. Stewart's position is that, while *Abitibi* discussed *Northern Badger*, it did not overturn it. He urges this Court to clarify that there remains "a distinction between a regulatory body that is a creditor because it is enforcing a debt, and a regulatory body that is not a creditor because it is enforcing the law" (p. 221). Similarly, Lund argues that a court should "consider the importance of the public interests protected by the regulatory obligation when deciding whether the debtor owes a debt, liability or obligation to a creditor" (p. 178).

portée de *Northern Badger* en confirmant que les réclamations environnementales d'un organisme de réglementation seront des réclamations prouvables dans certains cas. Il ne permet pas d'affirmer qu'un organisme de réglementation exerçant ses pouvoirs d'application est toujours un créancier. Le raisonnement de l'arrêt *Northern Badger* ne s'appliquait tout simplement pas aux faits de l'affaire *Abitibi*, étant donné les agissements de la province décrits précédemment.

[132] Dans *Abitibi*, la juge Deschamps a signalé que la législation en matière d'insolvabilité avait évolué au cours des années qui ont suivi *Northern Badger*. Cette évolution législative n'a en revanche pas modifié le sens à attribuer au terme « créancier ». À cet égard, je souscris à la conclusion du juge Burrows dans *Strathcona County c. Fantasy Construction Ltd. (Trustee of)*, 2005 ABQB 559, 256 D.L.R. (4th) 536, suivant laquelle les modifications en matière d'environnement qui ont été apportées à la *LFI* au cours des années suivant *Northern Badger* ne peuvent être interprétées comme ayant infirmé le raisonnement de cet arrêt. Tel qu'il devrait ressortir clairement de mon analyse précédente de l'art. 14.06, les modifications à la *LFI* ne traitent pas des cas où un organisme de réglementation faisant valoir une réclamation environnementale est un créancier.

[133] Les écrits de commentateurs universitaires appuient également la conclusion voulant que le raisonnement de l'arrêt *Northern Badger* conserve sa pertinence depuis *Abitibi* et les modifications à la loi sur l'insolvabilité. Monsieur Stewart estime que, même si l'arrêt *Abitibi* traite de *Northern Badger*, il ne l'a pas infirmé. Il exhorte notre Cour à préciser qu'il subsiste une distinction entre [TRADUCTION] « l'organisme de réglementation qui agit comme créancier car il recouvre une dette et celui qui n'est pas un créancier car il applique la loi » (p. 221). De même, M^me^ Lund fait valoir qu'un tribunal devrait [TRADUCTION] « prendre en considération l'importance que revêtent les intérêts publics protégés par l'obligation réglementaire au moment de décider si le débiteur a une dette, un engagement ou une obligation envers un créancier » (p. 178).

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

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

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

[134] Pour les motifs qui précèdent, on ne peut juger que l'arrêt *Abitibi* a modifié le droit, comme l'a résumé le juge en chef Laycraft. Je fais miennes les remarques qu'il fait au par. 33 de *Northern Badger* :

> [TRADUCTION] Les dispositions légales qui exigent l'abandon de puits de pétrole et de gaz font partie du droit commun de l'Alberta et lient chaque citoyen de la province. Toutes les personnes qui acquièrent un permis d'exploitation de puits de pétrole ou de gaz doivent les respecter. Des obligations légales semblables lient les citoyens dans bien d'autres secteurs de la vie moderne [. . .] Mais l'obligation incombant au citoyen n'est pas envers l'agent de la paix ou l'autorité publique qui applique la loi. L'obligation est établie comme une obligation à caractère public qui doit être respectée par l'ensemble des citoyens de la collectivité à l'égard de leurs concitoyens. Lorsque le citoyen visé par l'ordonnance s'y conforme, le résultat n'est pas perçu comme le recouvrement d'une somme d'argent par un agent de la paix ou l'autorité publique, ni comme l'exécution d'un jugement ordonnant le paiement d'une somme d'argent; d'ailleurs, cela ne constitue pas non plus l'objectif de l'ensemble du processus. Il faut plutôt y voir l'application du droit commun. L'organisme d'application de la loi ne devient pas un « créancier » du citoyen à qui incombe l'obligation.

[135] Étant donné l'analyse effectuée dans *Northern Badger*, il est clair que l'organisme de réglementation n'est pas un créancier de l'actif de Redwater. Les obligations de fin de vie que l'organisme de réglementation veut imposer à Redwater sont de nature publique. Ni l'organisme de réglementation ni le gouvernement de l'Alberta ne peuvent bénéficier financièrement de l'exécution de ces obligations. Ces obligations à caractère public sont non pas envers un créancier, mais envers les concitoyens et échappent donc à la portée des « réclamations prouvables ». Je ne veux toutefois pas laisser entendre par là qu'un organisme de réglementation n'est un créancier que s'il se comporte d'une manière identique à la province dans *Abitibi*. Il peut fort bien exister des situations où les agissements d'un organisme de réglementation se situent quelque part entre ceux dans *Abitibi* et ceux en l'espèce. Signalons que, contrairement à certains cas antérieurs, l'organisme de réglementation n'a exécuté aucuns travaux environnementaux lui-même. Je laisse aux tribunaux disposant de dossiers factuels

requirements. The Regulator is not a creditor within the meaning of the *Abitibi* test.

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

[137] Strictly speaking, this is sufficient to dispose of this aspect of the appeal. However, additional guidance on the sufficient certainty analysis may prove helpful in future cases. Accordingly, I turn now to a discussion of the "sufficient certainty" step and

complets le soin de résoudre pareilles situations à l'avenir. Dans la présente affaire, il est clair que l'organisme de réglementation cherche à faire respecter les devoirs à caractère public de Redwater, que ce soit en rendant les ordonnances d'abandon ou en maintenant les exigences relatives à la CGR. L'organisme de réglementation n'est pas un créancier au sens du critère d'*Abitibi*.

[136] Je rejette la thèse voulant que l'analyse qui précède écarte d'une façon ou d'une autre le premier volet du critère d'*Abitibi*. Les faits de l'affaire *Abitibi* n'étaient pas comparables à ceux de l'espèce. Bien que notre Cour ait examiné l'arrêt *Northern Badger* dans *Abitibi*, elle s'est contentée de mentionner les modifications subséquentes à la *LFI* et n'a pas infirmé l'arrêt antérieur. La Cour a été claire : l'issue finale « doit être fondée sur les faits de chaque affaire » (par. 48). Selon les motifs dissidents, vu l'analyse exposée précédemment, il sera presque impossible de juger que des organismes de réglementation sont des créanciers. L'arrêt *Abitibi* démontre lui-même que ce n'est pas le cas. De plus, comme je l'ai dit, il peut fort bien exister des cas qui se situent entre l'affaire *Abitibi* et celle qui nous occupe. Par contre, si l'on considère qu'*Abitibi* exige uniquement que le tribunal décide si l'organisme de réglementation a exercé un pouvoir d'application, il sera en fait impossible pour un organisme de réglementation de *ne pas* être un créancier. Les motifs dissidents ne nient pas sérieusement cette opinion et donnent seulement à penser que les organismes de réglementation peuvent publier des lignes directrices ou délivrer des permis. L'organisme de réglementation fait les deux mais, selon l'approche adoptée dans les motifs dissidents, il est dépourvu de moyens pour prendre quelque mesure concrète que ce soit dans l'intérêt public à propos de ses lignes directrices ou de permis sans avoir le statut de créancier. Comme je l'ai expliqué, l'arrêt *Abitibi* accorde clairement une place aux organismes de réglementation qui ne sont pas des créanciers.

[137] Cela suffit, à proprement parler, pour trancher cet aspect du pourvoi. Cependant, d'autres indications sur l'analyse de la certitude suffisante pourraient se révéler utiles à l'avenir. En conséquence, je passe maintenant à l'analyse de l'étape

of the reasons why the Abandonment Orders and the LMR conditions both fail on this step of the *Abitibi* test. *Abitibi* test.

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

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

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

[140] What a court must determine is whether there are sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to a regulator. In determining whether

de la « certitude suffisante » et des raisons pour lesquelles les ordonnances d'abandon et les conditions liées à la CGR ne franchissent pas cette étape du critère d'*Abitibi.*

(2) Il n'est pas suffisamment certain que l'organisme de réglementation exécutera les travaux environnementaux et présentera une demande de remboursement

[138] Le critère de la « certitude suffisante » énoncé aux par. 30 et 36 de l'arrêt *Abitibi* ne fait essentiellement que restructurer et reformuler les exigences des dispositions applicables de la *LFI*. Selon le par. 121(2), des réclamations éventuelles peuvent constituer des réclamations prouvables. Autrement dit, les dettes que devra peut-être le failli à un créancier peuvent constituer des réclamations prouvables, mais pas nécessairement l'être. Le paragraphe 135(1.1) prévoit l'évaluation d'une réclamation éventuelle, qui doit être évaluable suivant cette disposition; elle ne doit pas être trop éloignée ou conjecturale pour constituer une réclamation prouvable au sens du par. 121(2).

[139] Avant de pouvoir atteindre la troisième étape du critère d'*Abitibi*, il faut déjà avoir fait la démonstration que l'organisme de réglementation est un créancier. Au vu des faits de l'espèce, j'ai conclu que l'organisme de réglementation n'est pas un créancier de Redwater. Toutefois, afin d'expliquer pourquoi je me dissocie du juge siégeant au cabinet à l'égard de l'analyse de la « certitude suffisante », je vais procéder comme si l'organisme de réglementation était effectivement un créancier de Redwater en ce qui concerne les ordonnances d'abandon et les exigences de la CGR. Ces obligations de fin de vie n'exigent pas directement de Redwater qu'elle fasse un paiement à l'organisme de réglementation. Elles l'obligent plutôt à *faire quelque chose*. Comme l'indique l'arrêt *Abitibi*, si l'organisme de réglementation était en fait un créancier, les obligations de fin de vie constitueraient ses réclamations éventuelles.

[140] Ce que le tribunal doit décider, c'est s'il y a suffisamment de faits indiquant qu'il existe une obligation environnementale de laquelle résultera une dette envers un organisme de réglementation.

a non-monetary regulatory obligation of a bankrupt is too remote or too speculative to be included in the bankruptcy proceeding, the court must apply the general rules that apply to future or contingent claims. It must be sufficiently certain that the contingency will come to pass — in other words, that the regulator will enforce the obligation by performing the environmental work and seeking reimbursement.

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

(a) *The Abandonment Orders*

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

[143] The chambers judge acknowledged that it was "unclear" whether the Regulator would perform the abandonments itself or would deem the wells subject to the Abandonment Orders to be orphans (para. 173). He stated that, in the latter case, the OWA would probably carry out the abandonments, although it was not clear when they would be completed. Indeed, the chambers judge acknowledged that, given the OWA's resources, it could take as long as 10 years for it to get around to performing the required environmental work on the Redwater property. He nonetheless concluded that — even though the "sufficient certainty" step was not satisfied in a

Pour établir si une obligation réglementaire non pécuniaire du failli est trop éloignée ou trop conjecturale pour être incluse dans la procédure de faillite, le tribunal doit appliquer les règles générales qui visent les réclamations futures ou éventuelles. Il doit être suffisamment certain que l'éventualité se concrétisera ou, en d'autres termes, que l'organisme de réglementation fera respecter l'obligation en exécutant les travaux environnementaux et en sollicitant le remboursement de ses frais.

[141] Je vais maintenant analyser les ordonnances d'abandon de même que les exigences relatives à la CGR à tour de rôle et démontrer en quoi elles ne franchissent pas l'étape de la « certitude suffisante » du critère d'*Abitibi*.

a) *Les ordonnances d'abandon*

[142] L'organisme de réglementation a rendu, au titre de l'*OGCA* et de la *Pipeline Act*, des ordonnances enjoignant à Redwater d'abandonner les biens faisant l'objet de la renonciation. Même si l'organisme de réglementation était un créancier de Redwater, les ordonnances d'abandon doivent tout de même pouvoir faire l'objet d'une évaluation pour être incluses dans le processus de faillite. À mon avis, ni les conclusions de fait du juge siégeant en cabinet ni la preuve n'établissent qu'il est suffisamment certain que l'organisme de réglementation procédera à l'abandon et présentera une demande de remboursement. La réclamation est trop éloignée et conjecturale pour être incluse dans la procédure de faillite.

[143] Le juge siégeant en cabinet a reconnu qu'il n'était [TRADUCTION] « pas clair » si l'organisme de réglementation effectuerait lui-même le processus d'abandon ou s'il considérerait les puits assujettis aux ordonnances d'abandon comme orphelins (par. 173). Il a dit que, dans ce dernier cas, l'OWA se chargerait probablement de l'abandon, mais on ne savait pas quand cette tâche serait menée à terme. En effet, le juge siégeant en cabinet a admis qu'étant donné les ressources de l'OWA, cela pourrait lui prendre jusqu'à 10 ans avant qu'elle amorce les travaux environnementaux nécessaires sur la propriété de Redwater. Il a conclu néanmoins que, même

"technical sense" — the situation met what had been intended in *Abitibi*. That conclusion was at least partly based on his finding that the Abandonment Orders were "intrinsically financial" (para. 173).

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

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

si l'étape de la « certitude suffisante » n'a pas été franchie au « sens technique », la situation répondait à la norme voulue dans *Abitibi*. Cette conclusion reposait, du moins en partie, sur la sienne voulant que les ordonnances d'abandon soient « intrinsèquement financières » (par. 173).

[144] À mon avis, le juge siégeant en cabinet n'a pas tiré la conclusion de fait que l'organisme de réglementation se chargerait *lui-même* des travaux d'abandon. Je le rappelle, il a reconnu qu'il n'était « pas clair » si l'organisme de réglementation s'en occuperait. On peut difficilement dire qu'il s'agit qu'une conclusion de fait qui commande la déférence. Prise dans son ensemble, la preuve en l'espèce me semble mener à la conclusion selon laquelle l'organisme de réglementation ne procèdera pas lui-même à l'abandon des biens auxquels il a été renoncé.

[145] Dans le cadre de ses activités, l'organisme de réglementation n'effectue pas lui-même les travaux d'abandon. Il n'est pas tenu par la loi de le faire. Il s'agit plutôt d'une obligation incombant au titulaire de permis. Dans son affidavit, le déposant de l'organisme de réglementation a déclaré que celui-ci procédait très rarement à l'abandon de biens au nom des titulaires de permis et qu'il ne le faisait pratiquement jamais dans le cas d'un titulaire de permis sous séquestre ou en faillite. Le déposant a déclaré que l'organisme de réglementation n'avait pas l'intention d'abandonner les biens de Redwater visés par des permis. Comme l'a signalé le juge siégeant en cabinet, il est vrai que, dans sa lettre adressée à GTL en date du 15 juillet 2015, l'organisme de réglementation a menacé d'effectuer lui-même ces processus, mais il n'a rien fait par la suite pour mettre cette menace à exécution. Même si l'on devrait accorder de l'importance à cette lettre, la contradiction entre elle et les affidavits subséquents de l'organisme de réglementation font en sorte à tout le moins qu'il est difficile de dire avec quoi que ce soit de comparable à une certitude suffisante que l'organisme de réglementation compte effectuer le processus d'abandon. Ces faits distinguent la présente affaire d'*Abitibi*, où les conclusions du juge chargé de la restructuration reposaient sur la prémisse que la province exécuterait fort probablement elle-même les travaux de décontamination.

[146] Below, I will explain why the OWA's involvement is insufficient to satisfy the "sufficient certainty" test. First, I note that any reliance the chambers judge placed on the intrinsically financial nature of the Abandonment Orders was an error. In this regard, I am in complete agreement with Martin J.A. Considering whether an order is intrinsically financial is an erroneous interpretation of the third step of the *Abitibi* test. It is too broad and would result in a provable claim being found even where the existence of a monetary claim in bankruptcy is merely speculative. Thus, in *Nortel* CA, Juriansz J.A. rightly rejected the argument that the *Abitibi* test did not require a determination that the regulator would perform the environmental work and claim reimbursement, and that it was sufficient for there to be an environmental order requiring an expenditure of funds by the bankrupt estate. He held the following, at paras. 31-32:

. . . As I read it, the Supreme Court's decision is clear: ongoing environmental remediation obligations may be reduced to monetary claims that can be compromised in CCAA proceedings only where the province has performed the remediation work and advances a claim for reimbursement, or where the obligation may be considered a contingent or future claim because it is "sufficiently certain" that the province will do the work and then seek reimbursement.

The respondents' approach is not only inconsistent with *AbitibiBowater Inc., Re*, it is too broad. It would result in virtually all regulatory environmental orders being found to be provable claims. As Deschamps J. observed, a company may engage in activities that carry risks. When those risks materialize, the costs are borne by those who hold a stake in the company. A risk that results in an environmental obligation becomes subject to the insolvency process only when it is in substance monetary and is in substance a provable claim.

[146] J'expliquerai ci-après pourquoi l'intervention de l'OWA est insuffisante pour satisfaire au critère de la « certitude suffisante ». Premièrement, je constate que le juge siégeant en cabinet a eu tort de tabler sur le caractère « intrinsèquement financier » des ordonnances d'abandon. Je suis entièrement d'accord avec la juge Martin sur ce point. Se demander si une ordonnance est « intrinsèquement financière » constitue une interprétation erronée de la troisième étape du critère d'*Abitibi*. Elle est trop large et conduirait à la conclusion qu'il y a une « réclamation prouvable » même lorsque l'existence d'une réclamation pécuniaire en matière de faillite ne relève que de la conjecture. Ainsi, dans l'arrêt *Nortel* CA, le juge Juriansz a rejeté à juste titre l'argument selon lequel le critère d'*Abitibi* n'exigeait pas qu'il soit décidé que l'organisme de réglementation exécuterait les travaux environnementaux et demanderait un remboursement, et qu'il suffisait qu'il y ait une ordonnance environnementale exigeant une dépense de fonds par l'actif du failli. Il a déclaré ce qui suit, aux par. 31-32 :

[TRADUCTION] . . . Selon moi, la décision de la Cour suprême est claire : les obligations continues de décontamination environnementale peuvent être réduites à des réclamations pécuniaires pouvant être compromises dans des procédures fondées sur la LACC seulement lorsque la Province a exécuté les travaux de décontamination et qu'elle présente une demande de remboursement, ou lorsque l'obligation peut être considérée comme une réclamation éventuelle ou future, parce qu'il est « suffisamment certain » que la Province fera le travail et cherchera ensuite à obtenir un remboursement.

L'approche des intimées n'est pas seulement incompatible avec celle de l'arrêt *Abitibi*, elle est trop large. Il en résulterait que pratiquement toutes les ordonnances réglementaires en matière d'environnement soient considérées comme des réclamations prouvables. Comme l'a fait remarquer la juge Deschamps, une société peut exercer des activités qui comportent des risques. Lorsque ces risques se matérialisent, les coûts sont supportés par ceux qui détiennent une participation dans la société. Un risque qui entraîne une obligation environnementale n'est soumis au processus d'insolvabilité que lorsqu'il est en substance pécuniaire et qu'il constitue en substance une réclamation prouvable.

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

[147] Comme l'a reconnu à bon droit le juge siégeant en cabinet, ce n'est pas parce que l'organisme de réglementation n'effectuerait pas lui-même les travaux d'abandon qu'il se laverait les mains des biens faisant l'objet de la renonciation. Il les qualifierait plutôt, au besoin, d'orphelins conformément à l'*OGCA* et les confiera à l'OWA. Je ne prétends pas qu'un organisme de réglementation puisse stratégiquement éviter le critère de la « certitude suffisante » en déléguant simplement des travaux environnementaux à une organisation indépendante. Je ne déciderai pas, comme l'organisme de réglementation nous a exhortés à le faire, que le critère d'*Abitibi* exige *toujours* que les travaux environnementaux soient exécutés par l'organisme lui-même. Cependant, la véritable nature de l'OWA doit être soulignée. Il y a des motifs sérieux de conclure que, vu les caractéristiques propres à ce contexte réglementaire, l'OWA n'est pas l'organisme de réglementation.

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

[148] La création de l'OWA ne représentait pas une tentative de l'organisme de réglementation pour éviter l'ordre de priorité fixé en matière de faillite par la *LFI*. C'est un organisme sans but lucratif doté de son propre mandat et de son propre conseil d'administration indépendant, et il fonctionne comme une entité financièrement indépendante en vertu du pouvoir qui lui est délégué par la loi. Bien qu'un représentant de l'organisme de réglementation et un représentant d'Alberta Environment and Parks siègent au conseil d'administration de l'OWA, son indépendance n'est pas mise en question. Le rapport annuel 2014-2015 de l'OWA indique que cinq des six directeurs votants représentent l'industrie. L'OWA se sert d'un outil d'évaluation des risques pour décider, en ordre de priorité, quand et de quelle manière elle exécutera des travaux environnementaux sur les centaines de puits orphelins de l'Alberta. Personne ne prétend que l'organisme de réglementation a son mot à dire sur l'ordre dans lequel l'OWA décide d'exécuter des travaux environnementaux. Le rapport annuel 2014-2015 ajoute que, depuis 1992, 87 p. 100 de l'argent recueilli et investi pour financer les activités de l'OWA est fourni par l'industrie via la redevance pour les puits orphelins. Au paragraphe 99 de son mémoire, l'organisme de réglementation laisse

that the Regulator and the OWA are "inextricably intertwined" (para. 273).

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

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

[151] At the beginning of this litigation, the OWA estimated that it would take 10 to 12 years to get through the backlog of orphans. By 2015, that backlog was increasing rapidly, and it may well have continued to increase at the same or an even greater speed in the intervening years, as submitted by the Regulator. If anything, this suggests the possibility of an even larger backlog. There is no indication that

entendre indirectement que la province ou le gouvernement fédéral pourrait accorder à l'avenir des fonds supplémentaires à l'OWA mais, même si cette possibilité se concrétise, les fonds seront presque entièrement consentis sous forme de prêts. Je ne peux accepter la proposition des juges dissidents selon laquelle l'organisme de réglementation et l'OWA sont « inextricablement liés » (par. 273).

[149] À supposer même que l'abandon par l'OWA des biens de Redwater visés par des permis puisse satisfaire au critère de la « certitude suffisante », je conviens avec la juge Martin qu'il est difficile de conclure à la certitude suffisante que l'OWA se chargera effectivement des travaux d'abandon et qu'il n'y a aucune certitude qu'une demande de remboursement sera présentée si l'OWA finit par abandonner les biens.

[150] Les motifs dissidents laissent croire que les faits de l'espèce s'apparentent davantage à ceux de l'affaire *Northstar Aerospace Inc., Re*, 2013 ONCA 600, 8 C.B.R. (6th) 154, qu'à ceux de *Nortel* CA, faisant valoir qu'il est satisfait au critère de la « certitude suffisante » car, tout comme dans *Northstar*, personne ne veut acheter les biens de Redwater et la débitrice elle-même est insolvable; en conséquence, seule l'OWA peut exécuter les travaux. Il me semble facile de distinguer l'affaire *Northstar* de celle qui nous occupe. Dans cette affaire, le failli effectuait de son plein gré des travaux de décontamination avant sa faillite. Après que le failli eu fait cession de ses biens, le ministre de l'Environnement (« ME ») a pris lui-même la relève des activités de décontamination et il entendait le faire sans préjudice. Selon le juge Jurianz, comme le ME avait déjà entrepris des activités de décontamination, il était suffisamment certain qu'il s'en occuperait. Comme je le démontrerai maintenant, les faits de l'espèce sont fort différents.

[151] Au début du présent litige, l'OWA a estimé qu'il lui faudrait de 10 à 12 ans pour résorber l'arriéré d'orphelins. Cet arriéré augmentait rapidement en 2015 et il peut fort bien avoir continué de croître tout aussi ou encore plus rapidement au cours des années suivantes, comme le soutient l'organisme de réglementation. Cela tend plutôt à établir que l'arriéré pourrait encore augmenter. Rien n'indique

the Renounced Assets would have a particularly high priority in the backlog. Even if the potential additional funding materializes, the Regulator submits that it will be a generation or more before the OWA can address its existing inventory of orphans.

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

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

qu'une priorité particulièrement grande serait accordée dans l'arriéré aux biens faisant l'objet de la renonciation. Même si la possibilité d'attribuer des fonds supplémentaires se concrétise, l'organisme de réglementation fait valoir que cela prendra une génération ou plus avant que l'OWA ne puisse s'occuper de son inventaire actuel d'orphelins.

[152] Les motifs dissidents se fondent sur la conclusion du juge siégeant en cabinet selon laquelle l'OWA effectuerait « probablement » le processus d'abandon, tout en minimisant le fait qu'il a également conclu que l'OWA ne le ferait pas « nécessairement dans un délai précis » (par. 261 et 278, citant les motifs du juge siégeant en cabinet, par. 173). Vu l'échéancier le plus conservateur — celui de 10 ans dont a parlé le juge siégeant en cabinet —, il est difficile de prédire quoi que ce soit avec une certitude suffisante. La donne pourrait changer considérablement au cours de la prochaine décennie, tant au chapitre de la politique gouvernementale qu'à celui de la volonté de l'industrie pétrolière et gazière de l'Alberta de s'acquitter de ses responsabilités environnementales. Il ne s'agit pas du tout de la même situation que dans *Northstar*, où le ME avait déjà amorcé les travaux environnementaux.

[153] Plus particulièrement, ce long échéancier garantit que, s'il finit par exécuter les travaux, l'OWA ne présentera pas de demande de remboursement. La présentation de la demande est un élément tout aussi essentiel du critère que l'exécution des travaux. L'OWA lui-même ne peut faire rembourser ses frais par les titulaires de permis et, même si les coûts des processus d'abandon effectués par la personne autorisée par l'organisme de réglementation constituent une dette payable à cet organisme suivant le par. 30(5) de l'*OGCA*, on n'a produit aucune preuve montrant que l'organisme de réglementation a exercé son pouvoir de recouvrer ces frais dans des cas analogues, et pour cause : le fait est qu'au moment où l'OWA en arriverait à abandonner l'un ou l'autre des puits de Redwater, la liquidation de l'actif serait terminée et GTL serait libéré depuis longtemps. En somme, le juge siégeant en cabinet a eu tort de ne pas se demander si l'OWA peut être assimilé à l'organisme de réglementation et en ne

in fact perform the abandonments and advance a claim for reimbursement.

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

(b) *The Conditions for the Transfer of Licenses*

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

[156] In a sense, the factors suggesting an absence of sufficient certainty are even stronger for the LMR requirements than for the Abandonment Orders. There is a debt enforcement scheme under the *OGCA* and the *Pipeline Act* in respect of abandonment, but

considérant pas que, même s'il peut l'être, il n'est pas suffisamment certain qu'il effectuera dans les faits le processus d'abandon et présentera une demande de remboursement.

[154] En conséquence, même si l'organisme de réglementation avait agi comme un créancier en rendant les ordonnances, on ne saurait dire avec une certitude suffisante qu'il effectuerait les processus d'abandon et présenterait une demande de remboursement.

b) *Les conditions liées au transfert de permis*

[155] Je traiterai brièvement des conditions relatives à la CGR dont est assorti le transfert de permis. Une grande partie de l'analyse qui précède concernant les ordonnances d'abandon vaut tout autant pour ces conditions. Comme l'a souligné la juge Martin, il est difficile de comparer directement la nécessité d'obtenir une approbation réglementaire pour les transferts de permis et les ordonnances de décontamination en litige dans *Abitibi*. Or, notre Cour a confirmé aux par. 54-55 de *Moloney* que le critère d'*Abitibi* s'applique à une catégorie d'obligations réglementaires plus large que les « ordonnances ». Les conditions relatives à la CGR forment une « obligation non pécuniaire » de l'actif de Redwater, car elles doivent être remplies avant que l'organisme de réglementation n'approuve le transfert de tout permis de Redwater. Cependant, il convient de noter que, même mises à part les conditions relatives à la CGR, les permis sont loin d'être librement transférables. L'organisme n'approuvera pas le transfert des permis si le cessionnaire n'est pas un titulaire de permis au sens de l'*OGCA* ou de la *Pipeline Act* ou des deux. L'organisme de réglementation se réserve également le droit de rejeter un transfert proposé lorsqu'il juge que le transfert n'est pas dans l'intérêt public, comme dans un cas où le cessionnaire a des problèmes non résolus touchant à la conformité.

[156] En un sens, les facteurs laissant croire qu'il n'y a pas de certitude suffisante militent encore plus fortement en faveur des exigences relatives à la CGR que des ordonnances d'abandon. L'*OGCA* et la *Pipeline Act* prévoient un régime de recouvrement

there is no such scheme for the LMR requirements. The Regulator's refusal to approve licence transfers unless and until the LMR requirements have been satisfied does not give it a monetary claim against Redwater. It is true that compliance with the LMR requirements results in a reduction in the value of the bankrupt estate. However, as discussed earlier, not every obligation that diminishes the value of the bankrupt estate, and therefore the amount available to secured creditors, satisfies the "sufficient certainty" step. The question is not whether an obligation is intrinsically financial.

[157] Compliance with the LMR conditions prior to the transfer of licences reflects the inherent value of the assets held by the bankrupt estate. Without licences, Redwater's *profits à prendre* are of limited value at best. All licences held by Redwater were received by it subject to the end-of-life obligations that would one day arise. These end-of-life obligations form a fundamental part of the value of the licensed assets, the same as if the associated costs had been paid up front. Having received the benefit of the Renounced Assets during the productive period of their life cycles, Redwater cannot now avoid the associated liabilities. This understanding is consistent with *Daishowa-Marubeni International Ltd. v. Canada*, 2013 SCC 29, [2013] 2 S.C.R. 336, which dealt with the statutory reforestation obligations of holders of forest tenures in Alberta. This Court unanimously held that the reforestation obligations were "a future cost embedded in the forest tenure that serves to depress the tenure's value at the time of sale" (para. 29).

[158] The fact that regulatory requirements may cost money does not transform them into debt collection schemes. As noted by Martin J.A., licensing requirements predate bankruptcy and apply to all licensees regardless of solvency. GTL does not dispute the fact that Redwater's licences can be transferred only to other licensees nor that the Regulator retains the authority in appropriate situations to

de créances en matière d'abandon, mais il n'existe aucun régime de ce genre pour les exigences liées à la CGR. Le refus de l'organisme de réglementation d'approuver les transferts de permis jusqu'à ce que ces exigences aient été satisfaites ne lui donne pas une réclamation pécuniaire contre Redwater. Certes, le respect des exigences relatives à la CGR entraîne une diminution de la valeur de l'actif du failli. Toutefois, comme nous l'avons vu plus tôt, toute obligation qui diminue la valeur de l'actif du failli, et donc la somme que peuvent recouvrer les créanciers garantis, ne franchit pas nécessairement l'étape de la « certitude suffisante ». Il ne s'agit pas de savoir si une obligation est intrinsèquement financière.

[157] Le respect des conditions liées à la CGR avant le transfert des permis reflète la valeur inhérente des biens détenus par l'actif du failli. Sans les permis, les profits à prendre appartenant à Redwater ont, au mieux, peu de valeur. Tous les permis détenus par Redwater ont été reçus par elle, sous réserve d'obligations de fin de vie qui prendraient naissance un jour. Ces obligations constituent une part fondamentale de la valeur des biens visés par des permis, comme si les frais connexes avaient été payés d'emblée. Ayant reçu le bénéfice des biens faisant l'objet de la renonciation pendant la période productive de leur cycle de vie, Redwater ne peut plus éviter les engagements connexes. Cette interprétation concorde avec l'arrêt *Daishowa-Marubeni International Ltd. c. Canada*, 2013 CSC 29, [2013] 2 R.C.S. 336, qui portait sur les obligations légales de reboisement des détenteurs de tenures forestières en Alberta. Notre Cour a conclu à l'unanimité que les obligations relatives au reboisement constituaient « un coût futur inhérent à la tenure forestière qui a pour effet d'en diminuer la valeur au moment de la vente » (par. 29).

[158] La possibilité que des exigences réglementaires coûtent de l'argent ne les transforme pas en régimes de recouvrement de créances. Comme l'a fait remarquer la juge Martin, les exigences en matière de permis précèdent la faillite et s'appliquent à tous les titulaires de permis, peu importe leur solvabilité. GTL ne conteste pas le fait que les permis de Redwater ne peuvent être transférés qu'à

reject proposed transfers due to safety or compliance concerns. There is no difference between such conditions and the condition that the Regulator will not approve transfers where they would leave the requirement to satisfy end-of-life obligations unaddressed. All these regulatory conditions depress the value of the licensed assets. None of them creates a monetary claim in the Regulator's favour. Licensing requirements continue to exist during bankruptcy, and there is no reason why GTL cannot comply with them.

(3) Conclusion on the *Abitibi* test

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

d'autres titulaires de permis, ni le fait que l'organisme de réglementation conserve le pouvoir, dans les situations qui s'y prêtent, de rejeter les transferts proposés en raison de préoccupations relatives à la sécurité ou à la conformité. Il n'y a aucune différence entre ces conditions et celle voulant que l'organisme de réglementation n'approuve pas les transferts qui laisseraient en suspens l'exigence de satisfaire aux obligations de fin de vie. Toutes ces conditions réglementaires font baisser la valeur des biens visés par des permis. Aucune ne donne naissance à une réclamation pécuniaire en faveur de l'organisme de réglementation. Les exigences en matière de permis subsistent pendant la faillite, et il n'y a aucune raison pour laquelle GTL ne peut s'y conformer.

(3) Conclusion sur le critère d'*Abitibi*

[159] En conséquence, les obligations de fin de vie incombant à GTL ne sont pas des réclamations prouvables dans la faillite de Redwater et n'entrent donc pas en conflit avec le régime de priorité général instauré dans la *LFI*. Ce n'est pas une simple question de forme, mais de fond. Obliger Redwater à payer l'abandon avant de répartir la valeur entre les créanciers ne perturbe pas le régime de priorité établi dans la *LFI*. Au moment d'élaborer ce régime, le Parlement voulait permettre aux organismes de réglementation d'imposer une charge prioritaire sur le bien réel du failli touché par un fait ou dommage lié à l'environnement en vue de financer la décontamination (voir le par. 14.06(7)). Ainsi, la *LFI* envisage explicitement la possibilité que des organismes de réglementation tire une valeur des biens réels du failli touchés par un fait ou dommage lié à l'environnement. Bien que l'organisme de réglementation n'ait pu se prévaloir du par. 14.06(7), compte tenu de la nature de la propriété des biens dans l'industrie pétrolière et gazière de l'Alberta, les ordonnances d'abandon et la CGR reproduisent l'effet du par. 14.06(7) en l'espèce. De plus, il importe de souligner que les seuls biens de valeur de Redwater étaient touchés par un fait ou dommage lié à l'environnement. Les ordonnances d'abandon et exigences relatives à la CGR n'avaient donc pas pour objet de forcer Redwater à s'acquitter des obligations de fin de vie avec des biens étrangers au fait

in this case does not interfere with the aims of the *BIA* — rather, it facilitates them.

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

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

IV. Conclusion

[162] There is no conflict between Alberta's regulatory regime and the *BIA* requiring portions of the former to be rendered inoperative in the context of bankruptcy. Although GTL remains fully protected from personal liability by federal law, it cannot walk away from the environmental liabilities of the bankrupt estate by invoking s. 14.06(4). On a

ou dommage lié à l'environnement. Autrement dit, la reconnaissance que les ordonnances d'abandon et exigences relatives à la CGR ne sont pas des réclamations prouvables en l'espèce facilite l'atteinte des objets de la *LFI* au lieu de la contrecarrer.

[160] La faillite n'est pas un permis de faire abstraction des règles, et les professionnels de l'insolvabilité sont liés par les lois provinciales valides au cours de la faillite. À titre d'exemple, ils doivent respecter les obligations non pécuniaires liant l'actif du failli qui ne peuvent être réduites à des réclamations prouvables et dont les effets n'entrent pas en conflit avec la *LFI*, sans égard aux répercussions que cela peut avoir sur les créanciers garantis du failli. Les ordonnances d'abandon et exigences relatives à la CGR reposent sur des lois provinciales valides d'application générale et elles représentent exactement le genre de loi provinciale valide sur lequel se fonde la *LFI*. Tel qu'il est signalé dans *Moloney*, la *LFI* indique clairement que « [l]a propriété de certains biens et l'existence de dettes particulières relèvent du droit provincial » (par. 40). Les obligations de fin de vie sont imposées par des lois provinciales valides qui définissent les contours de l'actif du failli susceptible d'être partagé.

[161] Enfin, rappelons que l'objet général de la *LFI* de favoriser la réhabilitation financière ne concerne pas une société comme Redwater. Les sociétés n'ayant pas assez de biens pour satisfaire leurs créanciers ne seront jamais libérées de leur faillite puisqu'elles ne peuvent acquitter entièrement toutes les réclamations de leurs créanciers (*LFI*, par. 169(4)). Ainsi, la conclusion selon laquelle les obligations de fin de vie incombant à Redwater ne sont pas des réclamations prouvables n'est à l'origine d'aucun conflit avec cet objet.

IV. Conclusion

[162] Il n'y a aucun conflit entre le régime de réglementation de l'Alberta et la *LFI* en raison duquel des parties du premier doivent être inopérantes dans le contexte de la faillite. Bien que GTL demeure entièrement dégagé de toute responsabilité personnelle par le droit fédéral, il ne peut se soustraire aux engagements environnementaux qui lient l'actif du

proper application of the *Abitibi* test, the Redwater estate must comply with ongoing environmental obligations that are not claims provable in bankruptcy.

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

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

The reasons of Moldaver and Côté JJ. were delivered by

Côté J. (dissenting) —

I. Introduction

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

failli en invoquant le par. 14.06(4). D'après une juste application du critère d'*Abitibi*, l'actif de Redwater doit respecter les obligations environnementales continues qui ne sont pas des réclamations prouvables en matière de faillite.

[163] En conséquence, le pourvoi est accueilli. Dans *Alberta Energy Regulator c. Grant Thornton Limited*, 2017 ABCA 278, 57 Alta. L.R. (6th) 37, le juge Wakeling a refusé de suspendre l'effet de précédent de l'arrêt rendu par la Cour d'appel. Comme il l'a fait remarquer, les intérêts de l'organisme de réglementation lui-même étaient déjà protégés. Conformément aux ordonnances rendues auparavant par les tribunaux albertains, GTL avait déjà vendu l'ensemble des biens de Redwater ou y avait renoncé et le produit de la vente a été détenu en fiducie. Ainsi, la Cour rend l'ordonnance demandée par l'organisme de réglementation selon laquelle le produit de la vente des biens de Redwater doit être utilisé pour satisfaire aux obligations de fin de vie de Redwater. En outre, les déclarations du juge siégeant en cabinet qui figurent aux par. 3 et 5-16 de son ordonnance sont annulées.

[164] Puisqu'il a gain de cause dans le cadre de ce pourvoi, l'organisme de réglementation aurait normalement droit aux dépens. Toutefois, il a expressément mentionné ne pas les demander. C'est pourquoi aucune ordonnance ne sera rendue à cet égard.

Version française des motifs des juges Moldaver et Côté rendus par

La juge Côté (dissidente) —

I. Introduction

[165] Redwater Energy Corporation (« Redwater ») est une société pétrolière et gazière en faillite. Son actif se compose principalement de deux types de biens : des puits de pétrole et des installations pétrolières de valeur productifs qui sont encore susceptibles de générer un revenu; et des biens inexploités ayant une valeur négative, notamment des puits taris auxquels se rattachent de lourds engagements environnementaux. Le séquestre et syndic de faillite de Redwater, Grant Thornton Limited (« GTL »),

TAB 2

Court of King's Bench of Alberta

Citation: Orphan Well Association v Trident Exploration Corp, 2022 ABKB 839

Date: 20221213
Docket: 1901 06244
Registry: Calgary

Between:

Orphan Well Association

Applicant

- and -

Trident Exploration Corp., Trident Exploration (WX) Corp., Trident Exploration (Alberta) Corp., Trident Limited Partnership, Trident Exploration (Aurora) Limited Partnership I, Trident Exploration (2006) Limited Partnership I, and Fenergy Corp.

Respondents

Reasons for Decision
of the
Honourable Justice R.A. Neufeld

I. The Trident Insolvency

[1] Trident is a group of privately-owned oil and gas exploration and production companies and partnerships. As of May 2019, it held interests in approximately 4500 petroleum and natural gas wells across Alberta, of which 3700 were licenced to Trident as operator.

[2] On April 30, 2019, Trident issued a press release which advised that:

1) It had been engaged in discussions with the Alberta Energy Regulator (AER) and its lenders regarding restructuring, but without success;

2) As of April 30, 2019, its directors and management had resigned, and Trident had ceased operations and terminated all employees and contractors.

[3] Trident's primary obligations at the time consisted of:

1) Abandonment and reclamation obligations (ARO) associated with wells, facilities and pipelines estimated at $407,000,000;

2) Secured debt in the amount of $71,106,000;

3) Unsecured trade debts in the amount of $18,920,921.

[4] The effect of Trident's decision was to walk away from its obligations. Its licences were turned back to the AER, and its ARO would be assumed by the Orphan Well Association (OWA): *Orphan Fund Delegated Administration Regulation*, Alta Reg 45/2001, s 3(1).

[5] The AER, assisted by former (and unpaid) Trident employees and contractors attended to the immediate task of safely suspending Trident's field operations.

[6] The OWA took the unusual step of applying to this Court for an order appointing a Receiver.

[7] Historically, such an order would have been sought by secured creditors, but with the evolution of case law recognizing a "super priority" for environmental remediation (including ARO for oil and gas operations) and the magnitude of Trident's ARO, a different approach was considered appropriate.

II. Mandate of the Receiver

[8] The primary objective of the Receivership was to reduce the Trident ARO that would ultimately rest with the OWA. This was to be accomplished by selling the Trident assets to solvent oil and gas companies who were willing and able to assume environmental liability for the assets involved.

[9] The sales process was presented to the Court for approval. As asset sales were made, they too were presented to the Court for approval such that ownership of purchased assets would vest free and clear of all claims. These approvals were all granted without opposition as the process unfolded.

[10] At the outset, the Receiver sought advice from the sales agent, Veracity, about whether certain Trident licenced oil and gas assets should be operated pending sale to generate cashflow. The Receiver reported to the Court that, as part of its analysis, it considered all costs that would be incurred if operations were restored, including property taxes among other variable costs.

[11] The Receiver concluded that it would be uneconomic to operate Trident's assets and focused only on immediate steps for ensuring safe shut-in. As a result, throughout the Receivership proceedings, the Receiver did not pay other post-filing operational expenses, similar in nature to property taxes that would be incurred by a normal oil and gas company, including surface rentals, AER/OWA levies and payments for mineral leases, among other variable costs.

[12] When licenced oil and gas assets were sold, the purchaser assumed the ownership liabilities and ARO for those assets. The terms of sale did not include assumption of outstanding

municipal tax obligations or purchase price adjustments in that regard. However, all 19 affected municipalities were given notice of applications within the Receivership proceedings.

[13] A different approach was used in the sale of two real estate parcels which did not contain licenced oil and gas assets. Those sales contained adjustments for outstanding municipal taxes as is standard real estate conveyancing practice.

III. Current Status

[14] The Receiver reported in its August 15, 2022, Supplement to the 8th Report of the Receiver, that it views the sales process as successful because an estimated $266,000,000 (or 66%) of Trident's ARO was transferred to solvent oil and gas producers. This resulted in the continued operation of a significant number of assets to the benefit of all stakeholders. A further $5,000,000 was applied for and received under the Federal Site Rehabilitation Program, which was sufficient to partially abandon approximately 300 wells.

[15] At present, the Receiver holds approximately $900,000 in remaining funds, some or all of which was generated through the sale of non-licenced assets owned by Trident, such as real estate and machinery. The Receiver seeks advice and direction regarding the distribution of those funds. The AER/OWA contend that they should receive the funds pursuant to their super priority recognized in recent case law. The County of Kneehill, the County of Stettler and Woodland County argue that they should share in the proceeds as they also have a priority arising out of unpaid municipal taxes for Trident wells, pipelines and production facilities that accrued post-Receivership. The counties will be collectively referred to as the "Municipalities".

IV. Issues

[16] The Receiver's request for advice and directions raises two issues:

1) whether the AER/OWA is entitled to call on the proceeds of sale of all of Trident's assets, including realty; and

2) whether such entitlement takes precedence over municipal tax obligations that were incurred post-receivership in relation to licenced oil and gas wells pipelines and production facilities. If not, should the remaining funds be shared between the AER/OWA and the Municipalities?

[17] I have determined that the answer to both questions is yes. The AER/OWA is entitled to call on the proceeds of sale from all of Trident's assets and their entitlement takes precedence over municipal tax obligations because of the AER/OWA super priority over the funds in question.

V. Entitlement of the AER

[18] In recent years, the obligation of Receivers to undertake abandonment and reclamation of oil and gas facilities before distribution of funds to creditors has been widely characterized as a "super priority." To understand why that is so, it is necessary to first review the process used under the *Bankruptcy and Insolvency Act,* RSC 1985 c B-3 [*BIA*], as amended for resolving claims against the debtor's estate.

A. Insolvency Process

[19] Under the *BIA*, the monetization of assets and distribution of funds to creditors is done in a common proceeding. Existing actions against the debtor are stayed. Creditors are given the opportunity to submit claims for amounts owed at the time of bankruptcy or receivership. The trustee or receiver, whichever it may be, is tasked with monetizing the assets of the estate and considering the validity of the claims. That is, whether the debts alleged are owed and in what amount. The trustee or receiver may seek advice and directions on these issues, and to facilitate the monetization of assets, may obtain orders approving a sales process and individual sales so as to vest the assets in the purchaser free and clear of claims.

[20] Throughout the process, interested stakeholders are given notice of applications within the insolvency proceeding and an opportunity to participate.

[21] From time to time, the trustee or receiver may also seek approval to make interim distributions to creditors having provable claims and advice and direction regarding matters such as the validity of securities, the priorities among creditors and the interim or final distribution of estate proceeds.

[22] Not all obligations owed by a debtor will give rise to a claim provable in bankruptcy. Provable claims are defined at *BIA* s. 121(1) to be:

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

[23] Non-provable claims will continue after the insolvency proceeding has been completed. With the lifting of the stay of proceedings, they may continue to be pursued in the normal course. They cannot, however, be resolved within the insolvency process itself.

B. Abandonment and Reclamation Obligations

[24] The appropriate treatment of environmental obligations of an estate in bankruptcy or receivership within the common proceeding rubric has been the subject of considerable debate and jurisprudence in recent years.

[25] A series of cases decided by the Supreme Court of Canada and the Alberta Court of Appeal have provided direction.

1. *Northern Badger*

[26] The first was ***Pan Americana de Bienes y Servicio v Northern Badger Oil & Gas Limited***, 1991 ABCA 181 [***Northern Badger***]. In that case, a creditor of Northern Badger obtained a receivership order and subsequently a bankruptcy order.

[27] Northern Badger was the licenced operator of 33 wells. Northern Badger's receiver agreed to sell 21 wells and advised the Energy Resources Conservation Board (ERCB) shortly after the sales agreement that the remaining 12 wells had not been sold. In result, 7 wells were passed back to the receiver. When the receiver sought a discharge and proposed to distribute remaining cash on hand ($226,000) to Pan Americana, the ERCB responded by obtaining an order in council requiring the receiver to abandon the 7 wells at an estimated cost of $220,000.

[28] Pan Americana challenged the constitutionality of the abandonment order, arguing that Alberta could not compel a receiver/manager to incur abandonment costs that would be at the expense of secured creditors as this would violate the priorities stipulated under the federal *BIA*. The chambers judge agreed and directed the receiver/manager to disregard the provincial abandonment order.

[29] The Alberta Court of Appeal overturned the decision of the chambers judge. The Court held that the ERCB was not acting as a creditor in issuing the order. Rather, the ERCB was enforcing a public law. The ERCB could have become a creditor if it had undertaken the abandonment itself, and thereby become a creditor by virtue of the provisions of the *Oil and Gas Conservation Act*, RSA 2000, c O-6 [*OGCA*]. But the ERCB had not done so.

[30] The Court went on to hold that a court-appointed receiver has an obligation to obey laws of general application. The receiver is not entitled to pick and choose only profitable wells for operation and sale, leaving behind wells whose environmental liabilities exceed potential revenue for the benefit of secured creditors. In result, the receiver/manager was found to be personally liable for the abandonment costs – a finding that created considerable controversy in the financial and insolvency fields.

[31] Following ***Northern Badger***, the *BIA* was amended to shield receivers from personal liability. The debate continued, however, about how environmental orders issued by regulatory authorities were to be characterized within an insolvency proceeding. That is, whether such orders created obligations to the public writ large or could or should be subject of proof in an insolvency proceeding (either as a subsisting debt or obligation that can be translated to a monetary value).

2. *Abitibi*

[32] The answer to that question was provided by the 2012 decision of the Supreme Court in ***Newfoundland and Labrador v AbitibiBowater Inc***, 2012 SCC 67 [***Abitibi***].

[33] Abitibi was a multi-national company that had operated a pulp and paper business in Newfoundland and Labrador for over 100 years. The company was in financial distress. It made a proposal for insolvency protection under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*], and closed its operations in the province, which put many people out of work.

[34] The provincial government responded with legislation expropriating Abitibi's assets and made known its intent to undertake remediation of the expropriated lands. It then issued a series of orders requiring the company to conduct that remediation.

[35] The chambers judge presiding in the *CCAA* proceeding found that when the remediation orders were issued, it was fully expected that the government would be remediating the Abitibi sites. The purpose of the orders was to obtain funds from the Abitibi estate to defray the cost of remediation.

[36] The Supreme Court affirmed that an environmental remediation order can constitute a monetary claim in some circumstances. When it does, it is subject to resolution within an

insolvency proceeding, and has no higher priority than that accorded to environmental claims in the *CCAA vis-à-vis* the claims of other creditors.

[37] To determine whether an environmental protection order is, in substance, a provable claim, the Court must assess: (1) whether the regulator has advanced a claim as a creditor; (2) whether the asserted debt, liability or obligation, existed at the time of insolvency; and (3) whether it is possible to assign a monetary value to the claim: at para 26. The Court held that each criterion was met given the findings of fact made by the *CCAA* court.

[38] Accordingly, the Newfoundland and Labrador claim was subject to the *CCAA* proceeding, and the priorities established under the *CCAA*: at para 19.

3. *Redwater*

[39] While not necessarily inconsistent with the reasoning of the Alberta Court of Appeal in ***Northern Badger***, the approach used in ***Abitibi*** created uncertainty regarding the treatment of abandonment and reclamation orders in insolvency proceedings for Alberta oil and gas companies.

[40] Although subject to environmental laws of general application, the primary regulator of oil and gas exploration and production activities in Alberta is the AER, a successor to the ERCB involved in the ***Northern Badger***. The AER administers a program designed to ensure, at the licencing (and licence transfer) stage, that operators will have sufficient liquidity to meet end-of-life obligations at wells, production facilities and pipelines. When an insolvency occurs, the AER may, as a matter of practice, participate in the proceedings as an interested party, including reviewing proposed asset dispositions and deciding on licence transfer requests. It may also issue formal abandonment and reclamation orders. If licences are ultimately turned back to the AER by a receiver as unmarketable, the abandonment and reclamation responsibility transfers to the OWA.

[41] The OWA is established under Alta Reg 45/2001. It operates under the aegis of the AER, and is jointly funded by government and industry.

[42] Given the Supreme Court's reasoning in ***Abitibi***, it was uncertain whether ARO's would in substance constitute provable claims in an insolvency or create binding but non-monetary regulatory obligations. If the former, the AER would be subject to the proof of claim and priorities process. If the latter, its orders would need to be complied with to the extent possible before distribution of funds and creditors.

[43] This uncertainty was addressed in ***Orphan Well Association v Grant Thornton Ltd***, 2019 SCC 5 [***Redwater***].

[44] Redwater was an oil and gas exploration and production company. It owned a variety of wells, production facilities and pipelines. Some had value greater than their estimated abandonment and reclamation costs. Some did not.

[45] On insolvency, Redwater's receiver sought approval of a sales process that would allow the receiver to sell economic assets and renounce and disclaim uneconomic assets. The AER responded with abandonment orders for the assets which the receiver sought to renounce. The chambers judge declared that disclamation was allowed and the receiver was not subject to any obligations under the Abandonment Orders for disclaimed assets pursuant to s. 14.06(4)(a)(ii)

and (c) of the *BIA*. The chambers judge concluded that, in the circumstances, the Abandonment Orders were intrinsically financial according to the ***Abitibi*** test and therefore subject to the statutory claims and priorities process.

[46] The Alberta Court of Appeal upheld the decision of the chambers judge: ***Orphan Well Association v Grant Thornton Limited***, 2017 ABCA 124. Speaking for the majority, Slatter J.A. found that there was sufficient certainty of abandonment and reclamation taking place. The AER was a creditor notwithstanding the interposition of the OWA in the eventual abandonment and reclamation activities themselves. Justice Martin (as she then was) disagreed, stating as follows:

> 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 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. On appeal to the Supreme Court, it was held that the Abandonment Orders did not fit within the ***Abitibi*** test. The AER was acting as a regulator, in pursuit of the environmental protection, not as a creditor, who stood directly gain in the outcome, as was the case in ***Abitibi***.

[47] The Supreme Court of Canada overturned the Court of Appeal, agreeing with the dissent. Chief Justice Wagner, for the majority, explained at paras 135 and 136:

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

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

[48] In making this finding, the Supreme Court made it clear that the basic legal and policy considerations articulated in ***Northern Badger*** had not changed and did so with specific reference to Alberta's orphan well program. It is clear therefore that abandonment of oil and gas wells in Alberta is considered an overarching public duty. The Regulator does not become a creditor in enforcing such obligations and is not advancing a "non-provable" claim against the estate on behalf of the public. The Regulator may become a creditor if it incurs costs and asserts a statutory debt, but that is a choice for the Regulator to make.

[49] These underlying legal and policy principles were reinforced and restated in a recent decision of the Alberta Court of Appeal, ***Manitok Energy Inc (Re)***, 2022 ABCA 117 [***Manitok***].

4. *Manitok*

[50] The chambers judge in ***Manitok*** approved a proposed sales process in which the receiver of an oil and gas company would apply the sales proceeds of a group of wells and production facilities against the abandonment and reclamation costs of those assets only, leaving a surplus to be distributed to creditors. Other uneconomic assets would be disclaimed and turned back to the AER/OWA. The chambers justice found that such an approach was consistent with ***Redwater***, based on findings made by the Supreme Court of Canada at para 159, where it stated:

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

> requirements did not seek to force Redwater to fulfill end-of-life obligations with assets unrelated to the environmental condition or damage. In other words, recognizing that the Abandonment Orders and LMR requirements are not provable claims in this case does not interfere with the aims of the *BIA* — rather, it facilitates them.

[51] On appeal, the Alberta Court of Appeal noted that para 159 of ***Redwater*** presents interpretational challenges. Notwithstanding those challenges, it remained that the division of assets and liabilities endorsed in chambers would undermine the basic principles articulated in ***Northern Badger*** and ***Redwater*** and could not be endorsed. At para 29, the Court writes:

> This interpretation would render ***Redwater*** meaningless. If the proceeds of the sale of the bankrupt corporation's valuable assets cannot be used to reclaim "unrelated assets" there would never be any proceeds available to satisfy public abandonment and reclamation obligations. The assets that are going to be disclaimed by a receiver or trustee because they are overwhelmed by abandonment and reclamation obligations are always going to be "unrelated" under this approach. The disclaimed and orphaned assets cannot, by definition, be sold because of their abandonment and reclamation obligations. Unless the sale proceeds of the valuable assets are available to satisfy those obligations, they can never be satisfied.

[52] Intervenor municipalities argued in ***Manitok*** that the phrase "assets unrelated to environmental condition or damage" used in ***Redwater*** means that the proceeds or value of non-oil and gas assets are not available for the satisfaction of abandonment and reclamation obligations: at para 33. The Court acknowledged at paras 35 and 36 that one could read para 159 of ***Redwater*** as excluding resort to such assets, but expressed skepticism before declining to resolve the issue:

> One could read para. 159 of ***Redwater*** as excluding resort to "unrelated" non-oil and gas assets to cover abandonment and reclamation costs. However, as was pointed out by the Orphan Well Association, the reasons in ***Redwater*** refer repeatedly to the "assets of the estate", without drawing any such distinction: see for example ***Redwater*** at paras. 76, 102, 107, 114. Further, there is no clear boundary between licensed assets and other assets. For example, the sale to Persist (like many similar sales) included not only licensed assets but oil and gas rights, royalty rights, intellectual property, seismic data, vehicles and other chattels. ***Redwater*** gives no support to the municipalities' argument.
>
> In the final analysis, the assets sold to Persist appear to be indistinguishable from the type of assets that the trustee in ***Redwater*** sold. ***Redwater*** confirms that the proceeds of the sale of those assets must be applied first towards the satisfaction of abandonment and reclamation obligations. To the extent that there is any issue about it, the status of assets completely unrelated to the oil and gas business can be left for another day.

VI. Is the Receiver Obligated to Pay Municipal Taxes Post-Insolvency?

[53] Although the Court of Appeal left the door slightly open for municipalities to argue that not all assets of an insolvent oil and gas are subject to the AER super priority, the Municipalities

in this proceeding do not do so. Nor do they dispute the fundamental finding in ***Redwater***: that the ARO must be addressed by a Receiver to the extent reasonably possible and this must be done before distributions can be made. (Hence the term "super priority").

[54] Rather, the Municipalities argue that the remaining funds should be shared with them because:

1. This case involves competing entitlements to proceeds by entities having non-provable claims, the AER claim pursuant to ***Redwater*** and the Municipalities claim for unpaid post-insolvency taxes under the *MGA*, with both claimants having a public interest mandate and neither having priority over the other. Hence, the benefits should be shared.
2. The Receiver was obligated to pay property tax on Trident's assets from its appointment to the date of sale or transfer back to the AER, as a Receivership expense. As an officer of the Court, the Receiver is bound to pay those as they accrue during the receivership.
3. Receivers are appointed pursuant to the *Judicature Act*, so the court may order an equitable division of remaining proceeds in the proportions it sees fit.

[55] The AER/OWA do not dispute that the municipal taxes continued to accrue post-insolvency. Rather, the AER/OWA argue that the Receiver is not required to pay the municipal taxes outside of the priority scheme because:

1. The AER/OWA do not compete with the municipal taxes for priority. ARO is paid in priority because it is a non-monetary regulatory order, not a non-provable claim. Municipal taxes, as a non-provable claim, are subject to the priority sequence.
2. The Receiver is not liable to pay the municipal taxes because they are not "necessary costs of preservation" as the assets were not operated and payment of the taxes would not be for the benefit of all parties. And in any event, it is too late for the Municipalities complain that economic assets were sold without adjustment for municipal taxes. The time for such complaints was when the sales process was presented to the Court for approval.
3. Fairness and equity are not justifications to disregard clear and established principles which govern insolvency.

A. Does the Obligation to Pay Municipal Taxes Post-Receivership Confer a Priority on Municipal Governments that is Parallel to the Super Priority of the AER/OWA?

[56] The municipal taxes owed by Trident may be considered in three categories based upon when the taxes arise. The taxes arise either pre-insolvency, post-insolvency, or post-sale of the assessed assets.

[57] The Municipalities acknowledge that the municipal taxes owing when the Receiver was appointed constitute debts that would need to be proved. As there will be no proceeds available for provable claims, the Municipalities would receive nothing for these claims, even though they

have statutory priority against creditors other than the Crown (which includes the AER) under the *MGA*: s. 348(c).

[58] Similarly, the Municipalities also recognize that the post-sale municipal taxes constitute debts payable by the purchasers of Trident's assets. A claim for those taxes in bankruptcy, if it was ever to arise, would likely also constitute a provable claim against the purchaser subject to the priority scheme.

[59] However, in the interim period, bookended by periods of taxes as provable claims, the Municipalities argue that post-insolvency municipal taxes become non-provable claims subject to a super priority similar to ARO. This is because both the AER/OWA and the Municipalities have a public interest mandate and the Receiver has an obligation to pay municipal taxes, particularly for assets whose operation is simply suspended pending sale rather than destined for abandonment. Therefore, the municipal taxes should similarly be paid outside and in advance of the insolvency regime. The Municipalities point to the ***Manitok*** insolvency as an example of such payments being made pursuant to the sales process presented to and approved by the court.

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

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

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

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

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

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

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

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

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

[68] The Municipalities argue that municipal taxes can and should be paid by a Receiver as part as "necessary cost of preservation of assets," and the public interest: See ***Toronto Dominion Bank v Usarco Ltd*** **(1997)**, 50 CBR (3d) 127, 1997 CanLII 12417*;* ***Hamilton Wentworth Credit Union Ltd v Courtcliffe Parks Ltd*** **(1995)**, 23 OR (3d) 781, 1995 CanLII 7059; ***Robert F Kowal Investments Ltd et al v Deeder Electric Ltd*** **(1975)**, 9 OR (2d) 84, 59 DLR (3d) 492 [***Kowal Investments***]. The Municipalities conclude that:

> The unique difficulty here is that because both unpaid post-insolvency taxes and unfunded ARO constitute non-provable claims, we essentially have a priorities contest involving two interests that dwell outside the priorities scheme.
>
> The Municipalities agree with the Receiver that there is no legislation nor reported court decisions which give guidance as to how these non-provable claims should be treated as against each other. This makes allocating funds between these claims, which are not "provable claims", a somewhat novel exercise.

[69] The AER/OWA dispute that the payment of post-insolvency municipal taxes was a necessary cost of preservation of estate assets. They say that such costs were not necessary to allow assets to be operated, as the Receiver chose not to operate any of the assets—whether

marketable or otherwise. Among other considerations, the Receiver did not want to be exposed to any liabilities as an operator. They also argue it cannot be said that payment of property taxes was necessary to preserve assets as that concept is discussed in the case law.

[70] In ***Kowal Investments***, the Ontario Court of Appeal explained that "necessary costs of preservation" is one of three exceptions to the rule that receivers may not incur expenses on behalf of the estate, at the expense of creditors:

> To qualify, the payments must benefit all parties to the receivership, such as costs to maintain and repair property . . . or otherwise prevent destruction, waste or loss of property, including to prevent tax seizure.

[71] In ***Invictus***, this Court found that receiver/managers may be personally liable for post-receivership municipal taxes, in the same way as they may be personally liable for new contracts they enter into with third-parties in relation to the business, subject to a correlative right to be indemnified for those expenses out of the estate assets: ***Alberta Treasury Branches v Invictus Financial Corporation***, ABQB Edmonton No 8303 13970, at para 63 [***Invictus***].

[72] The Receiver here was not a receiver/manager as was the case in ***Invictus***. Nor was it legally or practically necessary to pay post-insolvency municipal taxes in order to preserve assets of the estate for the overall benefit of its creditors.

[73] The treatment of municipal taxes was part of the sales process presented to and approved by the Court. This was described in the Receiver's 8th report as follows:

> The Receiver determined it was uneconomic to operate Trident's assets after considering the associated costs, including post-filing property taxes, and therefore focused efforts on the safe shut-in of Trident's assets prior to initiating the Sales Process for the benefit of Trident's stakeholders. In the Receiver's view, and as described at length above, this was not an ordinary course receivership.

[74] The sale of marketable assets without adjustment for municipal taxes (pre- or post-insolvency) was also approved by the Court as the insolvency progressed, with notice to affected municipalities. The Municipalities did not oppose the sales process application, nor any subsequent application for approval of specific assets sales.

[75] It follows that payment of post-insolvency municipal taxes was not necessary to preserve Trident's exploration and production assets. On the contrary, the non-payment of such taxes made the assets more marketable to solvent companies, and hence more likely to generate economic benefits (and taxes) for host municipalities and landowners following resumption of production.

C. Does Fairness and Equity Justify Payment of the Municipal Taxes?

[76] Even if funds were available for distribution to the Municipalities, I would have been reluctant to order a distribution based on my jurisdiction under the *Judicature Act*. I agree with the AER/OWA, that the Municipalities' entreaties in this regard have been made too late.

[77] The proceeds of sale of Trident assets were from the outset intended to be used to reduce Trident's legacy abandonment and reclamation obligations, and by extension those of the Orphan Well program under Alberta's scheme for management of a province and industry wide problem. The OWA applied for the Receivership of Trident with that objective being clearly stated. The

Court approved the proposed plan, including the sales process and individual sales, free and clear of claims and encumbrances.

[78] Had the Municipalities taken issue with the sales process when first proposed, it is possible that municipal taxes may have been treated differently within this Receivership proceeding. They (and perhaps others) may have proposed a formula similar to that which they say was used in ***Manitok*** (although in ***Manitok***, the Receiver operated a number of producing assets for a number of years). Such a proposal may have been acceptable to the OWA and others, and if not, may have approved by the Court over the OWA's objection particularly if a financial case could be made for such treatment. They did not do so.

[79] Therefore, even if these were funds available for an "equitable" distribution I would not have made such an order.

VII. Conclusion

[80] In response to the request for advice and directions by the Receiver, I direct that the remaining funds will be distributed to the AER for use by the OWA. This includes proceeds of sale of non-licenced assets such as real estate and equipment.

[81] Although I do not accept the Municipalities' request to share in the remaining funds, I agree with the Municipalities that the non-payment of municipal taxes on certain oil and gas assets that are shut-in pending sale or transfer to the OWA appears to place rural municipal governments in a very unfair position *vis-à-vis* the Province of Alberta. Counsel explained that the provincial assessor includes such assets when determining the assessed value of properties in a rural municipality and removes them from the assessment roll only after abandonment is complete. Municipalities must use those assessed values in setting taxes for their rate payers to meet their budgetary requirements and education-related remissions back to the Province even though they may have no opportunity to recoup taxes from the assets in question.

[82] Although not directly in issue in this case, it seems to me that is there is a structural unfairness at play here from a municipal taxation and finance perspective as between the provincial government and rural municipalities. If that is indeed the case, it needs to be addressed by the Province of Alberta.

[83] As the application for advice and directions was made in the context of addressing issues of precedential value, there will be no costs awarded.

Heard on the 20th day of September, 2022.
Dated at the City of Calgary, Alberta this 13th day of December, 2022.

R.A. Neufeld
J.C.K.B.A.

TAB 3

Court of Appeal for Saskatchewan
Docket: CACV3427

Citation: *MNP Ltd. v Wilkes*, 2020 SKCA 66
Date: 2020-05-29

Between:

MNP Ltd., receiver of King Edward Apartments Inc. and Atrium Mortgage Investment Corporation

Applicants to Strike/Respondents on Time and Leave/Prospective Respondents

And

Cameron Wilkes, Hee Jung Koh, Allan Hall, and Bonnie Hall

Respondents on Strike/Applicants to Extend Time and for Leave/Prospective Appellants

And

Holly Wilkes, Trent Fraser, Gaye Fraser, Dev Francis, Glenda Francis, Richard Coupal, Joanne Coupal, Ed's Backhoe Service Inc., City Wide Paving Ltd., Superior Homes, LCC, 101141214 Saskatchewan Ltd., Double Star Drilling (Saskatchewan) Ltd., De Integro Investment Group Inc., A-1 Rent-Alls Ltd., Cormode & Dickson Construction (Southern SK) Ltd., Certified Plumbing & Heating Ltd., KF Kambeitz Farms Inc., Rob Seay, and Voltz Electric Inc.

Interested Parties

Before:	Jackson, Caldwell and Tholl JJ.A.
Disposition:	Application to strike dismissed; application to extend time to appeal granted; application for leave to appeal dismissed as unnecessary
Written reasons by:	The Honourable Madam Justice Jackson
In concurrence:	The Honourable Mr. Justice Caldwell The Honourable Mr. Justice Tholl
On application from:	QB 2905 of 2016, Regina
Applications heard:	October 7, 2019
Counsel:	Curtis Onishenko for Cameron Wilkes et al. Jeffrey Lee, Q.C., for MNP Ltd. Jared Epp for Atrium Mortgage Investment Corporation Jacey Safnuk for Superior Homes, LLC

Jackson J.A.

I. Introduction

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

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

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

[4] On April 16, 2019, a judge of the Court of Queen's Bench sitting in Chambers approved the sale of the KEAI Lawsuits to Atrium for $200,000 (*Atrium Mortgage Investment Corporation v King Edward Apartments Inc*. (16 April 2019) Regina, QBG 2905 of 2016 (QB) [*Chambers Decision*]). On May 15, 2019, the Wilkes Group filed a notice of appeal of the *Chambers Decision*. By filing on that date, the Wilkes Group missed the appeal window. Rule 31(1) of the *General Rules* requires all appeals and applications for leave to appeal under s. 193 of the *BIA* to be brought within ten days.

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

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

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

II. Primary Provisions of the *BIA* and the *General Rules*

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

Definitions

2 In this Act, …

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

…

Appeals

Court of Appeal

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

Définitions et interprétation

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

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

…

Appels

Cour d'appel

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

Date	Action
February 7, 2019	The receiver sent Atrium's proposal to buy the KEAI Lawsuits to all parties on the service list in the receivership proceedings. The receiver invited all parties on the service list to submit a superior cash offer to purchase the KEAI Lawsuits on or before February 21, 2019. No bids were forthcoming.
March 22, 2019	The receiver applied in the Court of Queen's Bench Chambers for an order approving the sale of the KEAI Lawsuits to Atrium for $200,000. The Wilkes Group opposed the sale.

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

IV. Issues

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

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

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

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

V. The Right of Appeal Under s. 193

[17] The receiver's position is that the Wilkes Group was required to obtain leave to appeal under s. 193(e) because none of the other categories contained in s. 193(a) through s. 193(d) of the *BIA* apply. As to the application of s. 193(c) to this case, the receiver asserts that the law has changed. Whereas at one time s. 193(c) may have been given a wide and liberal interpretation, the receiver submits that it now must be construed narrowly. In support of its position, the receiver relies on, *inter alia*, *Alternative Fuel Systems Inc v Edo (Canada) Ltd. (Trustee of)*, 1997 ABCA 273 (CanLII) [*Alternative Fuel*], and *2403177 Ontario Inc. v Bending Lake Iron Group Limited*, 2016 ONCA 225 at para 45, 396 DLR (4th) 635 [*Bending Lake*]. The position of the Wilkes Group is that they have an appeal as of right under s. 193, such that they are not required

to obtain leave to appeal. They do not seriously assert a right of appeal under any of the other clauses of s. 193 other than s. 193(c) – "the property involved in the appeal exceeds in value ten thousand dollars". In support of its position, the Wilkes Group relies on *Trimor Mortgage Investment Corporation v Fox*, 2015 ABCA 44, 26 Alta LR (6th) 291 (in Chambers) [*Trimor*], and the decisions referred to therein.

[18] Unhindered by prior case law, and applying the principles of statutory interpretation, I would conclude that Parliament signaled a right of appeal under s. 193(c) that eliminates only a narrow class of cases from appellate review. Indeed, that is the approach that has been taken by this Court in the few cases from this jurisdiction: *Saskatoon Sound City Ltd. (Bankrupt), Re* (1989), 80 Sask R 226 (CA) at para 1, and *Rocky Meadows Transport Ltd. v Double D Construction Ltd.* (1999), 177 Sask R 264 (CA) at para 5. See also *Wong v Luu*, 2013 BCCA 547, [2014] 4 WWR 504 (in Chambers), where the judge made these *obiter* comments regarding the breadth of s. 193(c): "The right of appeal under the *Bankruptcy and Insolvency Act* is broad, generous and wide-reaching. A right of appeal exists, for example, in respect of any matter if the property in question has a value greater than $10,000. This can hardly be thought of as a limited right of appeal; to the contrary, the bar is set low indeed" (at para 23).

[19] That said, in recent times in particular, there has arisen a large body of case law regarding not only s. 193(c) but the interpretation of s. 193 generally. By way of a broad overview of this case law, there has been a steady narrowing of two of the separate categories of rights of appeal in s. 193. For example, since *Elias v Hutchinson* (1981), 121 DLR (3d) 95 (Alta CA), there have been few cases grounding a right of appeal in future rights under s. 193(a). On this point, see Kenneth David Kraft and Ethan Chang, *The Judge Got It Wrong? A Look at the Appeal Provisions of the BIA*, (2016) Ann Rev Insolv Law 15 at 615–642 (WL). According to these authors, the "only matter that appears unquestionably to be a 'future right' is the grant, or refusal to grant, of a bankruptcy order".

[20] Similarly, the phrase "if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings" in s. 193(b) is now confined to similar cases in the context of the specific bankruptcy before the court: *Camirand Ltée c Gagnon* (1924), 5 CBR 518 (Que CA), see also *Norbourg Asset Management Inc., Re*, 2006 QCCA 752 at paras 9–11, 33 CBR

(5th) 144. Only s. 193(d) is interpreted precisely according to its terms, which provides a right of appeal "from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars".

[21] The overarching issue presented by the applications before the Court is how s. 193(c) should be interpreted; and, in point of fact, whether it should be interpreted in a like manner to s. 193(a) and s. 193(b) so as to narrow access to the appeal court when a decision is made under the *BIA*. On this issue, the jurisprudence reveals two approaches as to how s. 193(c) might be interpreted.

A. Two approaches to interpretation

1. *Orpen–Fallis* line of authority

[22] The Wilkes Group relies on a line of authority stemming from *Orpen v Roberts*, [1925] 1 SCR 364 [*Orpen*]. In *Orpen*, on a preliminary motion, the Registrar of the Supreme Court of Canada had been called upon to interpret s. 39 of *The Supreme Court Act*, SC 1906, c 139, as amended by *An Act to amend the Supreme Court Act*, SC 1920, c. 32, to read as follows:

> **Restrictions.**
> **39.** Except as otherwise provided by sections thirty-seven and forty-three, notwithstanding anything in this Act contained, no appeal shall lie to the Supreme Court from a judgment rendered in any provincial court in any proceeding unless, —
>
> **Value over $2,000.**
> *(a)* the amount or value of the matter in controversy in the appeal exceeds the sum of two thousand dollars; or,
>
> **Special leave.**
> (b) special leave to appeal is obtained as hereinafter special provided.
>
> RS c 139, ss 46, 48 and 49 in part.
>
> (Emphasis added)

[23] In applying this provision to determine whether the Court would have jurisdiction over an appeal from a *quia timet* action, the Registrar held that "in all *quia timet* actions relief can be given in this court, although the damages have not yet been incurred, if in consequence of the judgment in appeal they would amount to more than $2,000" (*Orpen* at 367). The reported decision records the words of the Court dismissing the appeal from the Registrar's decision (at 367):

> An appeal taken from the order made by the registrar was dismissed. The court said the subject matter of the appeal is the right of the respondent to build on the street line on Carlton street in the city of Toronto. "The amount or value of the matter in controversy" (section 40) is the loss which the granting or refusal of that right would entail. The evidence sufficiently shows that the loss – and therefore the amount or value in controversy – exceeds $2,000.
>
> (Emphasis added)

[24] A long line of authority maintained the *Orpen* interpretation of *The Supreme Court Act*, as long as that Court's jurisdiction depended on a monetary limit, and has influenced the interpretation of similar statutes. *Fallis v United Fuel Investments Limited*, [1962] SCR 771 [*Fallis*], is the leading exemplar of this line.

[25] In *Fallis*, the Supreme Court of Canada was interpreting s. 108 of the *Winding-up Act*, RSC 1952, c 296, which provided access to the Supreme Court of Canada in these terms:

> **Appeal to Supreme Court of Canada**
>
> **108.** An appeal, if the amount involved therein exceeds two thousand dollars, lies by leave of a judge of the Supreme Court of Canada to that Court from the highest court of final resort in or for the province or territory in which the proceeding originated.

[26] On an application to quash an order granting leave to appeal to the Court under s. 108, Cartwright J. for the Court held that the "test to be applied in determining whether there is an amount involved in the proposed appeal exceeding $2000 is that set out in the judgment of this Court in *Orpen* …" (at 774), i.e., what is the loss which the granting or refusal of that right would entail. It was accepted in *Fallis* that if the winding-up order were maintained the holders of the class "B" preferred shares would receive no more than $30 per share. In response to this evidence, the appellant, Mr. Fallis, had filed an affidavit "shewing that he is the owner of more than 1200 of the Class 'B' Preference shares and expressing the opinion that but for the order winding-up the company the market price of the Class 'B' shares would now exceed $80 per share" (at 773–774). With no contradiction of this evidence, and applying the *Orpen* test to those facts, the Supreme Court held that the appeal did involve more than $2,000 so as to bring it within the jurisdiction of the Court as fixed by s. 108.

[27] All of the decisions that grant or refuse leave by focussing on the value of the property involved in the appeal as those words are used in s. 193(c) of the *BIA*, as opposed to some other question, are applications of the *Orpen–Fallis* test. A good example of the application of the *Orpen–Fallis* line of cases by provincial appeal courts determining jurisdiction under s. 193(c) is

McNeill v Roe, Hoops & Wong (1996), 71 BCAC 213 (CA) [*McNeill*], which the Chambers judge aptly summarizes in *Galaxy Sports Inc. v Abakhan & Associates Inc.* (2003), 183 BCAC 192 (CA) [*Galaxy*], as follows:

> [12] … Finch J.A. (as he then was) [in *McNeill*] made the following helpful comments on behalf of the Court:
>
> > [11] An appeal lies as of right under s. 193(c) "… if the property involved in the appeal exceeds in value ten thousand dollars". In *Fallis et al. v. United Fuel Investments Ltd.* (1962), 4 C.B.R. (N.S.) 209, the Supreme Court of Canada considered the meaning of the words "amount involved" where they appeared in s. 108 of the *Winding-up Act*, R.S.C. 1952, c. 296. The court adopted the test enunciated in *Orpen v. Roberts*, [1925] S.C.R. 364, [1925] 1 D.L.R. 1101, namely that: "The amount or value of the matter in controversy, … is the loss which the granting or refusal of that right would entail" (*Fallis* at 211). In a comment following the report of this case in the *Canadian Bankruptcy Reports*, it was said that the meaning of "amount involved" in the *Winding-up Act* was substantially the same as the meaning of "property involved" in the *Bankruptcy Act*. That interpretation has been adopted by Mr. Justice Hollinrake in *Ng v. Ng* (3 February 1995), Vancouver CA019800 (B.C.C.A.); by Mr. Justice Macfarlane in *Re Scott Road Enterprises* (1988), 68 C.B.R. (N.S.) 54 at 58 (B.C.C.A.); and by Mr. Justice Macdonald in *Kenco Developments Ltd. v. Miller Contracting Ltd.* (1984), 53 C.B.R. (N.S.) 297 (B.C.C.A.). I can see no reason to do otherwise.
>
> [13] Finch J.A. referred to the definition in s. 2 of the *Act* as including "money" and observed, at para. 13, that "the 'property involved in the appeal' … may be determined by comparing the order appealed against the remedy sought in the notice of appeal". He concluded that, since the conditional discharge required the bankrupt to pay $168,750 to the creditors and he sought a variation to require him to pay only $40,000, the loss to the creditors if the appeal should succeed would far exceed the sum of $10,000, and the bankrupt accordingly had an appeal as of right under ss. 193(c) of the *Act*.
>
> [14] Here, in the opinion of the trustee, if the proposal succeeds the creditors will receive substantially more than they will if it is rejected. Further, if the orders made by Madam Justice Brown are not overturned, it is likely that the statutory criteria for acceptance of the proposal by the creditors, which had been met at the creditors' meeting, will not be met at a second meeting, with the result that Galaxy will be deemed to have assigned into bankruptcy. In my view, applying the above test, it follows that there is property of a value in excess of $10,000 involved in the appeals, and Galaxy has an appeal as of right pursuant to ss. 193(c) of the *Act*.
>
> (Emphasis added)

Other British Columbia decisions following *McNeill* and *Galaxy* include *Kostiuk (Re)*, 2006 BCCA 371, [2006] 10 WWR 259 [*Kostiuk*], and *Farm Credit Canada v West-Kana Farms Ltd.*, 2014 BCCA 501, 68 BCLR (5th) 333.

[28] Two decisions outside of British Columbia bear particular mention: *Roman Catholic Episcopal Corporation of St. George's v John Doe - 49 - GBS*, 2007 NLCA 17, 265 Nfld & PEIR 49 (in Chambers) [*John Doe*], and *Trimor*, relied on by the Wilkes Group, and recently receiving favourable commentary in *1905393 Alberta Ltd. v Servus Credit Union Ltd.*, 2019 ABCA 269 at para 26, 72 CBR (6th) 20 [*Servus*].[1]

[29] In *John Doe*, which follows *McNeill* as discussed in *Galaxy*, the Court dealt with a case where victims of sexual abuse had given proofs of claim to the trustee who rejected them on the basis that they had been filed after the claims bar date. On appeal, the issue of s. 193(c) was raised and the Court dealt with the matter as follows:

> [24] With respect to the argument of the Trustee that it is entitled to appeal as a matter of right because the property involved exceeds in value $10,000.00, counsel for the four respondents argues that the decision of the bankruptcy judge is procedural only and does not involve any sum of money. He submits that the bankruptcy judge made no determination as to entitlement of any of the respondents and, therefore, the issue in the appeal is only as to procedure. He also argues that there was no "property in peril" in the decision of the bankruptcy judge, and for that reason also, paragraph (c) is inapplicable.
>
> [25] On examination of the actual words of paragraph (c), I am unable to accept either of the arguments of counsel for the four respondents. Admittedly there was no "property in peril" but, in my view, the statute does not require a prospective appellant to establish property to have been in peril in the decision intended to be appealed. …
>
> …
>
> [27] Relying on that definition, and applying the test adopted in *Fallis*, I can only conclude that "the loss which the refusal of a right of appeal would entail" in this case is clearly more than $10,000.00. From the point of view of Class 1 creditors, Class 3 creditors, and the Corporation, the loss is potentially $2,000,000.00. The Proposal, as noted above, provides that any funds in the Class 4 creditors trust fund not required for Class 4 creditors are to be available: first, for the Class 1 creditors; second, for the Class 3 creditors; and any residue for the Corporation. Unquestionably, refusal of a right of appeal potentially involves their interests in a significant sum of money. The Trustee is obligated to protect the interests of those parties to the Proposal, in the assets realized. In my view, therefore, the Trustee has a right of appeal pursuant to paragraph (c) of section 193.
>
> (Emphasis added)

[30] In *Trimor*, the respondents were preferred shareholders of a debtor that had received a default judgment in the amount of $272,000 arising from a claim alleging breach of their

[1] In *Servus*, among other matters, leave to appeal was granted to determine whether s. 193(a) or s. 193(c) obviated the need to apply for leave to appeal. When the matter was heard, the Alberta Court of Appeal found it unnecessary to address that question (see *Pricewaterhousecoopers Inc v 1905393 Alberta Inc.*, 2019 ABCA 433 at para 19, 98 Alta LR (6th) 1).

shareholders' agreement, a breach of fiduciary duty by the bankrupt, fraud, misrepresentation and unlawful enrichment. The trustee disallowed the claim, taking the position that it had not been adjudicated. On application by the respondents, a Court of Queen's Bench Chambers judge found neither the court nor the trustee had the authority to challenge the default judgment. On the trustee's appeal, the respondents challenged the trustee's assertion that it had an appeal as a matter of right.

[31] Applying *Orpen* and *Fallis*, and the line of authority based on these two decisions, the appeal court Chambers judge determined that the issue on appeal would be whether the trustee had the authority to consider the merits of the claim underlying the default judgment. In finding the appeal fell squarely within s. 193(c), the Chambers judge made these two statements of particular relevance to the applications before this Court:

(a) "the amount or value of the matter in controversy is the loss which the granting or refusal of that right would entail" (at para 8); and

(b) "[t]he focus of the inquiry under s 193(c) is the amount of money at stake" (at para 10).

Since the amount of money at stake was $272,000, the trustee had an appeal as of right.

[32] Other authorities in the *Orpen–Fallis* line, which refer to the principles mentioned in those cases, include *Newfoundland and Labrador Refining Corporation v IJK Consortium*, 2009 NLCA 23, 52 CBR (5th) 8 [*IJK Consortium*], and *Temple Consulting Group Ltd. v Abakhan & Associates Inc.*, 2011 BCCA 540 at paras 7–8, 90 CBR (5th) 155 [*Temple Consulting*].

[33] Particular note should be made of the approach in Quebec. A modern authority in Quebec is *Wener c Groupe Cantrex inc.*, 1993 CanLII 4171 (Que CA) [*Wener*]. *Wener* relies on *Fogel v Grobstein* (1945), 26 CBR 248 (WL) (Que KB) at paras 27–32 [*Fogel*], which preceded *Fallis*. In *Fogel*, a trustee in bankruptcy sold the assets and business of the bankrupt as a going concern, including the unexpired term of the lease and the right of option to renew it for a further period of five years. The landlord objected to the lease being sold. The Court held that the appeal did not come within s. 193(c). Justice Barclay, as part of a five-judge panel, indicated that the Quebec Court of Appeal had interpreted s. 193(c) as meaning "the value in jeopardy" (at para 6).

For similar decisions see *Charron c Charron*, 2020 QCCA 154 at para 6 (in Chambers), and *Pelletier c CAE Rive-Nord*, 2018 QCCA 1070 at para 1 (in Chambers).

[34] In an annotation to the reported decision in *Fallis*, the editors of the *Canadian Bankruptcy Reports* placed *Fogel* in the *Orpen–Fallis* line of authority (4 CBR (ns) 209 (WL)), as per this quote:

> **Annotation**
>
> [*Fallis*] has important implications so far as the *Bankruptcy Act* is concerned. Under s. 150(c) of the *Bankruptcy Act* an appeal lies to the Court of Appeal in bankruptcy matters if the property involved in the appeal exceeds in value $500. Section 108 of the *Winding-up Act* refers to "amount involved" rather than "property involved" but the meaning would appear to be substantially the same. Prior to the 1949 amendment the *Bankruptcy Act* also used the phrase "amount involved". See R.S.C. 1927, c. 11, s. 174(1)(c).
>
> In the case of *In re Andrew Motherwell Ltd.*, 5 C.B.R. 107, 55 O.L.R. 294, 3 Can. Abr. 594 the Ontario Court of Appeal following the *Cushing-Sulphite* [(1906), 37 SCR 427] case held that a monetary sum must be involved. In a number of subsequent cases it was decided that it was not necessary that the amount involved be represented by dollars but it was sufficient if the appellant could show that his rights might be affected in an amount exceeding $500: *Re Maple Leaf Brewery Ltd.* (1938), 20 C.B.R. 137, 65 Que. K.B. 304, 1 Abr. Con. (2nd) 448; *In re Succession Pierre Tetreault* (1947), 28 C.B.R. 224, 1 Abr. Con. (2nd) 448. On this basis "amount involved" or "property involved" means "amount in jeopardy" not that a monetary sum of $500 must be involved: *Fogel v. Grobstein*, 26 C.B.R. 248, [1945] Que. K.B. 571, 1 Abr. Con. (2nd) 447; *Deslauriers v. Brunet (Vermette)*, 30 C.B.R. 77, [1949] Que. K.B. 629, 1 Abr. Con. (2nd) 443.
>
> In Duncan & Honsberger "Bankruptcy in Canada" 3rd ed., at p. 853, it is stated: "The decisions in which it has been held that there is jurisdiction under this subsection cannot all be reconciled." [*Fallis*] would appear to have overcome this difficulty. It would seem that the *Andrew Motherwell* and *Cushing* cases are no longer good law. If the loss, which the granting or refusing of the right claimed, exceeds $500 then there will be an appeal.
>
> (Emphasis added)

See also *Ng v Ng* (1995), 54 BCAC 307 (CA) [*Ng*], where the Chambers judge quoted the above passages from the *Canadian Bankruptcy Reports* in support of a conclusion that an appeal from a decision preventing the spouse of a bankrupt from pursuing an action to enforce a separation agreement was an appeal falling in s. 193(c) because "the property involved in the lawsuit that the appellant seeks to continue by order of the court is in excess of $10,000" (at para 14).

[35] A concise synthesis of much of the above case law may be found in Janis P. Sarra, Geoffey B. Morawetz and the L.W. Houlden, *The 2019-2020 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2019), as follows:

> "Property involved" means that the property in jeopardy as a result of the judgment must have a value in excess of $10,000, but it is not necessary that the judgment be for a monetary sum of $10,000: *Fogel v. Grobstein* (1945), 26 C.B.R. 248 (Que. C.A.); *Drislauriers v Brunet (Vermette)* (1949), 30 C.B.R. 77 (Que. C.A.); *Apex Lumber Co. v. Johnstone* (1925), 7 C.B.R. 157 (B.C. C.A.). In *Fallis v. United Fuel Investments Ltd*., [1962] S.C.R. 771, 4 C.B.R. (N.S.) 209, 34 D.L.R. (2d) 175, the court said that the proper test is: What is the loss that the granting or refusing of the right claimed will entail?
>
> (Emphasis added)

2. *Alternative Fuel–Bending Lake* approach to s. 193(c)

[36] As I have indicated, the receiver relies on *Alternative Fuel* and *Bending Lake*. Before considering these decisions, it is convenient to begin with a review of *Coast Shingle Mill Company (Re)*, [1926] 2 WWR 536 (BCCA) [*Coast*], as it is the start of a line of jurisprudence that seems to have been directed at narrowing the type of cases for which there would be a direct right of appeal when the appellant asserts a *claim* of loss, rather than an actual loss. In *Coast*, the issue was whether the judge in the court appealed from had erred by ordering that a matter proceed by way of an action rather than by way of an application brought in Chambers. A five-judge panel of the Court agreed that this was "a question of procedure alone" (emphasis added, at 537) and quashed the appeal. See also *Goupil* (1923), 29 Revue Legale 102, and *Cie de Ste Foye (Re)* (1918), 1 CBR 165 (Que KB).

[37] This line of authority was given new life in *Dominion Foundry Co. (Re)* (1965), 52 DLR (2d) 79 (Man CA) [*Dominion Foundry*]. A three-judge panel of the Manitoba Court of Appeal dealt with an appeal of a decision dismissing a motion (a) to set aside a trustee's proposed sale of the debtor's assets, (b) to restrain the trustee from completing the sale, and (c) directing that a further meeting of the inspectors be held to reconsider the method of advertising the sale. The Court expressed concern that a broad reading of s. 193(c), which at that point had set a threshold of only $500, would, in effect, give automatic rights of appeal in every case (at 81):

> When it comes to a matter of a complete disposition of all of the assets of a bankrupt estate, the question is bound to exceed $500 (otherwise there would be no bankrupt). Also, once the assets of the bankrupt have been disposed of, any future rights of creditors are non-existent, as a general rule. Thus, if we were to construe these two subsections in such a way as to authorize an appeal in this case, it seems to me we would have to do so in every case. There would be an automatic appeal from any judgment respecting the decision of a trustee in bankruptcy to sell all the assets of the bankrupt. This is clearly not intended by the *Bankruptcy Act* when read as a whole, because it would defeat the whole purpose of the *Act*, which provides for a trustee and inspectors and imposes a duty on them to dispose of the assets of the bankrupt and distribute the proceeds amongst the creditors.
>
> (Emphasis added)

[38] The appeal court went on to distinguish *Fallis* (at 83–84):

> I am of the opinion that this decision is readily distinguishable from the case at bar. In the [*Fallis*] case, a voluntary winding-up was sought, and Fallis and his associates clearly established that if the company were wound up their interests in the company (greatly in excess of $2,000) would be in jeopardy.
>
> In the motion before us, we have passed beyond the realm of common law civil dispute. We are now under the statute law of the *Bankruptcy Act*. The company is actually found to be bankrupt and has been placed by the Court in the hands of a trustee with his attendant inspectors advising and assisting in the making of decisions relating to the duties imposed upon the trustee. The methods employed by the trustee and his inspectors to dispose of the assets of the bankrupt have been called in question. This is surely a matter of procedure. With respect, I adopt the language of Chief Justice Macdonald of the British Columbia Court of Appeal in *Re Coast Shingle Mill Co., Limited*, 7 C.B.R. 553, where he says, at p. 554:
>
> > There are a number of cases bearing upon different facts, but on this fact they seem to agree, that where the question is a question of procedure it does not fall within either (a) or (c) of subsec. (2) of sec. 74 [6 C.B.R. 208]; that is to say, no question of future rights arises, nor does any question of a specific sum of money.
> >
> > (Emphasis added)

[39] Two aspects of *Dominion Foundry* are often cited by courts when finding there is no right of appeal under s. 193(c) in the context of a particular case:

(a) s. 193(c) should not be read too broadly, otherwise there would be a right of appeal in all cases; and

(b) questions of procedure do not fall within s. 193(c).

[40] *Alternative Fuel*, relied upon by the receiver in this case, is an example of the second proposition. In *Alternative Fuel*, a judge of the Court of Queen's Bench sitting in bankruptcy

directed the sale of certain equipment to company A, which had been allowed to submit a higher bid outside of the original tendering process. Company B, which had been the highest bidder within the tendering process, applied for a ruling that leave was not required, or alternatively, for leave to appeal. Relying on *Dominion Foundry*, the Chambers judge held that company B had no right of appeal under s. 193(c) because it was challenging "the method by which the equipment is to be sold, namely bypassing the tender procedure" (at para 11). The Chambers judge then went on to grant leave as the question was of significance to bankruptcy practice and to the parties.

[41] *Business Development Bank of Canada v Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 OR (3d) 617 [*Pine Tree*], cites both aspects of *Dominion Foundry*, i.e., the need to narrow access and that matters of procedure do not fall within s. 193(c). In *Pine Tree*, a judge of the Superior Court of Ontario had appointed a receiver to administer all the assets of the debtor. The debtor and the second mortgagee sought to appeal the order appointing the receiver. A judge sitting in Chambers held that neither the debtor nor the second mortgagee had a right of appeal. Relying on *Dominion Foundry* to so hold, the Chambers judge wrote as follows:

> [17] Nor do I accept the argument that the property in the appeal exceeds in value $10,000 for purposes of s. 193(c). As noted by the Manitoba Court of Appeal in *Dominion Foundry Co.*, at para. 7, to allow an appeal as of right in these circumstances would require doing so in almost every case because very few bankruptcy cases would go to appeal where the value of the bankrupt's property did not exceed that amount. More importantly, though, an order appointing a receiver does not bring into play the value of the property; it simply appoints an officer of the court to preserve and monetize those assets, subject to court approval.
>
> (Emphasis added)

[42] That brings the Court to *Bending Lake*, which was an appeal of an order transferring all of the debtor's property to an unrelated purchaser. The Chambers judge determined that two contextual factors "militate against employing an expansive application of the automatic right of appeal contained in s. 193(c)" and "point to the need for an approach which is alive to and satisfies the needs of modern, 'real-time' insolvency litigation" (at para 53). The Chambers judge discussed the two contextual factors:

> [49] First, the predecessor section to the modern s. 193(c) was enacted in 1919, at a time when the then *Bankruptcy Act* did not include the right to seek leave to appeal in the event a decision did not fall within one of the categories giving automatic rights of appeal. As Doherty J.A. observed in *Re Ravelston Corp.* [(2005) 24 CBR (5th) 256 (Ont CA)], the earlier absence in s. 193 of an ability to seek leave to appeal prompted courts to

> give categories of appeals as of right a wide and liberal interpretation in order to avoid closing the door on meritorious appeals. The 1949 inclusion of the leave to appeal right now found in s. 193(e) removes the need for such a broad interpretative approach.
>
> [50] Second, Canada's other major insolvency statute, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"), contains, in s. 13, an across-the-board requirement to obtain leave to appeal from any order made under that Act. The automatic right of appeal provisions in ss. 193(a) to (d) of the *BIA* do not work harmoniously with the *CCAA*'s appeal regime.

From there, the Chambers judge described the approach he would follow in deciding the case before him:

> [53] In my view, these contextual factors militate against employing an expansive application of the automatic right of appeal contained in s. 193(c) and, instead, point to the need for an approach which is alive to and satisfies the needs of modern, "real-time" insolvency litigation. I shall employ such an approach in applying the following three principles that have emerged from the jurisprudence: s. 193(c) does not apply to (i) orders that are procedural in nature, (ii) orders that do not bring into play the value of the debtor's property, or (iii) orders that do not result in a loss.
>
> (Emphasis added)

[43] The decision in *Bending Lake* has since been extensively followed in Ontario: see *Downing Street Financial Inc. v Harmony Village-Sheppard Inc.*, 2017 ONCA 611, 49 CBR (6th) 173; *First National Financial GP Corporation v Golden Dragon HO 10 Inc*., 2019 ONCA 873, 74 CBR (6th) 1; and *Comfort Capital Inc. v Yeretsian*, 2019 ONCA 1017, 75 CBR (6th) 217.

[44] Outside of Ontario, *Bending Lake* has been followed in *McDonnell Group, LLC v Control Mobile Inc.*, 2018 BCCA 309, [2019] 3 WWR 689 [*McDonnell*]. In *McDonnell*, the debtor filed an action against one of its creditors. After a receivership order was made, the creditor then offered to buy the debtor's assets, including the action. The debtor sought to prevent the sale but was unsuccessful, leading to an appeal. The Chambers judge held that the application did not fall under s. 193(c) as there was no evidence demonstrating the vesting of the action would result in a loss of more than $10,000. See also *7451190 Manitoba Ltd v CWB Maxium Financial Inc.*, 2019 MBCA 95.

B. Approach to follow

[45] *Bending Lake* rests on a line of Chambers decisions that have held that s. 193(c) should be construed narrowly but takes those cases further. It supports a narrow construction of s. 193(c) on the following bases:

(a) by adding what is now s. 193(e) in 1949, Parliament signalled an intention to narrow the other categories in s. 193; and

(b) s. 193 should be interpreted in a manner consistent with the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*], which permits access to an appeal court by means of a leave provision only.

In place of the *Orpen–Fallis* test, a court applying *Bending Lake* will ask whether the order under appeal is (a) procedural in nature, (b) brings into play the value of the debtor's property, or (c) results in a loss – in order to determine whether there is an appeal as of right. Having examined each of these three principles, and notwithstanding the receiver's arguments in this case, I see no reason to depart from the *Orpen–Fallis* line of authority based on *Alternative Fuel* and *Bending Lake*.

[46] As a preliminary comment, every exercise of statutory interpretation begins with a review of the purposive obligation imposed by the modern principle of statutory interpretation as set out in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21–22 [*Rizzo*], and as noted in Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed (Toronto: Butterworths, 1994), and s. 64 of the *Legislation Act, 2006*, SO 2006, c 21, Sch F, and s. 2-10(2) of *The Legislation Act*, SS 2019, c L-10.2. This purposive approach is supported by s. 12 of the *Interpretation Act*, RSC, 1985, c. I-21, which provides that "[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". In my respectful view, narrowing the right of access to appellate review is inconsistent with *Rizzo* and s. 12 of the *Interpretation Act*.

[47] I am not certain that the addition of a right to appeal with leave in 1949 should be taken as signalling Parliament's intention that the other rights of appeal conferred by the *BIA* should thereafter be construed narrowly. One might conclude that, after 1949, it would no longer be

necessary to give a strained interpretation to s. 193(a) through s. 193(d) because, with the addition of s. 193(e), it is now possible to grant leave to appeal a meritorious issue that does not fit easily into one of the other four categories for which the *Act* provides an as of right appeal. But, I do not see how adding a requirement to apply for leave on one ground can be used to narrow an existing, unqualified right of appeal on another. As was said recently in *Servus*, "The Parliament of Canada when enacting legislation can be taken to understand its own statute book and the common law and, if it intended therefore by virtue by creating a leave option to eliminate or narrow down the other statutory as of right provisions, it could have done so in a less mysterious way" (at para 25).

[48] In my respectful view, the addition of s. 193(e) should lead neither to a narrow nor an expansive interpretation of the balance of the categories in s. 193. Rather, s. 193(c) and s. 193(e) must be interpreted according to their terms and within their context. As part of this context, it must be understood that prior to the enactment of the *Bankruptcy Act, 1949*, SC 1949, c 7 [*1949 Act*], the equivalent of s. 193 read as follows in s. 74(2) of *The Bankruptcy Act*, SC 1919, c 36 [*1919 Act*]:

Review and Appeal **Appeals in bankruptcy.**	**Revision et appel.** **Appels en matière de faillite.**
74(2) Any person dissatisfied with an order or decision of the court or a judge in any proceedings under this Act may, —	**74**(2) Quiconque est mécontent d'une ordonnance ou d'une décision du tribunal ou d'un juge, dans toutes procédures instituées sous le régime de la présente loi, peut,
(a) if the question to be raised on the appeal involves future rights; or,	*(a)* si la question qui doit être soulevée en appel implique des droits futurs; ou
(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy or authorized assignment proceedings; or,	*(b)* si l'ordonnance ou la décision doivent vraisemblablement influencer d'autres causes d'une nature semblable·dans les procédures de faillite ou de cession autorisée; ou
(c) if the amount involved in the appeal exceeds five hundred dollars;	*(c)* si la somme impliquée dans l'appel dépasse cinq cents dollars; ou
(d) if the appeal is from the grant or refusal to grant a discharge and the aggregate of the unpaid claims of creditors exceeds five hundred dollars;	*(d)* s'il s'agit d'en appeler d'une libération accordée ou refusée et que les réclamations globales des créanciers non payées excèdent cinq cents dollars
appeal to the Appeal Court.	se pourvoir en Cour d'Appel.

[49] In 1949, in addition to adding a right to apply for leave, Parliament also changed *amount* in s. 150(c) to *property*, as follows:

Appeals
Court of Appeal

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

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

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

(c) if the property involved in the appeal exceeds in value five hundred dollars;

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

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

(Emphasis added)

Appels.
Cour d'appel

150. Sauf disposition expresse à l'effet contraire, appel est recevable à la Cour d'appel de toute ordonnance ou décision d'un juge du tribunal dans les cas suivants :

a) si le point en litige concerne des droits futurs;

b) si l'ordonnance ou la décision doit vraisemblablement influer sur d'autres causes de, nature semblable dans les procédures en faillite;

c) si les biens en question dans l'appel dépassent en valeur la somme de cinq cents dollars;

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

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

(Emphasis added)

[50] In the annotation to *Fallis*, above-mentioned, and in *Dominion Foundry* and *McNeil*, it is stated that the *property involved* in the appeal means the same thing as the *amount involved* in the appeal. If this means that the change brought about by the *1949 Act* was of no consequence, I would respectfully disagree. The changes to the *Bankruptcy Act* in 1949, to provide a right of appeal when the property, rather than the amount, exceeds $500 (but currently $10,000), aligned itself with the balance of the *Act*, which had from the enactment of the first *Bankruptcy Act* turned on a definition of *property* in the English version and *bien* in the French (see *The Bankruptcy Act*, SC 1919, c 36, s 2(dd), and *Loi concernant la faillite*, SC 1919, c 36).

[51] On this point, L.W. Houlden, Geoffrey B. Morawetz and Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, loose-leaf (Rel 2020-03) 4th ed (Toronto: Carswell, 2005) (WL), commented on the amendment: "Presumably the amendment was made to make it clear that it is unnecessary to have a monetary sum involved for an appellant to be entitled to appeal under s. 193(c)" (at para I§60). I agree. At the very least, the change from the *amount involved* to the *property involved* signalled that the law that had been developing with respect to access to the Supreme Court of Canada, i.e., in the 1925 decision of *Orpen*, was intended to apply to statutes

that were in *pari materia*. The change was not intended to be a reversion to the law that existed prior to *Orpen*, i.e., *Cushing Sulphite-Fibre Company v Cushing* (1906), 37 SCR 427, which was expressly overruled by *Fallis*, albeit after the 1949 amendments.

[52] This interpretation is supported by comments made before the Standing Committee of the House of Commons that was struck to review the proposed *1949 Act* (on December 1, 1949, nine days prior to the *1949 Act* receiving royal assent). With T.D. MacDonald as a witness, the following exchange occurred with Charles-Arthur Dumoulin Cannon, member for Îles-de-la-Madeleine, and Donald Fleming, member for Eglington (*Standing Committee on Banking and Commerce*, 21th Parl, 1st Sess, No 1 (1 December 1949) at 149 (Hon. Charles Cannon, Hon. Donald Fleming, and T.D. MacDonald)):

> **Mr. Cannon**: … What about (b), Mr. Chairman, that is new?
>
> **The Vice-Chairman**: Yes.
>
> **Mr. Cannon**: Is there any particular reason given for that requirement?
>
> **The Witness**: That is 149 (1)(b)?
>
> **Mr. Cannon**: No, 150 (e).
>
> **The Witness**: Just to cover any case that might be worthy of appeal which does not fall within the enumeration. When the bill was first introduced in 1949, section 150 read like this: "Unless otherwise provided in this Act an appeal lies from the order or decision of a judge of a court to the Court of Appeal with leave of a judge thereof"; and that is all that was said. Now, the trouble when it was left that way was this, that it seemed to us that it was left too much up in the air as to the principles upon which a judge would proceed. I can very well see a judge of the court saying; well, you have not given me very much guidance to help me in determining when I should permit an appeal; so it was thought it would be well to leave it substantially as in the present section of the Act, which is now done in clause 150 of the bill, and then somewhat in line with clause 150 of the original draft bill, to put in paragraph (e) so that if the enumeration is not sufficient you provided that the judge can exercise a discretion.
>
> **Mr. Fleming**: It is a residuary right?
>
> **The Witness**: Yes. The enumeration is quite complete, but by adding this subclause (e) you afford the court a discretion so that he may permit an appeal should there be other cases in which justice is not covered by the enumeration.
>
> **Mr. Fleming**: Is this a residual jurisdiction?
>
> **The Witness**: Exactly.
>
> **The Vice-Chairman**: Does clause 150 carry?
>
> Carried
>
> (Emphasis added)

[53] As a final observation in relation to the effect of the addition of a right to apply for leave to appeal under s. 193(e) on the interpretation of s. 193(c), Professor Russell describes what is meant by an appeal with leave (Peter H. Russell, "The Jurisdiction of the Supreme Court of Canada: Present Policies and a Programme for Reform" (October 1968) 6 Osgoode Hall Law Journal 1 at 23):

> The appeal with leave represents a fundamentally different conception of the Supreme Court's function than that embodied in *de plano* appeals. From the litigant's point of view it is both broader and narrower than the appeal as of right. It is broader in the sense that it is available in situations where there is no right to appeal; but it is narrower in that whether or not it is granted depends in the final analysis on the court's discretion and not on the litigant's right. This suggests that the basic rationale for appeals with leave has to do not with the rights or interests of private litigants but with the public interest in the authoritative resolution of difficult and important legal problems.

This provides a further clarification as to how s. 193(e) functions within legislation that, in addition to providing an avenue to apply for leave to appeal, also establishes rights of appeal.

[54] I also question whether it is necessary or possible to construe s. 193 of the *BIA* so as to bring it into harmony with the *CCAA.* Parliament has provided different appeal rights in each of these statutes and must be taken to have done so for a reason. I will not repeat the *BIA* provisions, but the *CCAA* provisions are as follows:

Leave to appeal	**Permission d'en appeler**
13 Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.	**13** Sauf au Yukon, toute personne mécontente d'une ordonnance ou décision rendue en application de la présente loi peut en appeler après avoir obtenu la permission du juge dont la décision fait l'objet d'un appel ou après avoir obtenu la permission du tribunal ou d'un juge du tribunal auquel l'appel est porté et aux conditions que prescrit ce juge ou tribunal concernant le cautionnement et à d'autres égards.
R.S., 1985, c C-36, s 13; 2002, c 7, s 134.	LR (1985), ch C-36, art 132002, ch 7, art 134.

[55] This is a distinctly different right of appeal than what exists in s. 193 of the *BIA*, which establishes four categories where an applicant has a right of direct access to the appeal court, plus an appeal with leave. The difference in statutory language is justified by the differing application of the two Acts. The *BIA* concerns both individual *and* commercial bankruptcies and insolvencies, sometimes including the remedy of a receivership, where the acting official is a

receiver, with powers conferred by the security agreement, and supervised only to some extent by the courts.

[56] The differing application of the *CCAA* and the *BIA*, even in the commercial context, has recently been made plain in *9354-9186 Québec inc. v Callidus Capital Corp*., 2020 SCC 10 [*Callidus*]:

> [39] The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).
>
> (Emphasis added)

[57] Quite clearly, where a corporation is the insolvent entity, the distinctions between the operational aspects of the two statutes narrow considerably. In particular, where a debtor corporation will never emerge from bankruptcy, the equitable distribution of the bankrupt's assets among its creditors is the *BIA's* only relevant purpose and it is a purpose shared with the *CCAA* (see *Callidus* at para 46).

[58] Nonetheless, the *BIA* does not lose its character as being a statute that serves commercial as well as individual interests. The tension to provide flexibility and less supervision in the context of a commercial undertaking is in direct opposition to the need to protect more vulnerable debtors or multiple small and large creditors in the bankruptcy context. In my view, this explains the differing approaches to the rights of access to appellate courts.

[59] As others have noted, s. 193 of the *BIA* is ripe for reform: see Frank Bennett, *Bennett on Bankruptcy*, 16th ed (Toronto: CCH Canadian, 2013) at 607. The interpretative problem represented by the conflicting jurisprudence is further exacerbated by two aspects of the *General Rules*: a short time period for appeal (ten days) and a requirement that the application for leave to appeal be brought and filed at the same time as the notice of appeal. These restrictions on the right of appeal regularly catch out counsel and then result in the type of cross-applications that exist in this case, thereby increasing cost, decreasing efficiency and affecting access to justice. To that extent, any attempt to provide a definitive interpretation of s. 193(c) is to be applauded.

The issue is whether Parliament or the courts should be the instrument of change. On this point, see *Royal Bank of Canada v Bodanis*, 2020 ONCA 185 at para 8.

[60] Even if the courts are the proper place for reform, I do not believe the solution lies in construing s. 193(c) narrowly so as to reduce more appeals under the *BIA* to the need to apply for leave to appeal. It is also important not to move the analysis from interpreting the legislation to interpreting the judicially imposed criteria for access to the appellate courts. With much respect, it is preferable to construe the words of the statute and apply them to the context of a specific case, without applying either a narrow or broad interpretation of the statute.

[61] While it is solidly established in the jurisprudence that there is no right of appeal under s. 193(c) from a question involving procedure *alone*, courts should not start with that question. The primary task is to answer the question raised by s. 193(c) and determine whether the property involved in the appeal exceeds $10,000. Courts have used different ways of giving meaning to s. 193(c), but it is still the words of the statute that govern. Thus, in *Fallis*, by its adoption of what the Court had said in *Orpen*, the test is stated as, What is the loss which the granting or refusing of the right claimed will entail? In *Fogel*, the Court asked what is "the value in jeopardy" (at para 6). In *McNeil*, the Chambers judge observed that "[t]he 'property involved in the appeal' … may be determined by comparing the order appealed against the remedy sought in the notice of appeal" (at para 13). In *Trimor*, the Chambers judge added to the *Orpen–Fallis* test by stating "[t]he focus of the inquiry under s. 193(c) is the amount of money at stake …" (at para 10). All of these expressions are consistent with the statutory language present in s. 193(c).

[62] In answering any of those questions, an appeal court may determine that there is no property involved in the appeal exceeding in value $10,000 but rather that the question in issue is procedural only. But merely because the question in issue is procedural, does not necessarily mean there is not property involved in the appeal that exceeds in value $10,000. An issue can be procedural while also having more than $10,000 at stake. In examining this principle further, it is helpful to look again at the three leading cases that put forward the proposition that the property involved in the appeal did not exceed $10,000 because the question in issue was procedural:

(a) *Coast* – the issue was whether the Chambers judge had erred by permitting the bringing of an action rather than requiring the matter to be heard in Chambers;

(b) *Dominion Foundry* – the issue pertained to the manner of sale; and

(c) *Pine Tree* – the issue was whether a receiver should have been appointed or not.

It should be noted that the reported decisions do not show that the proponent of a right of appeal in these cases put forward evidence to show that the procedural issue in question had resulted in or could result in a loss.

[63] It is one thing to say there is no appeal as of right under s. 193(c) from an order that directs a receiver as to the *manner* of sale because the "property involved in the appeal [does not exceed] in value ten thousand dollars" where no claim of loss is alleged. Classifying such an order as procedural appears to have no consequence because the complaint is about the *choice* of procedure that the trustee or receiver made rather than about the value of the property (*Dominion Foundry*). It is quite another matter to say there is no *right* of appeal under s. 193(c) from any order that is procedural in nature when there is a claim of loss in excess of $10,000. In short, courts must be careful not to extrapolate from decided cases to reduce every choice that a trustee or a receiver makes to a question of procedure so as to deny a proposed appellant a right of appeal. The issue in s. 193(c) is whether based on the evidence there is at least $10,000 at stake, not whether the order is procedural.

[64] According to the *Orpen–Fallis* line of authority, which I believe this Court should follow, an appellate court's task is to determine first and foremost whether the appeal involves property that exceeds in value $10,000, i.e., to answer the question posed by s. 193(c). It is not necessary that recovery of that amount be guaranteed or immediate. Rather the claim must be sufficiently grounded in the evidence to the satisfaction of the Court determining whether there is a right of appeal. As the Court in *Fallis* indicated, the determination of the amount or value may be proven by affidavit. It may be that a court will conclude that the appeal does not involve property that exceeds in value $10,000, but rather involves a question of procedure alone, but one does not begin with the second question first. In my view, this is an important distinction.

C. Applying s. 193(c) to this appeal

[65] The notice of appeal filed on behalf of the Wilkes Group indicates that the appeal is taken on the following grounds:

TAB 4

Hillmount Capital Inc. v. Pizale, 2021 ONCA 364 (CanLII)

Date:	2021-05-28
File number:	M52200
Other citation:	462 DLR (4th) 228
Citation:	Hillmount Capital Inc. v. Pizale, 2021 ONCA 364 (CanLII), <https://canlii.ca/t/jg447>, retrieved on 2023-09-07

COURT OF APPEAL FOR ONTARIO

CITATION: Hillmount Capital Inc. v. Pizale, 2021 ONCA 364
DATE: 20210528
DOCKET: M52200 (C68999)

Strathy C.J.O., Brown and Miller JJ.A.

BETWEEN

Hillmount Capital Inc.

Respondent
(Applicant)

and

Celine Brittany Pizale and Richard Stanley Pizale

Moving Parties/Appellants
(Respondents)

Jamie Spotswood and Rachel Migicovsky, for the moving parties/appellants, Celine and Richard Pizale

Robert Macdonald and Teodora Prpa, for the receiver, Zeifman Partners Inc.

Behn Conroy, for the purchasers, Patricia and David Armstrong

Shana Nodel, for second mortgagees, 1713691 Ontario Inc. and Boris Nodel

Terry M. Walman, for first mortgagee, Elle Mortgage Corporation

Heard: February 8, 2021 by video conference

BROWN J.A.:

I. OVERVIEW

Order wrongfully preferred preserving the integrity of the sales process over the substantive interests of the Pizales and their creditor mortgagees.

[22] More specifically, the Pizales submit that the Chambers Judge erred in concluding that:

(i) the Approval and Administration Orders were procedural in nature when the Pizales were arguing that the orders prejudiced their substantive rights;
(ii) the Approval Order did not put the value of the Property in question. The Pizales submit that the appraisals they filed put that value in question;
(iii) the Pizales did not retain an interest in the Property and therefore its value was not in question. The Pizales argue that while the receivership changed the nature of their interest in the Property, it did not extinguish it; and
(iv) the Approval Order did not result in a loss of at least $10,000. According to the Pizales, the Chambers Judge ignored the increase in their exposure to their creditors resulting from the sale of the Property on an "as is" rather than "as complete" basis.

[23] Finally, the Pizales submit the Chambers Judge erred in failing to grant leave to appeal as he misconstrued the bases of the Pizales' opposition to the Approval Order and their grounds of appeal.

V. FIRST ISSUE: DID THE CHAMBERS JUDGE APPLY THE CASE LAW CONCERNING *BIA* s. 193(c) TOO NARROWLY?

[24] Section 193(c) of the *BIA* states that "an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases: … (c) if the property involved in the appeal exceeds in value ten thousand dollars."

[25] Before the Chambers Judge, the Pizales acknowledged that *BIA* s. 193(c) does not apply to certain types of orders, specifically those identified in *Bending Lake*. That decision observed, at para. 53, that the case law holds that *BIA* s. 193(c) does not apply to orders (i) that are procedural in nature,[2] (ii) that do not bring into play the value of the debtor's property[3] or (iii) do not result in a loss.[4] The last principle derives from two Supreme Court of Canada cases, *Orpen v. Roberts*, 1925 CanLII 2 (SCC), [1925] S.C.R. 364, at p. 367, and *Fallis and Deacon v. United Fuel Investments Ltd.*, 1962 CanLII 96 (SCC), [1962] S.C.R. 771.

[26] Notwithstanding this acknowledgement, the Pizales contend that the Chambers Judge failed to apply those principles in what they style as the less restrictive approach set out in the decision of the Saskatchewan Court of Appeal in *MNP Ltd. v. Wilkes*, 2020 SKCA 66, 449 D.L.R. (4th) 439 ("*Wilkes*").

[27] To deal with that submission, I shall address two issues: (i) the significance, if any, of the "narrow" and "broad" interpretation labels regarding s. 193(c) found in some of the case law; and (ii) the practical difference, if any, of the approach in *Wilkes* in contrast to that found in the cases summarized in *Bending Lake*.

The "narrow" and "broad" interpretation dichotomy

[28] Although the Pizales rely on some appellate decisions from other provinces to advocate for a broad interpretation of the automatic rights of appeal in *BIA* ss. 193(a)-(d), they ignore panel decisions of this court that have expressly taken a narrow approach to the interpretation of those appeal rights due to the broad automatic stay on appeal contained in *BIA* s. 195.[5]

[29] For example, several weeks after the *Bending Lake* decision, a panel of this court released reasons in *Enroute Imports Inc. (Re)*, 2016 ONCA 247, 35 C.B.R. (6th) 1. At issue on that appeal was an order concerning the ability to examine a representative of the bankrupt. The panel stated, at para. 5:

> The case law considering s. 193(c) from this court makes clear that, given the broad nature of the stay imposed by s. 195 of the *BIA*, the right of appeal without leave under s. 193(c) must be narrowly construed. In addition, the appeal must directly involve property exceeding $10,000 in value: *Crate Marine Sales Limited (Re)*, 2016 ONCA 140, *Robson Estate v. Robson* (2002), 2002 CanLII 53241 (ON CA), 33 C.B.R. (4th) 86 (Ont. C.A.), *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, and *Ontario Wealth Management Corporation v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 17 C.B.R. (6th) 91. (emphasis added)

[30] The panel found that the order at issue did not fall within s. 193(c) for two reasons: the entitlement to conduct an examination was procedural in nature and did not directly involve property, and the appellants' argument that the motion judge erred in finding that the proposal was reasonable and made in good faith did not put the property directly in issue. The panel also denied leave to appeal.

[31] The next year, a panel in *Romspen Investment Corporation v. Courtice Auto Wreckers Limited*, 2017 ONCA 301, 47 C.B.R. (6th) 1, leave to appeal refused, [2017] S.C.C.A. No. 238, followed *Enroute Imports* in holding that the right of appeal under s. 193(c) must be narrowly construed and limited to cases where the appeal directly involves property exceeding $10,000 in value: at para. 22.

[32] These statements by two panels of this court strike a different analytical stance than the comments by the chambers judge in *Wong v. Luu*, 2013 BCCA 547, 348 B.C.A.C. 155, at para. 23, that the right of appeal under *BIA* s. 193 is "broad, generous and wide-reaching." I would further note that the decisions in *Wong* and *Wilkes* did not address the effect of the automatic stay in s. 195 on the interpretation of ss. 193(a)-(d), a factor this court has considered significant for its interpretative approach.

[33] That said, the recent panel decision of this court in *Davidson (Re)*, 2021 ONCA 135, 86 C.B.R. (6th) 1, determined that it was not necessary in that case to engage in a debate over whether *BIA* s. 193(c) should be given a narrow or broad interpretation: at paras. 9-10. In that case, the panel assumed that s. 193(c) applied but dismissed the appeal on the merits.

The state of the case law

[34] When one looks past the labels of "narrow" and "broad", one discovers that a consensus appears to exist in the case law about how to answer s. 193(c)'s question of whether the property involved in the appeal exceeds $10,000. As I will explain, the Pizales' submission greatly overstates the differences between the operative principles described in *Wilkes* and the case law summarized and categorized in *Bending Lake*.

[35] *Wilkes* held that a court's primary task when examining whether an automatic right of appeal exists is to answer the question raised by s. 193(c) "and determine whether the property involved in the appeal exceeds $10,000." Writing for the court, Jackson J.A. continued, at para. 61:

> Courts have used different ways of giving meaning to s. 193(c), but it is still the words of the statute that govern. Thus, in *Fallis*, by its adoption of what the Court had said in *Orpen*, the test is stated as, What is the loss which the granting or refusing of the right claimed will entail? In *Fogel*, the Court asked what is "the value in jeopardy" (at para 6). In *McNeil*, the Chambers judge observed that "[t]he 'property involved in the appeal' … may be determined by comparing the order appealed against the remedy sought in the notice of appeal" (at para 13). In *Trimor*, the Chambers judge added to the *Orpen–Fallis* test by stating "[t]he focus of the inquiry under s. 193(c) is the amount of money at stake …" (at para 10). All of these expressions are consistent with the statutory language present in s. 193(c).

[36] As mentioned above at para. 25, *Bending Lake* summarized the case law as identifying three types of orders that do not fall within the ambit of *BIA* s. 193(c). The first type the case law identifies is an order that does not result in a loss, as described in the *Orpen* and *Fallis* cases, which were the focus of the court's analysis in *Wilkes*. The need for an order to result in a loss to fall within s. 193(c)

was framed slightly differently by the Alberta Court of Appeal in *Re Bearcat Exploration Ltd. (Bankrupt)*, 2003 ABCA 365, 339 A.R. 376, where the court stated, at para. 10, that an appeal under *BIA* s. 193(c) "must in substance be about the value of the property, not just any claim related to bankruptcy." Or, as put by panels of this court in *Enroute Imports* and *Courtice Auto Wreckers*, the appeal must "directly involve" property exceeding $10,000 in value.

[37] *Bending Lake* also pointed out that the jurisprudence treated two other types of orders as falling outside of s. 193(c): those that do not bring into play the value of the debtor's property; and those that are procedural in nature. Excluding those types of orders from the ambit of s. 193(c) is consistent with – and indeed flows logically from – the loss principle articulated in the *Orpen/Fallis* cases.

[38] By its nature the second type of order - one that does not bring into play the value of the debtor's property - would not result in a loss or put property value in jeopardy. For example, it is well-established in the *BIA* s. 193(c) jurisprudence that an order appointing a receiver or interim receiver usually does not bring into play the value of the debtor's property as it simply appoints an officer of the court to preserve and monetize those assets subject to court approval.[6]

[39] The third type of order that the case law places outside of s. 193(c) is a procedural order, which really is a sub-set of orders that do not bring into play the value of the debtor's property. The case law identifies various procedural orders of this kind: the dismissal of the bankrupt's motion to strike out the petition against him;[7] the conduct of an examination of the bankrupt;[8] an order declining leave to examine the bankrupt;[9] approval of the trustee's proposed auction process;[10] directions regarding the conduct of a trial;[11] an appeal process order;[12] an order denying a union leave to apply for certification during receivership;[13] and an order granting an adjournment.[14] In some circumstances, a sale approval order, on analysis, may be merely procedural in nature.[15]

[40] *Wilkes* acknowledges that "it is solidly established in the jurisprudence that there is no right of appeal under s. 193(c) from a question involving procedure *alone*": at para. 61 (emphasis in original). Indeed, a few months after the release of *Wilkes*, Jackson J.A., sitting as a chambers judge, concluded in *Re Harmon International Industries Inc.*, 2020 SKCA 95, 81 C.B.R. (6th) 1, that leave was required to appeal a receiver's sale process order stating, at paras. 34-35:

0161

> Thus, what the Court has before it is an Order that authorizes a *list price* of $3.8 million for the Millar Avenue Building. It does not propose a sale price of $3.8 million. All that the Order does is establish a process for the sale of the property. Any proposed sale must still be confirmed.
>
> At this point, the claim of loss is without any foundation at all. It is, as such, entirely speculative. It assumes that the listing agent will not market the property to its fullest potential or that the receiver will place an improvident sale before the Court of Queen's Bench to be confirmed and the Court will confirm it. It is possible that Harmon will apply to Elson J. under s. 185(7) of the *BIA* or wait until it is determined that the property is proposed to be sold for less than what Harmon believes it is worth and place the Brunsdon Appraisal before Elson J. at that time. It is also possible that Harmon will obtain other financing so as to permit it to buy the property at the list price or the property will sell for an amount acceptable to Harmon. In my view, the Order does not directly have an impact on the proprietary or monetary interests of Harmon or crystallize any loss at this time. It concerns a matter of procedure only. It is merely an order as to manner of sale, as was the case in *Dominion Foundry Co. (Re)* (1965), 1965 CanLII 596 (MB CA), 52 DLR (2d) 79 (Man CA). No value is in jeopardy, and no party can claim a loss as a result. In my view, the property involved in the proposed appeal does not exceed in value $10,000 as those words are used in s. 193(c) of the *BIA*. Thus, I conclude it was necessary for Harmon to apply for leave to appeal. (Emphasis added.)

[41] However, *Wilkes* makes an additional point. Merely because the question in issue is procedural does not necessarily mean there is not property value involved in the appeal that exceeds $10,000. Section 193(c) requires a court to analyze the economic effect of the order sought to be appealed: at paras. 62-63.

[42] I agree. What is required in any consideration of whether the appeal of an order falls within *BIA* s. 193(c) is a critical examination of the effect of the order sought to be appealed. Such an examination requires scrutinizing the grounds of appeal that are advanced in respect of the order made below, the reasons the lower court gave for the order, and the record that was before it. The inquiry into the effect of the order under appeal therefore is a fact-specific one; it is also an evidence-based inquiry, which involves more than merely accepting any bald allegations asserted in a notice of appeal: *Bending Lake*, at para. 64. *Wilkes* concurs on this point, holding, at para. 64, that the loss claimed must be "sufficiently grounded in the evidence to the satisfaction of the Court determining whether there is a right of appeal," a point repeated in the subsequent chambers decision in *Re Harmon International Industries*, at para. 32.

[43] While the amendment of the *BIA* in 1992 to include Part XI dealing with "Secured Creditors and Receivers" increased the practical need for the timely adjudication of appeals launched from

orders made under the Act, an approach to the application of s. 193(c) that requires a fact-specific, evidence-based critical scrutiny of the effect of the order sought to be appealed should foster the remedial objectives of Canada's insolvency statutes to provide for "timely, efficient and impartial resolution of a debtor's insolvency": *9354-9186 Quebec Inc. v. Callidus Capital Corp.*, 2020 SCC 10, 444 D.L.R. (4th) 373, at para. 40 (emphasis added.)

[44] There will be cases where the effect of an order sought to be appealed is such that an appeal lies as of right under *BIA* s. 193(c) but the respondent takes the view that the appeal is without merit or the automatic stay under *BIA* s. 195 would cause undue delay or prejudice in the bankruptcy proceeding. In such cases, it is open to the respondent to move to cancel the automatic stay. A motion to cancel the stay prompts a judicial assessment of the merits of the appeal, the appellant's litigation conduct, and the relative prejudice that cancelling or maintaining the stay would have on interested persons and the interests of justice generally: *Royal Bank of Canada v. Bodanis*, 2020 ONCA 185, 78 C.B.R. (6th) 165 (Chambers), at paras. 11-14; *After Eight Interiors Inc. v. Glenwood Homes Inc.*, 2006 ABCA 121, 391 A.R. 202 (Chambers), at para. 6; *Pelletier (Re)*, 2020 ABCA 450, 86 C.B.R. (6th) 108 (Chambers), at para. 45.

Conclusion

[45] The Pizales' contention that the Chambers Judge erred by applying too restrictive an approach to s. 193(c) is based on a dichotomy in the case law that is more illusory than real, more semantic than substantive. While the cases under s. 193(c) have explained the interpretative task using differing language (as is to be expected in a body of jurisprudence under a national statute), at their core the cases share common ground in attempting to discern the operative effect of the order sought to be appealed: does the order result in a loss or gain, or put in jeopardy value of property, in excess of $10,000?

[46] The Chambers Judge identified the applicable legal principles. I see no basis to interfere with his decision on that ground.

VI. SECOND ISSUE: DID THE CHAMBERS JUDGE MISAPPREHEND THE PIZALES' KEY ARGUMENTS?

[47] I shall now consider the Pizales' submission that the Chambers Judge misapprehended the key elements of their arguments. The Pizales advance two main arguments:

TAB 5

In the Court of Appeal of Alberta

Citation: Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd, 2021 ABCA 66

Date: 20210218
Docket: 2101-0002-AC
2101-0004-AC
Registry: Calgary

Docket: 2101-0002-AC

Between:

Athabasca Workforce Solutions Inc.

Applicant

- and -

**Greenfire Oil & Gas Ltd. and
Greenfire Hangingstone Operating Corporation**

Respondents

- and -

**Alvarez Marsal Canada Inc., in its capacity as Proposal Trustee of
Greenfire Oil & Gas Ltd. and Greenfire Hangingstone Operating Corporation**

Not a Party to the Application

- and -

Trafigura Canada General Partnership, McIntyre Partners and Greenfire Acquisition Corporation

Respondents on Application

Docket: 2101-0004-AC

Between:

Behrokh Azarian, Homayoun Hodaie, Mandana Rezaie, Mehran Pooladi-Darvish, Meysam Ovaici, Firooz Abbaszadeh, Mehran Joozdani, Layla Amjadi, Meer Taher Shabani-Rad, Zahra Ahmadi-Naghdehi, Afshin Shameli,

Maryam Mohsen Zadeh, Parham Minoo, Haleh Peiravi, Mohammad Ahadzadeh Ardebili, Ramin Jalalpoor, Elham Vakili Azghandi, Tariq Mahmood Roshan, Amin Jalalpoor, Faisal Khan, Poonam Dharmani and Ali Nilforoush

Applicants

- and -

Greenfire Oil & Gas Ltd. and Greenfire Hangingstone Operating Corporation

Respondents

- and -

Alvarez Marsal Canada Inc., in its capacity as Proposal Trustee of Greenfire Oil & Gas Ltd. and Greenfire Hangingstone Operating Corporation

Not a Party to the Application

- and -

Trafigura Canada General Partnership, McIntyre Partners and Greenfire Acquisition Corporation

Respondents on Application

Reasons for Decision of The Honourable Madam Justice Marina Paperny

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Application for Permission to Appeal

Reasons for Decision of
The Honourable Madam Justice Marina Paperny

Introduction

[1] The applicants seek a declaration that they, as proposed appellants, do not require leave to appeal the decision of a supervising judge under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (BIA). If leave is required, they seek leave to appeal the decision.

[2] The impugned decision approved a sale and vesting order (SAVO), an interim financing order, and an interim financing charge order (collectively, the IFO) over the assets of Greenfire Hangingstone Operating Corporation. The applicant Athabasca Workforce submits it is a creditor of Greenfire Hangingstone as well as a significant shareholder of its parent company, Greenfire Oil & Gas Ltd. (collectively, Greenfire). The second set of applicants are individual investors in Greenfire.

Background

[3] On April 3, 2018, Greenfire purchased the Hangingstone Facility, a bitumen production plant in Alberta's oilsands region. On July 5, 2019, Athabasca and Greenfire Hangingstone entered into a transportation agreement related to the plant's operations. Athabasca Workforce says that, after Athabasca was required to purchase shares in the parent company, Greenfire failed to pay them for their services. On August 20, 2020, Athabasca Workforce filed an application that Greenfire be declared bankrupt. Greenfire disputed the bankruptcy, claimed that in fact it was a creditor of Athabasca Workforce, and, in an effort to keep the facility viable, filed a Notice of Intention to Make a Proposal under the BIA on October 8, 2020.

[4] During this time, Greenfire sought interim financing from potential lenders. Greenfire was required to extend its time to submit a proposal on several occasions thereafter. Meanwhile, the Hangingstone facility was non-operational and began to accrue damage due to freezing temperatures and inactivity. In December 2020, Greenfire sought court approval of the SAVO and IFO. Absent an interim lender and therefore a resumption in operations, damage to the Hangingstone facility and associated environmental liability would continue to increase. With respect to the SAVO and IFO, Greenfire negotiated an Asset Purchase Agreement with an arm's length party, Greenfire Acquisition Co, and negotiated an Interim Financing Agreement with Trafigura Canada General Partnership (Trafigura), the terms of which were contingent on court approval. In December 2020, Greenfire filed an application to approve interim financing, grant Trafigura a priority charge (the interim lender), and approve the Asset Purchase Agreement.

[15] In *Bending Lake*, an issue was raised as to whether a transaction ought to be postponed to let shareholders re-finance the company. The court held, and I agree, that such an appeal does not bring into play the value of the debtor's property. Rather, the effect of the SAVO is to generate sale proceeds that stand in place of the assets; it is a means to monetize the estate. As to whether the order results in a gain or loss, an approval and vesting order does not determine the entitlement of any party with an economic interest in the sale proceeds. No interested party has gained or lost as a result of the order.

[16] For these reasons, I conclude that neither s 193(a) nor (c) apply to the proposed appeal, and leave to appeal is therefore required.

Should leave to appeal be granted?

[17] The following factors are considered on an application for leave to appeal under s 193(e) of the BIA:

a) whether the point on appeal is of significance to the practice;
b) whether the point raised is of significance to the action itself;
c) whether the appeal is *prima facie* meritorious or frivolous; and
d) whether the appeal will unduly hinder the progress of the action.

[18] In addition, leave should only be granted if the judgment appears to be contrary to law, amounts to an abuse of judicial power or involves an obvious error, causing prejudice for which there is no remedy: see *Alternate Fuel Systems* at para 12; *Dykun v Odishaw,* 1998 ABCA 220 at para 4; *West Edmonton Mall Property Inc. v Duncan & Craig*, 2001 ABCA 40 at para 9; *DGDP-BC Holdings Ltd. v Third Eye Capital Corporation*, 2020 ABCA 442 at para 18.

(a) Is the point on appeal significant to the practice?

[19] The applicants submit the orders are novel in that approval of the IFO required the approval of the proposed sale of assets as a condition. Therefore, the SAVO was granted in the absence of a proper sale process being conducted and with inadequate evidence of value. I disagree. The approval of interim financing and sales of assets under sections 50.6 and 65.13 of the BIA are matters of judicial discretion and are highly fact dependent. The BIA includes a list of non-exhaustive factors to inform the exercise of that discretion. The reasons of the supervising judge demonstrate a balancing of interests of all stakeholders, having regard to the precarious financial situation, the already serious damage done to the asset, and the restarting and environmental risks. Having regard to the lack of other viable alternative proposals, the support of key stakeholders, the lack of prejudice to Greenfire's creditors as a result of the interim financing, and the attendant lenders charge, there is no basis on the record to suggest the appeal will have any broad significance to the practice.

(b) Is the point raised of significance to the action?

[20] It would be a rare case where an interested party does not view a proposed appeal to be significant to the action. In most instances the answer to this question will be in the affirmative, and will be balanced against the other criteria. That is the case here.

(c) Is the proposed appeal prima facie meritorious?

[21] The applicants submit that the supervising judge made several errors of law or palpable and overriding errors in his assessment of the facts. While they recognize that the granting of the SAVO and the interim financing orders are discretionary, they submit the conclusions were based on incorrect inferences relating to the parties' positions and upon unwarranted findings. For instance, they submit that the supervising judge erred in concluding: there was no better recovery for the creditors, Greenfire had the confidence of its major creditors, the interim financing enhanced the prospects of a viable proposal, the sale would benefit creditors, and if the interim financing orders were not approved, the most likely outcome would be the transfer of the assets to the Orphan Well Association.

[22] The supervising judge reviewed the criteria that guides discretion under the BIA. He was aware of the leading authorities and principles for the approval of a sale of assets in insolvency proceedings as set forth in *Royal Bank of Canada v Soundair Corp*, 4 OR (3d), 83 DLR (4th) 76 (ONCA). He understood the purposes of the interim financing and appreciated that such financing would not be available absent a priority charge securing same. He considered the process that had been undertaken to secure that financing and that it eventually resulted in the Trafigura offer. He recognized that the granting of the order and charge was critical, failing which the facility faced enormous risk of damage and increased repair and restart costs. The record does not support the conclusion that the chambers judge misdirected himself or misapprehended the evidence when he concluded that the IFO and SAVO warranted his approval.

[23] In addressing the consideration payable under the APA, the supervising judge found it to be fair and reasonable having regard to the *Soundair* principles. He recognized that there had not been a formal auction process, nor is one required or advisable in every case. He commented that Alberta courts have acknowledged that "pre-pack sales" resulting from processes conducted prior to insolvency proceedings can satisfy the *Soundair* requirements. He considered the relevant factors, including the deteriorating financial condition of the debtor; that other options were considered even though the sale would only provide returns to the debtor's primary secured creditors; the prospect of employment and utilization of existing trade creditors and the fairness of the consideration having regard to the price paid by Greenfire to acquire the facility less than three years earlier.

[24] The supervising judge weighed the evidence before him, and his finding that any potential alternative source of interim financing was "too little too late" was grounded in that evidence. With respect to the applicants being denied an opportunity to test evidence through cross-examination, the critical information had already been filed in previous affidavits, and the supervising judge was aware of concerns with respect to the seventh affidavit. He put questions to Greenfire's counsel about this evidence and was satisfied with the responses. He recognized that this transaction was not "the usual" transaction, but that no one had provided any other viable alternative. Speculation about what might be possible did not replace the significance of a certain transaction.

[25] The applicants do not point to any error of law in the analysis that would warrant judicial intervention. This was a discretionary decision that warrants a high degree of deference. The prospect of a successful appeal is doubtful.

(d) Will the appeal unduly delay the proceedings?

[26] Not only will an appeal delay the proceedings, it will also create further jeopardy for the stakeholders of Greenfire. Pursuant to the interim financing agreement, Trafigura has already advanced $4 million between December 19 and 21, and a further $4.5 million between December 29 and January 19. That is, $8.5 million of a total of $20 million has already been advanced. Granting leave to appeal in these circumstances risks serious potential damage to the facility, given that the additional funds are required to perform repairs and for maintainance. Moreover, there is no reason to believe that the sanctioned transaction can be delayed pending the outcome of an appeal, or for that matter that there will be another viable transaction for anyone to consider. Repairing the damage and returning the facility to an operational state depends on the transaction closing.

Fresh evidence application

[27] The applicant investors also seek leave to file an additional affidavit in which they put forward a term sheet to provide for further interim financing options. They submit the test for fresh evidence has been met because the affidavit material was not available before the chambers judge as it was yet to be completed, but now it could bear decisively on the issue before me – whether leave ought to be granted to appeal the decision to approve the interim financing and SAVO.

[28] In my view such affidavit evidence ought not to be allowed. This court in *Roswell Group Inc. v 1353141 Alberta Ltd*, 2020 ABCA 428 reiterated the test. That this document was not available to the chambers judge was due to the fact that it had not yet been agreed to. This supports his conclusion of "too little too late". Moreover, I am persuaded that the conditional nature of the document would have been insufficient to displace the conclusion arrived at by the supervising judge. I also note that trying to bring an improved or better offer to the court on appeal is a dubious practice and may have the effect of undermining the principles of fairness articulated in *Soundair*.

TAB 6

Business Development Bank of Canada v. Pine Tree Resorts Inc. et al. [Indexed as: Business Development Bank of Canada v. Pine Tree Resorts Inc.]

Ontario Reports

Court of Appeal for Ontario,

Blair J.A. (in Chambers)

April 29, 2013

115 O.R. (3d) 617 | 2013 ONCA 282

Case Summary

Bankruptcy and insolvency — Practice and procedure — Appeals — Second mortgagee appealing order granting first mortgagee's application for appointment of receiver over mortgagor's assets — Second mortgagee wishing to exercise its rights under s. 22 of Mortgages Act — Leave to appeal required as appeal did not fall within s. 193(a) or s. 193(c) of Bankruptcy and Insolvency Act ("BIA") — Test for leave to appeal under s. 193(e) of BIA being whether proposed appeal raises issue of general importance to practice in bankruptcy/ insolvency matters or to administration of justice generally, is prima facie meritorious and would not unduly hinder progress of bankruptcy/insolvency proceedings — Proposed appeal not satisfying those criteria — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 193 — Mortgages Act, R.S.O. 1990, c. M.40, s. 22.

BDC held security for the money owed to it by Pine Tree by way of a first mortgage and general security agreements. Romspen was the second mortgagee. Both mortgages were in default. Romspen wished to exercise its rights as a subsequent mortgagee under s. 22 of the *Mortgages Act* to put BDC's mortgage in good standing and take over the sale of the property. It proposed to pay all arrears of principal and interest, together with BDC's costs, expenses and outstanding realty taxes, but did not propose to repay HST arrears, which constituted a default under the BDC security documents. BDC applied successfully for the appointment of a receiver over the Pine Tree's assets. Pine Tree and Romspen sought to appeal that order. Romspen intended to argue that it was entitled to exercise its [page618] rights under s. 22 of the *Mortgages Act* as the arrears of HST did not jeopardize BDC's security because they were a subsequent encumbrance, and therefore it was not necessary for them to comply with that covenant in order to be able to take advantage of a subsequent mortgagee's rights under s. 22.

Held, leave to appeal should be denied.

Leave to appeal under s. 193(*e*) of the *Bankruptcy and Insolvency Act* was required. The appeal did not involve "future rights" within the meaning of s. 193(*a*). Section 193(*c*) did not apply as an order appointing a receiver did not bring into play the value of the property. In determining whether to grant leave to appeal under s. 193(*e*), the court will look to whether the proposed appeal (a) raises an issue that is of general importance to the practice in bankruptcy/insolvency or to the administration of justice as a whole; (b) is *prima facie* meritorious; and (c) would unduly

hinder the progress of the bankruptcy/ insolvency proceedings. In this case, the application judge's considerations were entitled to great deference and, in any event, were purely factual and case-specific and did not give rise to any matters of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole. Moreover, Romspen's s. 22 argument was not *prima facie* meritorious. Finally, all parties agreed that the property in question had to be sold, and there was a need for the sale to proceed expeditiously. Interfering with the timeliness of that process could potentially impact on the success of the sale. Leave to appeal should not be granted.

Baker (Re) (1995), 22 O.R. (3d) 376, [1995] O.J. No. 580, 83 O.A.C. 351, 31 C.B.R. (3d) 184, 53 A.C.W.S. (3d) 933 (C.A., in Chambers); *Fiber Connections Inc. v. SVCM Capital Ltd*., [2005] O.J. No. 1845, 198 O.A.C. 27, 10 C.B.R. (5th) 201, 139 A.C.W.S. (3d) 10 (C.A., in Chambers); *GMAC Commercial Credit Corp. of Canada v. TCT Logistics Inc*., [2003] O.J. No. 5761 (C.A., in Chambers); *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp*., [1988] B.C.J. No. 1403, 19 C.P.C. (3d) 396 (C.A.); *R.J. Nicol Construction Ltd. (Trustee of) v. Nicol*, [1995] O.J. No. 48, 77 O.A.C. 395, 30 C.B.R. (3d) 90, 52 A.C.W.S. (3d) 957 (C.A., in Chambers), **consd**

Other cases referred to

Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of), [1997] A.J. No. 869, 206 A.R. 295, 48 C.B.R. (3d) 171, 73 A.C.W.S. (3d) 727 (C.A., in Chambers); *Blue Range Resources Corp. (Re)*, [1999] A.J. No. 975, 1999 ABCA 255, 244 A.R. 103, 12 C.B.R. (4th) 186; *Century Services Inc. v. Brooklin Concrete Products Inc*. (March 11, 2005), Court File No. M32275, Catzman J.A. (Ont. C.A., in Chambers); *Country Style Food Services (Re)*, [2002] O.J. No. 1377, 158 O.A.C. 30, 112 A.C.W.S. (3d) 1009 (C.A., in Chambers); *Ditchburn Boats & Aircraft (1936) Ltd. (Re)* (1938), 19 C.B.R. 240 (Ont. C.A.); *Dominion Foundry Co. (Re)*, [1965] M.J. No. 49, 52 D.L.R. (2d) 79 (C.A.); *Leard (Re)*, [1994] O.J. No. 719, 114 D.L.R. (4th) 135, 71 O.A.C. 56, 25 C.B.R. (3d) 210, 47 A.C.W.S. (3d) 242 (C.A., in Chambers); *Ravelston Corp. (Re)*, [2005] O.J. No. 5351, 24 C.B.R. (5th) 256 (C.A.); *Theodore Daniels Ltd. v. Income Trust Co*. (1982), 37 O.R. (2d) 316, [1982] O.J. No. 3315, 135 D.L.R. (3d) 76, 25 R.P.R. 97 (C.A.)

Statutes referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 193 [as am.], (*a*), (*c*), (*e*)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 [as am.]

Mortgages Act, R.S.O. 1990, c. M.40, s. 22, (1) [page619]

APPEAL from an order appointing a receiver.

Milton A. Davis, for appellants Pine Tree Resorts Inc. and 1212360 Ontario Limited.

David Preger, for appellant Romspen Investment Corporation.

[14] Neither (*a*) nor (*c*) applies in these circumstances, in my view. I will address whether leave to appeal should be granted later in these reasons.

[15] "Future rights" are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future: see *Ravelston Corp. (Re)*, [2005] O.J. No. 5351, 24 C.B.R. (5th) 256 (C.A.), at para. 17. See, also, *Ditchburn Boats & Aircraft (1936) Ltd. (Re)* (1938), 19 C.B.R. 240 (Ont. C.A.); *Dominion Foundry Co. (Re)*, [1965] M.J. No. 49, 52 D.L.R. (2d) 79 (C.A.); and *Fiber Connections Inc. v. SVCM Capital Ltd.*, [2005] O.J. No. 1845, 10 C.B.R. (5th) 201 (C.A., in Chambers).

[16] Here, Romspen's legal rights are its right to exercise its power of sale remedy and its right to put the first mortgage in good standing under s. 22 of the *Mortgages Act*. The first crystallized on the default under the Romspen mortgage, the second on the default under the BDC mortgage. Both rights were therefore triggered before the order of Mesbur J. They were at best rights presently existing but exercisable in the future.

[17] Nor do I accept the argument that the property in the appeal exceeds in value $10,000 for purposes of s. 193(*c*). As [page622] noted by the Manitoba Court of Appeal in *Dominion Foundry Co.*, at para. 7, to allow an appeal as of right in these circumstances would require doing so in almost every case because very few bankruptcy cases would go to appeal where the value of the bankrupt's property did not exceed that amount. More importantly, though, an order appointing a receiver does not bring into play the value of the property; it simply appoints an officer of the court to preserve and monetize those assets, subject to court approval.

[18] In my view, leave to appeal is required in the circumstances of this case.

Should Leave to Appeal Be Granted?

The test

[19] In *Fiber Connections Inc.*, Armstrong J.A. (in Chambers) reviewed extensively the jurisprudence surrounding the test to be applied for granting leave to appeal under s. 193(*e*). As he noted, at para. 15, there is some confusion as to what that test is. Two articulations of the test have emerged, and each has its support in the case law.

[20] One formulation is that set out by McLachlin J.A. (as she then was) in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.*, [1988] B.C.J. No. 1403, 19 C.P.C. (3d) 396 (C.A.). It asks the following questions:

(i) Is the point appealed of significance to the practice as a whole?

(ii) Is the point raised of significance in the action itself?

(iii) Is the appeal *prima facie* meritorious?

(iv) Will the appeal unduly hinder the progress of the action?

[21] These are the criteria generally applied when considering whether to grant leave to appeal from orders made in restructuring proceedings under the *Companies' Creditors*

Arrangement Act, R.S.C. 1985, c. C-36 ("*CCAA*"), although their application has not been confined to those types of cases.

[22] A second approach to the test was adopted by Goodman J.A. in *R.J. Nicol Construction Ltd. (Trustee of) v. Nicol*, [1995] O.J. No. 48, 77 O.A.C. 395 (C.A., in Chambers), at para. 6. Through this lens, the court is to determine whether the decision from which leave to appeal is sought (a) appears to be contrary to law; (b) amounts to an abuse of judicial power; or [page623] (c) involves an obvious error, causing prejudice for which there is no remedy.

[23] Ontario decisions have traditionally leaned toward the *R.J. Nicol* factors when determining whether to grant leave to appeal under s. 193(*e*) of the *BIA*: see, in addition to *R.J. Nicol*, for example, *Leard (Re)*, [1994] O.J. No. 719, 114 D.L.R. (4th) 135 (C.A., in Chambers); and *Century Services Inc.*

[24] This view has evolved in recent years, however, and three decisions in particular have added nuances to the *R.J. Nicol* approach by considering such factors as whether there is an arguable case for appeal and whether the issues sought to be raised are significant to the bankruptcy practice in general and ought to be addressed by this court: see *Fiber Connections Inc.*, at paras. 16-20; *GMAC Commercial Credit Corp. of Canada v. TCT Logistics Inc.*, [2003] O.J. No. 5761 (C.A., in Chambers); and *Baker (Re)*, (1995), 22 O.R. (3d) 376, [1995] O.J. No. 580 (C.A., in Chambers). These factors echo the criteria set out in *Power Consolidated.*

[25] In *Baker (Re)*, Osborne J.A. acknowledged the two alternative approaches to determining whether leave to appeal should be granted. He concluded, at p. 381 O.R., that the *R.J. Nicol* criteria were "generally relevant" but observed that all factors need not be given equal weight in every case. For that particular case, he emphasized the factor that the issue sought to be appealed was "a matter of considerable general importance in bankruptcy practice". In *TCT Logistics*, at para. 9, Feldman J.A. listed all of the *R.J. Nicol* and the *Power Consolidated* criteria -- without apparently distinguishing between them -- as matters to be taken into account. She granted leave holding that the issues in that case were significant to the commercial practice regulating bankruptcy and receivership and ought to be considered by this court.

[26] Finally, in *Fiber Connections Inc.*, Armstrong J.A. reviewed all of the foregoing authorities and, at para. 20, granted leave to appeal because he was satisfied in that case that there were arguable grounds of appeal (although it was not necessary for him to determine whether the appeal would succeed) and because the issues raised were significant to bankruptcy practice and ought to be considered by this court.

[27] I take from this brief review of the jurisprudence that, while judges of this court have tended to favour the *R.J. Nicol* test in the past, there has been a movement towards a more expansive and flexible approach more recently -- one that incorporates the *Power Consolidated* notions of overall importance to [page624] the practice area in question or the administration of justice as well as some consideration of the merits.

[28] That being the case, it is perhaps time to attempt to clarify the "confusion" that arises from the co-existence of the two streams of criteria in the jurisprudence. I would adopt the following approach.

[29] Beginning with the overriding proposition that the exercise of granting leave to appeal under s. 193(*e*) is discretionary and must be exercised in a flexible and contextual way, the

following are the prevailing considerations in my view. The court will look to whether the proposed appeal

(a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this court should therefore consider and address;

(b) is *prima facie* meritorious, and

(c) would unduly hinder the progress of the bankruptcy/ insolvency proceedings.

[30] It is apparent these considerations bear close resemblance to the *Power Consolidated* factors. One is missing: the question whether the point raised is of significance to the action itself. I would not rule out the application of that consideration altogether. It may be, for example, that in some circumstances the parties will need to have an issue determined on appeal as a step toward dealing with other aspects of the bankruptcy/ insolvency proceeding. However, it seems to me that this particular consideration is likely to be of lesser assistance in the leave to appeal context because most proposed appeals to this court raise issues that are important to the action itself, or at least to one of the parties in the action, and if that consideration were to prevail there would be an appeal in almost every case.

[31] I have not referred specifically to the three *R.J. Nicol* criteria in the factors mentioned above. That is because those factors are caught by the "*prima facie* meritorious" criterion in one way or another. A proposed appeal in which the judgment or order under attack (a) appears to be contrary to law, (b) amounts to an abuse of judicial power or (c) involves an obvious error causing prejudice for which there is no remedy will be a proposed appeal that is *prima facie* meritorious. I recognize that the *Power Consolidated* "*prima facie* meritorious" criterion is different than the "arguable point" notion referred to by Osborne J.A. in *Baker* and by Armstrong J.A. in *Fiber Connections*. In my [page625] view, however, the somewhat higher standard of a *prima facie* meritorious case on appeal is more in keeping with the incorporation of the *R.J. Nicol* factors into the test.

[32] As I have explained above, however, the jurisprudence has evolved to a point where the test for leave to appeal is not simply merit-based. It requires a consideration of all of the factors outlined above.

[33] The *Power Consolidated* criteria are the criteria applied by this court in determining whether leave to appeal should be granted in restructuring cases under the *CCAA*: see *Country Style Food Services (Re)*, [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A., in Chambers), Feldman J.A., at para. 15; and *Blue Range Resources Corp. (Re)*, [1999] A.J. No. 975, 244 A.R. 103 (C.A.). The criteria I propose are quite similar. There is something to be said for having similar tests for leave to appeal in both *CCAA* and *BIA* insolvency proceedings. Proposed appeals in each area often arise from discretionary decisions made by judges attuned to the particular dynamics of the proceeding. Those decisions are entitled to considerable deference. In addition, both types of appeal often involve circumstances where delays inherent in appellate review can have an adverse effect on those proceedings.

Application of the test in the circumstances

TAB 7

In the Court of Appeal of Alberta

Citation: Re Fantasy Construction Ltd. (Bankrupt), 2007 ABCA 335

Date: 20071102
Docket: 0703-0229-AC
Registry: Edmonton

Between:

In the Matter of the Bankruptcy of Fantasy Construction Ltd.

Respondent/Respondent
(Applicant)

In the Matter of the Bankruptcy of Southbend Construction Company

Respondent/Respondent
(Applicant)

- and -

Office of the Superintendent of Bankruptcy

Applicant/Appellant
(Respondent)

- and -

In the Matter of the Bankruptcy of Cutting Edge Foods Inc.

Not a Party to the Appeal
(Applicant)

Reasons for Decision of
The Honourable Mr. Justice Jack Watson

Application for Leave to Appeal the Decision by
The Honourable Madam Justice J.E. Topolniski
Memorandum of Decision dated the 27th day of July, 2007
Filed the 30th day of July, 2007
(2007 ABQB 502, Docket: BK03-109703/BK03-95683/BK03-95482)

Reasons for Decision of
The Honourable Mr. Justice Jack Watson

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1. Introduction

[1] The applicant Superintendent of Bankruptcy, seeks leave to appeal to this Court pursuant to s. 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"), from a ruling of Topolniski J. of the Court of Queen's Bench, sitting as a bankruptcy judge. The applicant did not suggest that any other aspect of s. 193 of the *BIA* applied to the situation. S. 193(e) of the *BIA* reads as follows:

> 193. Unless otherwise provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> *****
>
> (e) in any other case by leave of a judge of the Court of Appeal.

[2] The test for grant of leave is in ***West Edmonton Mall Property Inc. v. Duncan & Craig*** (2001), 277 A.R. 93, [2001] A.J. No. 158 (QL), 2001 ABCA 40 at paras. 8 to 12: see below.

2. Outline of the Issues

[3] The ruling of Topolniski J. related to three separate corporate bankruptcy cases. Only two of these cases are now involved. The respondents on this motion are PriceWaterhouseCoopers, the trustee for Fantasy Construction Ltd., ("PWC") and Browning Crocker Inc., the trustee for Southbend Construction Company, ("BCI"). The facts of the cases are summarized in her reasons for the ruling: ***Re: Fantasy Construction Ltd. (Bankrupt)***, [2007] A.J. No. 909 (QL), 2007 ABQB 502, at paras. 3 to 10.

[4] Topolniski J. ruled that, as a bankruptcy judge, she had jurisdiction to determine the *vires* of Directive 10 issued by the Applicant: para. 62 of her decision. She made that ruling on a motion for advice and directions by the respondents and by a secured creditor, the respondents invoking to s. 34(1) of the *BIA*, which allows a trustee to "apply to the court for directions in relation to any matter affecting the administration of the estate of a bankrupt". Having taken jurisdiction, she has not yet actually heard the submissions about *vires*, let alone gotten to any consideration of how Directive 10 might apply to the cases if she were satisfied about *vires*.

[5] Directive 10 of the applicant is the *Redemption of Security and Section 147 Levy of the BIA*, O.S.B. Directive 10, (19 December 1997). Directive 10 was said to have been issued to clarify the circumstances in which a levy will apply on payments of secured claims. By its terms, Directive 10

sets out exceptions to when the levy is payable. Before me, while joining in opposition to the grant of leave, the respondents suggested that the application of Directive 10 to their respective cases might differ – assuming it were held to be within the *vires* of the applicant.

[6] The applicant's position before Topolniski J. and before me is that Topolniski J. did not have jurisdiction to decide the question of *vires* as to Directive 10, as exclusive original jurisdiction on that question rests in the Federal Court under s. 18 and 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 (the "FCA"). The respondents submit that Topolniski J. had, and has, jurisdiction to determine *vires* in this regard.

[7] When the matter came on before me, I also asked counsel for submissions as to whether the challenge to the ruling of Topolniski J. might be considered premature since she had not yet made any decision about *vires* nor had she made any decision about the application of the Directive if found to be within *vires*. Counsel were given the opportunity to supplement their submissions with comment on that point and took up the chance.

[8] At the hearing, PWC declined to emphasize prematurity as a reason to deny leave on the basis that resolution of the jurisdiction of Topolniski J. was inevitable. They reiterated this view in supplemental submissions. BCI initially took the position that prematurity was a proper basis to refuse leave here because the risk of application of Directive 10 in their case was low and a future decision of Topolniski J. on the issue of application of Directive 10 might mean that BCI would not have to invest any more in the jurisdictional debate. BCI slightly backed way from this position in their supplemental submissions largely as a result of concerns about further delay being injected into the proceedings.

[9] The applicant resisted a finding of prematurity on the basis that if Topolniski J. found *vires*, her assumption of jurisdiction to do so would be unreviewable at the instance of the applicant, and the respondents would not necessarily seek to challenge that finding on appeal. The applicant urged that whether Topolniski J. could take jurisdiction to determine *vires* was a question that would have to be addressed at some point. The applicant also submitted that if it were not possible to get a ruling on the question of jurisdiction now, it might not be possible to object to the decision on jurisdiction on an appeal from an actual *vires* decision.

3. The Test for Leave

[10] As noted above, the governing test is set out in ***West Edmonton Mall***, itself drawing on L.W. Houlden and C.H. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 3rd ed. (revised) [Scarborough: Carswell], Vol. II, p 57. Picard J.A. wrote that the test has four elements:

(a) whether the point on appeal is of significance to the practice;
(b) whether the point on appeal is of significance to the action itself;

and express preclusion of a topic well within the scope of the Queen's Bench bankruptcy jurisdiction and general jurisdiction, namely a branch of basic legality of the law asked to be applied by that Court. It also depends on acceptance of a position that a "legislative act", when challenged only on *vires* and not either on its reasonableness nor on the process by which it came into being, is subject to judicial review at all. That Topolniski J. did not directly address this latter point does not mean the point would be evaded on appeal since it implicitly figured in her reasons.

[64] In sum, the strength of the applicant's argument is not such that it justifies a grant of leave and an appeal at this phase of the matters. Taking the test in ***West Edmonton Mall*** as a whole, it might not be necessary for me to say that the applicant's position is "frivolous", although I am persuaded that it satisfies that part of the test. If I am in error in that respect, I would say that the applicant's position is so weak that it does not overcome the effect of the other factors in this instance, notably prematurity as related to significance of the issue. It is not wise to interrupt the flow of the underlying cases with a general reference to this Court on the topic of *vires*.

Significance to the Practise

[65] In this regard, the significance element of the test is not concerned with whether the matter is something of academic interest to lawyers, but whether it is of actual significance to the industry and professions involved in bankruptcy. I cannot disagree that the imposition of a bifurcated process for evaluation of the *vires* of a Directive of the Superintendent would be of significance to the profession in that sense. The case of ***Marchand*** demonstrates how the courts would probably work assiduously to ensure they each remained within jurisdiction. However, the process would necessarily be more expensive and take longer. This would be a sufficient impact on the profession to be regarded as significant.

[66] However, at the present stage of this matter, there is no such impact. The ruling of Topolniski J., if left to stand, informs the profession in Alberta on this subject and creates no bifurcated system for Alberta. The option of eventually challenging the ruling of Topolniski J. on the topic of *vires* would not be removed by the denial of leave to appeal in this case at this stage, even though I offer reasons touching on the merits of the argument as a single judge.

[67] Following the decision of Topolniski J. as to *vires*, and any application (or not) by her of Directive 10, the possibility of an appeal as right under s. 193 of the *BIA* may well exist for either side. The denial of leave here would not create *res judicata* against the applicant to enjoin arguing the point on such an appeal. It would not create *res judicata* even against seeking leave under s. 193(e) of the *BIA* from the actual *vires* decision and application (if any) of the Directive, inasmuch as the *vires* decision would itself raise new issues of law and public interest questions. If Topolniski J. were to find *vires*, the implications for the Superintendent would only be that it would have to wait until another opportunity arose to dispute her conclusion.

[68] In the result, the factor of significance to the profession does not militate in favour of grant of leave at this stage.

Significance to the Action

[69] The significance to this action as regards the difference in court procedures also does not militate in favour of leave. As it stands now, a competent court, possessed of all of the necessary jurisdiction in bankruptcy, will come to make a decision on the *vires* of Directive 10 and then move expeditiously to the rest of the issues in the matter. The applicant's position would delay that process. Even if the applicant were successful on appeal, that result would merely deflect the *vires* issue into the Federal Court, which might well find that it does not belong there, or the Federal Court might reach the same conclusion on *vires* that Topolniski J. might reach, and in any event would have to send the matter back to the Court of Queen's Bench to continue.

[70] On this point, I am persuaded that the question of court jurisdiction is premature and that resolution of that point by the Court of Appeal and thereafter, perhaps, by the Supreme Court, is untimely. Both Courts would lack the advantage of a full record which would show practical as well as legal implications of a finding about *vires* as well as perhaps about application which would set the context of the jurisdictional point. Moreover, to allow leave here would create litigation by instalment, a procedure deprecated by ***Robertson v. Edmonton Police Service***, [2003] A.J. No. 1213 (QL), 2003 ABCA 279 at paras. 3 to 19; ***Workum v. Alberta Securities Commission***, [2006] A.J. No. 722 (QL), 2006 ABCA 181, at para. 2, and cases mentioned therein.

Hindering of the Action

[71] Judicial notice can be taken that to grant leave would cause delay and more cost in relation to these bankruptcy proceedings where, by their nature, the cases involve efforts to preserve assets so as to diminish losses for everyone involved. The delay can be said to be undue at least because it is not necessary for this jurisdictional question to be decided now. This factor does not favour the grant of leave.

6. Conclusion

[72] In conclusion, none of the factors would support a grant of leave to the applicant in this instance at this stage of the bankruptcy proceedings. The application is dismissed.

Appeal heard on September 25, 2007

Supplementary submissions made on October 5, 2007

Reasons filed at Edmonton, Alberta
this 2nd day of November, 2007

TAB 8

Court of King's Bench of Alberta

Citation: Qualex-Landmark Towers Inc v 12-10 Capital Corp, 2023 ABKB 109

Date: 20230227
Docket: 2001 06911
Registry: Calgary

Between:

Qualex-Landmark Towers Inc

Plaintiff

- and -

12-10 Capital Corp and John Doe

Defendants

- and -

Dollar Cleaners (1972) Ltd, Canadian Pacific Railway Company, Teck Metals Ltd, Symcor Inc, Otis Canada, Inc, Sherwin-Williams Canada Inc, Z S K Investments Ltd, Oxford Properties Group Inc, Bank of Montreal, D.K. Management Ltd, Morguard Corporation Corporation Morguard

Third Party

Reasons for Decision
of the
Honourable Justice D.B. Nixon

I. Introduction

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

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

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

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

[5] QLT asserts that where there is a claim for environmental remediation and the Defendant is insolvent, that claim for environmental remediation should rank in priority to other creditors. Based on the approach advanced by QLT in this case, the priority ranking of secured creditors would be displaced by the obligations that Capital Corp owes in respect of environmental remediation.

[6] QLT brought this Action against 12-10 Capital Corp ("**Capital Corp**") because: (i) Capital Corp owns certain real property (the "**12-10 Lands**"); (ii) the 12-10 Lands has contaminants embedded within it (the "**Contamination**"); and (iii) the Contamination is alleged to have migrated from the 12-10 Lands to real property owned by QLT (the "**QLT Lands**").

[7] In this case, Capital Corp is alleged to be insolvent based on its balance sheet, but it has not yet entered formal insolvency proceedings. I infer that QLT initiated this litigation because Capital Corp is marketing or will market its contaminated 12-10 Lands, or portions thereof, for sale.

[8] The concern of QLT is that a sale of the 12-10 Lands by Capital Corp is unlikely to satisfy the amount of the outstanding mortgages and accrued interest let alone the aggregate cost of the environmental remediation for which Capital Corp is responsible. Further, a sale of the 12-10 Lands with a corresponding application of the sale proceeds to the outstanding mortgages would dispose of the only valuable asset held by Capital Corp, without regard to the outstanding environmental obligations of the corporation.

[9] Given these circumstances, QLT further asserts that the likely *modus operandi* of Capital Corp will significantly hinder the ability of QLT to enforce a future judgment. That would effectively decide the issue of priorities before this matter is ultimately determined. If that occurs, QLT is concerned that the Contamination obligations of Capital Corp will not be addressed.

II. The Appeal and Application

[10] The appeal component is pursuant to rule 6.14 of the *Alberta Rules of Court*, Alta Reg 124/2010. It is an appeal of a June 20, 2022 decision of the Master (as he then was), which denied the QLT application for an attachment order (the "**Appeal**").

[11] QLT also makes an application to amend the Statement of Claim to add the mortgagees on the 12-10 Lands as Defendants and to add some narrative to engage a priority issue concerning the environmental remediation obligations (the "**Application**").

III. Facts and Findings

[12] QLT purchased the QLT Lands in 2007. These lands are located to the east of the 12-10 Lands.

[13] There are Contamination concerns with the 12-10 Lands. These concerns were revealed by subsurface investigations as early as 2006.

[14] Capital Corp purchased the 12-10 Lands in 2009. Capital Corp completed some subsurface investigation of the 12-10 Lands between 2012 and 2015. This investigation by Capital Corp included some groundwater pumping and vapour testing. All of the testing took place at the direction of Alberta Environment and Parks ("**AEP**"). QLT was not made aware of this testing at that time or the results.

[15] Mr. Riaz Mamdani controls the Strategic corporate group (the "**Strategic Group**") which includes Capital Corp. In a letter from AEP to Mr. Mamdani, dated April 2018, Capital Corp was directed to submit an environmental site assessment ("**ESA**") in respect of the 12-10 Lands.

[16] The ESA proposal was to include a complete delineation and a remediation action plan or a risk management plan (collectively, the "**Risk Management Plan**"). The AEP directed that the ESA proposal be submitted by June 1, 2018.

[17] The delineation drilling for the ESA proposal was planned. Based on the evidence, I infer that Capital Corp never completed the delineation drilling.

[18] In July 2019, Capital Corp entered into an agreement with a commercial real estate firm to sell a portion of the 12-10 Lands. In January 2022, Capital Corp formalized an Agreement of Purchase and Sale to sell the eastern portion of the 12-10 Lands (the "**Transaction Property**") for $13,300,000 (the "**January 2022 Sale**").

[19] The January 2022 Sale did not close. As a result, Capital Corp still owns the 12-10 Lands.

[20] In a letter to the Strategic Group, dated February 2022, AEP advised that it still had not received the Risk Management Plan or further soil and groundwater investigation updates from Capital Corp. AEP set a new deadline of July 8, 2022. Based on the evidence, I infer that Capital Corp did not comply with that revised deadline.

[21] During cross-examinations, it became known to QLT that: (i) the 12-10 Lands was the only real property in which Capital Corp had an interest; and (ii) Capital Corp currently generates revenues by leasing the 12-10 Lands.

[22] The most westerly parking lot and the middle portion of the 12-10 Lands were leased to Strategic Builders for $5,000 per month. The most easterly component of the 12-10 Lands included a building that was leased to Store & Go Ltd for $20,000 per month.

[23] The outstanding mortgages registered against the 12-10 Lands included the following.

a. A mortgage in favour of Peoples Trust Company ("**Peoples Trust**") in the amount of approximately $3,400,000 (the "**Peoples Mortgage**"). This mortgage is secured against the eastern portion of the 12-10 Lands.

b. A mortgage beneficially owned by Trez Capital Limited Partnership ("**Trez Capital**") in the amount of approximately $5,700,000 (the "**First Trez Mortgage**"). This mortgage is secured against all the 12-10 Lands. As of April 21, 2022, approximately $1,000,000 of the First Trez Mortgage is accrued interest.

c. A mortgage beneficially owned by Trez Capital in the amount of $8,100,000 (the "**Second Trez Mortgage**"). This mortgage is secured against all of the 12-10 Lands. The Second Trez Mortgaged was registered after the first direction of AEP to address the Contamination. As of April 21, 2022, just over $3,000,000 of the Second Trez Mortgaged is accrued interest. The Second Trez Mortgage has a current interest rate of 25% per annum. Since being issued, Capital Corp has only made one payment on the Second Trez Mortgage.

[24] The First Trez Mortgage and the Second Trez Mortgage are accruing interest (collectively, the "**Trez Capital Mortgages**"). The interest on the Peoples Mortgage is being paid by other related companies within the Strategic Group.

[25] As of May 2022, there was an aggregate of approximately $17,200,000 in outstanding mortgages and accrued interest secured against the 12-10 Lands (collectively, the "**Mortgages**").

[26] QLT estimates that the cost to remediate the QLT Lands is at least $2,006,500. Notwithstanding that Capital Corp concedes the Contamination on the 12-10 Lands, there is no evidence that it has accrued any obligation or liability in its books and records concerning its obligation to remediate that real property or the QLT Lands.

[27] The 12-10 Lands that were not included in the Transaction Property represented approximately 25% of the pre-Sale assets of Capital Corp (the "**Retained Property**"), and that segment of the 12-10 Land had an imputed value of approximately $4,400,000.

[28] Capital Corp estimates its monthly net cash outflow before interest to be $28,719, and the mortgage interest to be $236,457, for a total net monthly carrying cost of $265,176.

[29] During cross-examination, Mr. Mamdani was asked whether the assets of Capital Corp were sufficient to satisfy its liabilities. He answered that it would depend on the potential sale price of the aggregate property and what costs Capital Corp would have to pay along the way. I also infer it will depend on how much interest accrues on the Mortgages in the interim period, and which is not paid in the ordinary course of events.

IV. Standard of Review

[30] The standard of review for an appeal of a Master's decision (as he then was) to a Justice of this Court is correctness on all issues: ***Bacheli v Yorkton Securities Inc***, 2012 ABCA 166 at paras 29-30. As a result, this Appeal is a hearing *de novo*.

[31] A Justice hearing the Appeal may exercise their discretion afresh without deference to the Master: ***Club Industrial Trailers v Paramount Structures***, 2022 ABQB 34 at paras 16-18.

V. Issues

[32] The issues in this Appeal and Application are as follows.

a. Should the Proposed Mortgagee Defendants (defined below) be added to the Action, and should the proposed amendments be made to the Statement of Claim?

b. Does QLT have a reasonable likelihood of establishing that its claim for environmental remediation will rank in priority to the Proposed Mortgagee Defendants?

c. Is Capital Corp dealing with its property for the purposes of meeting its reasonable and ordinary business expenses if it sells its only asset and applies the sale proceeds to its mortgages?

d. Is Capital Corp hindering the ability of QLT to enforce a future judgment against it if it sells its only asset and applies the sale proceeds to it mortgages?

e. Should this Court exercise its discretion to grant an attachment order?

VI. Analysis

A. Should the Proposed Mortgagee Defendants be added to the Action, and should the proposed amendments be made to the Statement of Claim?

[33] QLT provided notice to the mortgagees of its application in Masters Chambers (as it then was) for an attachment order. The mortgagees are Peoples Trust, TCC Mortgage Holdings Inc ("**TCC**"), and Computershare Trust Company of Canada ("**Computershare**") and the beneficial mortgagee (being Trez Capital, who beneficially owns the TCC and Computershare mortgages).

[34] The Master was of the view that, for an attachment order to be granted in favour of QLT on a portion of the proceeds of a sale of the 12-10 Lands, the mortgagees and beneficial mortgagee should be parties to the underlying Action. I infer that the Master took this view because an attachment order would engage the legal rights of the lenders. Counsel for each of Trez Capital and Peoples Trust agreed.

[35] As a result, QLT brought an Application to amend its Statement of Claim to add the mortgagees and the beneficial mortgagee as Defendants in the Action. It also sought to amend the narrative of the Statement of Claim to engage the priority issue concerning the environmental remediation obligations.

1. Amendment Test – The Legal Framework

[36] Generally, amendments to pleadings are easily obtained: rules 3.65 and 3.74. They are typically allowed, subject to four exceptions. Those exceptions are where: (i) the amendment

B. Does QLT have a reasonable likelihood of establishing that its claim for environmental remediation will rank in priority to the mortgagees?

1. Environmental Law – Legal Framework

[51] I take judicial notice of the current environmental legislative framework in Alberta: *Alberta Evidence Act*, RSA 2000, c A-18 at s 32; see also see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 6th ed (Toronto: LexisNexis, 2022) at para 19.57 [**Sopinka**]. That framework starts with the *Responsible Energy Development Act*: SA 2012, c R-17.3 [***REDA***]; ***Vivendi Canada Inc v Dell'Aniello***, 2014 SCC 1 at para 62. The *REDA* authorizes the Alberta Energy Regulator ("**AER**") to govern a broad array of matters within Alberta.

[52] The AER administers several energy resource statutes, including the *Environmental Protection and Enhancement Act*, RSA 2000 c E-12, s 2 [***EPEA***]. The *EPEA* operates to protect and enhance the environment and to ensure polluters pay for any environmental damage: *EPEA*, s 2(i). The *EPEA* has broad application.

[53] The authority of the AER is further outlined in the various rules and regulations that flow from a number of statutes. The AER creates directives, which contain requirements and processes that companies must follow. Compliance with these directives is enforced through the AER's compliance assurance program.

[54] The *EPEA* sets out the various responsibilities that corporations and individuals (referred to generally as "person[s] responsible") must fulfill when they use land to generate business. The underlying purpose of the *EPEA* is to support and protect the environment: *EPEA*, s 2. That statute also authorizes regulatory bodies (such as the AER and AEP) to create regulations, issue orders, and carry out tasks related to the environment.

[55] Several provisions of the *EPEA* outline specific duties and obligations on operators and other persons responsible for the maintenance and remediation of land. These include the duty to take remedial measures: s 112; see also ss 113, 129, and 137.

[56] Section 112(1) of the *EPEA* addresses the person responsible for the release of a substance that is causing or has caused adverse environmental effects. It requires the responsible person to repair and confine the effects of the substance, and to remediate or dispose of the substance so as to prevent further adverse effects.

[57] Section 112(1) of the *EPEA* can form the basis for an Environmental Protection Order ("**EPO**") under section 113 of that statute. An EPO can be issued where the Director is of the opinion: (i) that a release of a substance into the environment may occur, is occurring, or has occurred; and (ii) that a release may cause, is causing, or has caused an "adverse effect". The phrase "adverse effect" is defined as the "impairment of or damage to the environment, human health or safety or property": *EPEA,* s 1(b).

[58] An EPO requires the recipient to take specified actions to address the release of a substance into the environment: ***ConocoPhillips Canada Resources Corp v Director, South Saskatchewan Region, Alberta Environment and Sustainable Resource Development*** (14 August 2014), 13-031 and 032-D1 at para 35, online: *Alberta Environmental Appeals Board* <www.eab.gov.ab.ca/dec/13-031-032-D1.pdf>.

[59] Section 113 of the *EPEA* also sets out the requirements that the Director may incorporate in an EPO. Those requirements could include: (i) taking any action specified to prevent the

release; (ii) actions to minimize or remedy the effects of the substance on the environment; or (iii) a requirement that the recipient construct something if that is necessary to control or eliminate the release of the substance into the environment.

[60] Remediation is not defined in the *EPEA*. Instead, the *EPEA* delegates to the Director exclusive jurisdiction to determine remediation protocol: *EPEA,* ss 112, 128; see also ***Director (EAP) v Alberta (Provincial Court)***, 2017 ABQB 3 at para 54 [***Alberta 2017***].

[61] The powers delegated to the Director in the *EPEA* in respect of remediation, including the extraordinary power to access private land and undertake remediation that is not otherwise occurring, demonstrates that the Legislative Assembly does not intend for environmental remediation to languish. I infer that the Legislative Assembly wants such issues to be addressed promptly.

[62] As mentioned above, the *EPEA* also authorizes applications by the Director to gain access to private lands: *EPEA*, s 250(5). This power is available where an order was issued to undertake site remediation in circumstances where that order is not followed: see ***Alberta 2017*** at para 30. Costs incurred by the Director may be recovered in an action in debt and create a charge against the lands involved: see *EPEA*, s 216.

[63] The legislative purpose of the *EPEA* is also supported by the *Conservation and Reclamation Regulation*, Alta Reg 115/1993. The objective of that regulation is to ensure that reclaimed land has an equivalent land capability. This means that the land must be capable of supporting various land uses that it was capable of supporting prior to an activity being conducted on the land. That said, this does not mean that the remediated land needs to be identical to its former capabilities: ***Re Vantage Point Resources Inc***, 2021 ABAER 4 at para 23.

2. Attachment Order – The Prerequisites

[64] QLT seeks an attachment order in this case because it wants to ensure that the proceeds realized on the sale of the 12-10 Land are applied to address the obligations of Capital Corp in respect of the environmental remediation of the QLT Lands and the 12-10 Lands. In particular, QLT wants the environmental remediation obligations in respect of the QLT Lands to be addressed in priority to paying the Proposed Mortgagee Defendants.

[65] The basis for an application for an attachment order is set out in the *Civil Enforcement Act*, RSA 2000, c C-15, s 17(2) [***CEA***]. The statutory framework provides that the Court may grant an attachment order if it is satisfied that:

a. there is a reasonable likelihood that the claimant's claim against the defendant will be established, and

b. there are reasonable grounds for believing that the defendant is dealing with the defendant's exigible property, or is likely to deal with that property,

   i. otherwise than for the purpose of meeting the defendant's reasonable and ordinary business or living expenses, and

   ii. in a manner that would be likely to seriously hinder the claimant in the enforcement of a judgment against the defendant.

3. Application of the Law to the Facts

a. General Comments

[66] Concerning the Appeal of the attachment order, the burden is QLT because it is the appellant. At the outset, we need to acknowledge that pre-judgment attachment is an extraordinary remedy.

[67] While an attachment order is available under the *CEA*, I am guided by the judicial abhorrence to prejudgment execution: ***Giammarco & Co (Western) Division Ltd v TRL Real Estate Syndicate (05) Ltd***, 2014 ABQB 424 at para 21, citing ***Rea v Patmore***, 1999 ABQB 759 at para 4. As it is a discretionary remedy, I can refuse to grant the requested attachment order even if the legislated requirements are satisfied: *CEA* s 17(2). Whether I will exercise my discretion and grant the attachment order will depend on the circumstances and my analysis.

[68] With respect to the first part of the test in section 17(2) of the *CEA*, QLT must establish a reasonable likelihood of success at trial against Capital Corp concerning the application of the super priority concept in respect of the environmental remediation obligations associated with the QLT Lands. The applicable standard of a "reasonable likelihood of success" is lower than a strong *prima facie* case but is closer to that standard than merely establishing a genuine issue to be tried: ***Giammarco*** at para 22.

[69] Concerning the request for an attachment order, Capital Corp has conceded that: (a) the Contamination is in the groundwater and potentially the soil of the QLT Lands; (b) the Contamination is at concentrations that exceed relevant AEP guidelines; (c) the Contamination has emanated from the 12-10 Lands; (d) the Contamination has migrated to the QLT Lands; and (e) Capital Corp has failed to remediate to prevent further spread of the Contamination. Given that context before the Master, the parties moved immediately to section 17(2)(b) of the *CEA*.

[70] However, QLT asserts that the above concessions do not address the issue of priorities. Therefore, the priority issue will be addressed through the proposed amendments to the Statement of Claim.

b. Proposed Amendment

[71] The proposed amendments to the Statement of Claim have been touched on above. For reference, the particular relief sought in the draft amended Statement of Claim is the addition of the following clause:

> (d) A declaration that a judgment for damages made pursuant to subsection (a) and the Defendants' Remediation Obligations are to be paid/undertaken using the money from the proceeds of any sale of the Capital Corp Lands in priority of all creditors, debts, or obligations, including without limitation, secured creditors and registered mortgagees.

c. Reasonable Likelihood Analysis

[72] For purposes of the Appeal concerning the attachment order, I need to determine whether QLT has a reasonable likelihood of "establishing" the declaration sought in paragraph 22(d) of its proposed amended Statement of Claim. In addressing the "reasonable likelihood" threshold, there are two factors that this Court needs to consider in this Appeal. First, the underlying nature

of the relief sought by QLT, which concerns environmental remediation obligations. Second, whether Capital Corp is insolvent.

[73] These two factors engage the principles stipulated in recent jurisprudence: see ***Redwater***, ***Manitok***, ***Perpetual 2021***, ***Perpetual 2022***, and ***Trident Exploration***. The substantive question is how those common law principles apply in the circumstances of this case, absent formal insolvency proceedings. A couple of additional elements will be reviewed, being the question as to whether QLT needs to be a "regulator" as a prerequisite to making its claim and whether the ***Abitibi*** test applies in this case: ***Newfoundland and Labrador v AbitibiBowater Inc***, 2012 SCC 67 [***Abitibi***].

i. Nature of Claim and Insolvency

[74] QLT asserts that the Master erred by ignoring the nature of the underlying claim for environmental remediation. This assertion requires the examination of four factors.

[75] First, the polluter-pays principle. This principle is a recognized tenet of Canadian environmental law. The polluter-pays principle assigns to those responsible for pollution the associated responsibility for remedying environmental damage caused by that pollution: ***Redwater*** at para 29.

[76] In this context, Capital Corp is a "polluter": see *EPEA,* Part 5. Capital Corp is a "person responsible for the contaminated site" because it is the owner of the contaminated site. In that capacity it will continue to be a "person responsible for the contaminated site" if there is a sale of the 12-10 Lands because it was a previous owner who was the owner at any time when the substance was in, on or under the contaminated site. I make this determination because the "person responsible for the contaminated site" means a person responsible for the substance that is in, on or under the contaminated site: *EPEA,* s 107(1)(c)(i).

[77] Where a substance is released into the environment that may cause, is causing or has caused, an adverse effect, the person responsible for the substance shall, as soon as that person becomes aware of or ought to have become aware of the release, take all reasonable measures to: (i) repair, remedy and confine the effects of the substance; and (ii) remediate, manage, remove or otherwise dispose of the substance in such a manner as to prevent an adverse effect or further adverse effect. That person is also responsible for restoring the environment to a condition satisfactory to the Director: *EPEA*, s 112(1).

[78] Second, unless the proceeds from the sale of valuable assets of a corporation are available to satisfy environmental remediation obligations, those obligations may never be satisfied. The directive of the Alberta Court of Appeal is that such a result is to be avoided: ***Manitok*** at para 29. This applies even when assets are sold and converted to cash: ***Manitok*** at para 32. For this reason, environmental remediation obligations may displace (*i.e.*, rank in priority to) secured lenders, including mortgagees. That is essence of the super priority concept that is inherent in ***Redwater***: ***Trident Exploration*** at para 53.

[79] In this case, the aggregate value of Capital Corp is in the range of $17,700,000. That is the aggregate estimated value of the Transaction Property ($13,300,000) and the Retained Property ($4,400,000).

[80] The aggregate debt represented by the Mortgages as of May 2022 was in the amount of $17,200,000. However, that amount is without regard to: (i) the additional interest that has

accrued between May 2022 and the September 2022 hearing date; and (ii) the environmental remediation obligations.

[81] If the interest rate on the Mortgages was commensurate with current interest rates, this may not be a significant concern. However, the average interest rate on the Mortgages is significantly above the norm. This is evident with the Second Trez Mortgage, which has a current interest rate of 25% per annum.

[82] Given that Capital Corp has effectively conceded the Contamination of the QLT Lands, and that the Contamination has migrated from the 12-10 Lands to the QLT Lands, I find that this remediation obligation must be taken into account in determining the solvency of Capital Corp. I make that determination by applying common sense, based on the judicial guidance in ***Perpetual 2021*** and ***Perpetual 2022*** and the current environmental legislative framework in Alberta.

[83] In this case, there is little doubt that Capital Corp is insolvent. In support of this comment, I note that: (i) Capital Corp has ceased to pay the Trez Capital Mortgages; (ii) when the Trez Capital Mortgages were being paid, those payments were being made by "related parties"; and (iii) the underlying business entity has a negative cash outflow. Those "related parties" were entities within the Strategic Group. Also, the aggregate of the Mortgages and the environmental remediation obligations of Capital Corp outweigh the value of the 12-10 Lands, which is the only asset of value held by Capital Corp. In my view, the fact that there is no evidence that Capital Corp has recorded the environmental remediation obligations on its book is irrelevant. My insolvency determination is further supported by the fact that Capital Corp is subject to a total net monthly carrying cost of $265,176.

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

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

[86] I acknowledge that there is no evidence that Capital Corp has recorded any obligations for environmental remediation on its books of account. The absence of an accrual of

environmental remediation obligations is likely common, especially for smaller corporations that are not directly involved in the oil and gas industry. However, under the current state of the law, the absence of an accounting accrual likely does not matter. Based on the jurisprudence, the obligation to effect environmental remediation exists, and it should be taken into account.

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

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

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

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

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

> The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life ... But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is

> not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the entire process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whom the duty is imposed: ***Redwater*** at para 134.

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

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

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

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

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

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

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

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

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

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

iii. The *Abitibi* Test – Does QLT have a claim provable in bankruptcy?

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

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

[103] The ***Abitibi*** test is: "[f]irst, there must be a debt, a liability or an obligation to a *creditor*. Second, the debt, liability or obligation must be incurred *before the debtor becomes bankrupt*. Third, it must be possible to attach a *monetary value* to the debt, liability or obligation": ***Abitibi*** at para 26; see also ***Redwater*** at para 119; and ***Trident Exploration*** at para 37.

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

[105] In this case, QLT is acting as a *bona fide* citizen and beneficiary of the duty that Capital Corp owes to its fellow citizens to remediate. QLT seeks to have Capital Corp protect the QLT

Lands from the further migration of the Contamination by: (i) having the QLT Lands remediated; and (ii) implementing a protective barrier around the QLT Lands following full remediation of same. The ultimate goal of QLT is to have the environmental work actually performed and it is seeking legal recourse as a party that is impacted by the Contamination.

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

[107] The third prong of the ***Abitibi*** test is not engaged because the environmental obligations associated with the QLT Land do not have a monetary value. At this juncture there is insufficient certainty in the quantum of those obligations to make them provable, even if a bankruptcy had been formalized: ***Redwater*** at paras 145, 149, 154.

[108] The nature of the obligation in this case is environmental remediation. Although there will be a cost to that work, it is not monetary in nature at this stage. Indeed, the SCC in ***Redwater*** held it was an error for the chambers judge to characterize abandonment orders as "intrinsically financial": ***Redwater*** at para 146. Although not identical, I view an EPO under the *EPEA* analogous to an abandonment order in ***Redwater***.

[109] The sufficient certainty analysis focuses on whether the regulator will ultimately perform environmental work and assert a monetary claim for reimbursement: ***Redwater*** at para 121. In ***Redwater***, it was not sufficiently certain that the Orphan Well Association would perform the abandonments due to the backlog of orphan wells: ***Redwater*** at paras 149-154. Therefore, the receiver could not walk away from the environmental liabilities and was required to comply with ongoing environmental remediation obligations: ***Redwater*** at para 162.

[110] In this case, the AEP is the relevant authority. It has broad powers under the *EPEA*, including the powers to remediate: *EPEA*, ss 113, 210, 214.

[111] As mentioned above, the AEP has issued letters to Capital Corp. Those letters imposed obligations on that entity to do something. When Capital Corp was delinquent in fulfilling its obligations, AEP issued follow-up letters in 2022.

[112] While the AEP has broad powers to undertake remediation, there is no indication that it has any intention to perform the remediation itself. It is not sufficiently certain that the AEP will undertake any remediation of the 12-10 Lands or the QLT Lands.

[113] That being the case, the obligation to remediate rests solely with Capital Corp. There are no other parties that, with any sufficient certainty, will remediate the 12-10 Lands on behalf of Capital Corp and bring forward a corresponding debt claim for reimbursement. The relief sought in this Action is for Capital Corp to remediate the QLT Lands or to fund that remediation. As such, it is not a claim to which it is possible to attach a monetary value. As a result, the third prong of the ***Abitibi*** test is not met.

[114] In closing on this particular area, given the super priority granted to environmental remediation obligations in similar circumstances, I am of the view that there is a viable argument that Capital Corp will not be able to walk away from its environmental obligations: ***Redwater*** at para 162. To restate my assessment, I am of the view that there is a reasonable likelihood that Capital Corp will not be able to walk away from its environmental obligations. Subject to hearing full argument on the matter, a super priority could apply against Capital Corp in respect of the Contamination, and QLT is a likely beneficiary of that ranking because the super priority

would be above, and displace, the priorities held by the mortgagees. As framed by the Supreme Court of Canada, this is a matter of substance; not a mere matter of form: ***Redwater*** at para 159.

[115] In the above paragraph, I commented that a super priority may apply against Capital Corp in respect of the Contamination of the QLT Lands. That said, the relevant question is whether there is a "reasonable likelihood of success" in this Action that QLT will be successful in its quest to impose super priority in respect of the Mortgages because of the Contamination associated with the QLT Lands. As I stated above, the threshold for a "reasonable likelihood of success" is lower than a strong *prima facie* case but is closer to that standard than merely establishing a genuine issue to be tried: ***Giammarco*** at para 22. Based on my reading of ***Redwater*** and the subsequent cases that have considered the issue, I am of the view that in a full hearing of the matter, QLT is reasonably likely to be successful in respect of the super priority issue.

[116] Based on my review of the evidence and analysis of the law, I find that QLT has a "reasonable likelihood" of establishing that its claim for environmental remediation will rank in priority to the Mortgages.

C. Is Capital Corp dealing with its property for the purpose of meeting its reasonable and ordinary business expenses if it sells its only asset and applies the sale proceeds to its mortgages?

[117] QLT asserts that the Master (as he then was) erred when he held that where there is a sale of land by a defendant/owner to an arm's length buyer and the proceeds are to be used to pay down the mortgages against the land, that application of proceeds is for the purpose of meeting the owner's reasonable and ordinary business expenses.

[118] The question as to whether the steps taken by a business entity are for the purpose of meeting its ordinary business expenses requires the consideration of the nature and scope of usual type of business that is engaged in by the industry of the defendant: ***1482221 Alberta Ltd v Haney Farms (1985) Ltd***, 2009 ABQB 760 at para 49; ***Graeff Estate v Huey***, 2020 ABQB 262 at para 34; ***Yorkton (City) v Mi-Sask Industries Ltd***, 2021 SKCA 43 at paras 79 and 83. As part of the context, I note Capital Corp pursued a sale of a portion of the 12-10 Land after the AEP directed it to undertake investigation and remediation. The use of the 12-10 Land over the past number of years is also part of the context. As noted above, Capital Corp has held the 12-10 Land since 2009.

[119] Part of the 12-10 Land has been leased to Strategic Builders. The remainder of the land has been leased to Store & Go Ltd. As a general comment, an ordinary business expense of Capital Corp concerning the economic use of the 12-10 Land are expenditures that have a nexus to the real estate business.

[120] One underlying issue that QLT asserted in its submissions was that Capital Corp has over-mortgaged the 12-10 Lands. Over-mortgaging means that the loan-to-value ratio is excessive. This excessive leverage is an important part of the context in this hearing. While I touched on this issue briefly above in reference to a loan-to-value comment, I will analyze it more below.

[121] When determining whether the Capital Corp dealings are for the purpose of meeting its ordinary business expenses, the term "expenses" is to be interpreted broadly: ***Cho v Twin Cities Power-Canada***, 2012 ABCA 47 para 17; ***Giammarco*** at para 34. The repayment of pre-existing

TAB 9

In the Court of Appeal of Alberta

Citation: DGDP-BC Holdings Ltd v Third Eye Capital Corporation, 2021 ABCA 284

Date: 20210810
Docket: 2101-0173AC
Registry: Calgary

Between:

DGDP-BC Holdings Ltd.

Applicant

- and -

Third Eye Capital Corporation

Respondent

- and -

PricewaterhouseCoopers Inc. in its capacity as Receiver and Manager of Accel Canada Holdings Limited and Accel Energy Canada Limited

Respondent

Reasons for Decision of
The Honourable Justice Barbara Lea Veldhuis

Applications for Permission to Appeal

Reasons for Decision of
The Honourable Justice Barbara Lea Veldhuis

Background

[1] The applicant, DGDP-BC Holdings Inc. (DGDP), applies for leave to appeal pursuant to s. 193(e) of the *Bankruptcy and Insolvency Act*, RCS 1985, c B-3 [*BIA*], a Sale Approval and Vesting Order (SAVO) dated June 14, 2021, which approved the sale of assets of Accel Canada Holdings Limited (Accel Holdings) to Conifer Energy Inc., (Conifer) a subsidiary of the respondent, Third Eye Capital Corporation (Third Eye).

[2] The transaction underlying the SAVO contemplated that DGDP's debt under a debtor-in-possession interim lenders agreement (the Interim Facility), which granted an interim lenders' charge (Interim Lenders' Charge) over Accel Holdings' assets, would be satisfied by granting DGDP a gross overriding royalty (GORR).

[3] A GORR was approved in a related, but separate order, by the case management judge at the same hearing. This order declared that the GORR amounted to full satisfaction of all amounts owed by Accel Holdings to DGDP under the Interim Facility. DGDP, in the alternative, is seeking leave to appeal provisions of this order.

[4] The role of Third Eye and the numerous hats that it wears in these proceedings underlies many of DGDP's complaints. As noted in 2021 ABCA 226 at para 10, an earlier appeal in these insolvency proceedings:

> [Third Eye] was the primary secured creditor of the insolvent Accel Holdings, having advanced about $326 million. It was one of the interim lenders protected by the Interim Lenders' Charge and agent for the interim lenders. It was the successful bidder for the purchase of the assets of the Accel Entities. It was the applicant for the appointment of the receiver, to facilitate the sale of the Accel Energy assets to its nominee.

[5] DGDP seeks to challenge the SAVO and the GORR on the grounds that the sale to Third Eye constitutes an "illegal preference" and thus outside the case management judge's jurisdiction to approve under s. 243 of the *BIA*. It also seeks a stay of proceedings. Third Eye and the court-ordered receiver and manager, PricewaterhouseCoopers Inc. (PWC), oppose the application and seek a lifting of the stay that automatically arises under s. 195 of the *BIA* if leave is granted. PWC notes that if the stay is not lifted, the transaction with Conifer will likely not close and there are insufficient funds to continue the insolvency proceedings into September.

[6] This insolvency has been contentious. This is the third leave application that DGDP has sought in these proceedings. Previously it challenged:

(a) an order granting priority to the receiver's borrowing charge over the Interim Lenders' Charge without obtaining DGDP's consent: 2020 ABCA 442; and

(b) an order regarding the sale of the assets of Accel Energy Canada Limited (Accel Energy and collectively, with Accel Holdings, the Accel Entities) that discharged the Interim Lenders' Charge against Accel Energy's assets without satisfying the amounts owing under the Interim Facility: 2021 ABCA 33.

[7] DGDP's appeals were dismissed: 2021 ABCA 226. No further appeals were taken.

[8] For the reasons set out below, DGDP's applications for leave to appeal are dismissed.

History

[9] The history of the insolvency proceedings is set out in these earlier decisions and has been overseen by a case management judge. In October 2019, the Accel Entities filed Notices of Intention to make a proposal under the *BIA*. These proceeding evolved into one under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*] and PWC was appointed as the monitor.

[10] In November 2019, the case management judge approved the Interim Facility, which was described as a "super priority (debtor-in-possession), interim, revolving credit facility". Through the Interim Facility, the case management judge granted the debtor-in-possession loans priority over the other creditors of the Accel Entities. DGDP is the assignee of the minority lender under the Interim Facility and has 46.67% of the debt. The two other lenders under the Interim Facility were arranged and managed by Third Eye. Under an agency agreement, these lenders appointed Third Eye as agent with broad powers to act on behalf of all the lenders under the Interim Facility.

[11] The Interim Facility provided that Accel Energy and Accel Holdings would be acting jointly and severally as "Borrowers", and each (and certain affiliated entities) guaranteed the obligations of the other. Nevertheless, when PWC drew down funds, they were allocated either to Accel Energy or Accel Holdings, depending on which corporation was actually going to use the funds at the time.

[12] Initially, the case management judge approved a process for the sale of the assets of the Accel Entities in May 2020. PWC was able to negotiate a sale of all the Accel Entities' assets to Third Eye through its nominee Conifer. This *en bloc* transaction was intended to be satisfied by way of cash and a credit bid, with DGDP being paid in cash. However, over time, this *en bloc* transaction was found to be unworkable, and a sale of Accel Energy's assets proceeded with Conifer for cash first, with an anticipated sale of Accel Holdings' assets to follow.

[13] In June 2020 Third Eye applied under the *BIA* and s. 13(2) of the *Judicature Act*, RSA 2000, c. J-2 to appoint PWC as receiver of the Accel Entities. Third Eye also sought an order

acknowledged that their role is not sacrosanct or above the powers of the court to restructure the affairs of the insolvent parties and do what is just, equitable and practical in the circumstances.

[41] The case management judge was satisfied that the purchase and sale agreement with Conifer met the principles from *Soundair* and as a result, the SAVO was justified.

[42] Next, she turned to which GORR was a just and equitable satisfaction of the amounts owing to DGDP under the Interim Facility and reviewed each party's position. She determined that it was just, practical and equitable to approve Third Eye's GORR. The reduced interest rate Third Eye proposed in the put option reflected the enhanced security of the interest in the land, the equal ranking with the receiver's borrowing charge, and the addition of Accel Energy's lands as assets that the GORR will cover. She also found that there was no reason to include future wells in the GORR as requested by DGDP because future wells were never part of the original bargain. Finally, Third Eye's GORR achieved an equilibrium amongst the debt lenders as each will be treated equally. However, she allowed DGDP's request to have additional fees and interest added to the opening balance.

[43] DGDP comes before this Court seeking leave to appeal.

Leave to appeal under s. 193(e) of the *BIA*

[44] DGDP reiterates the arguments made before the case management judge. It states that it never agreed to a GORR in principle as repayment in full of the amounts owing under the Interim Facility. It asserts that there are clear biding rules that prevented the case management judge from accepting Third Eye's GORR in the face of DGDP's objection. In addition, by accepting Third Eye's GORR the case management judge exceeded her jurisdiction under s. 243(1) of the *BIA* to approve a credit bid that acted as an illegal preference. It suggests that it is an important issue to determine whether s. 243(1) of the *BIA* allows the court to declare the GORR to be payment in full satisfaction of the debt, despite the clear wording of the Interim Facility which required repayment by cash only, stating that the case management judge could not override its contractual rights. It states that allowing this case to stand would turn the entire insolvency regime on its head.

[45] Alternatively, it attacks the case management judge's assessment of the terms of the GORR, and in particular, states that the case management judge erred in finding that the Interim Lenders' Charge did not attach to all lands of the Accel Entities (including future wells).

[46] The chambers judge in *2003945 Alberta Ltd v 1951584 Ontario Inc*, 2018 ABCA 48 set out the factors to be considered in granting leave to appeal at para 41:

(a) whether the point of appeal is of significance to the bankruptcy practice;

(b) whether the point is of significance to the action itself;

(c) whether the appeal is prima facie meritorious;

(d) whether the appeal will unduly hinder the progress of the action; and

(e) whether the judgment appears to be contrary to law, amounts to an abuse of judicial power, or involves an obvious error causing prejudice, for which there is no other remedy.

[47] I agree with the chambers judge in *Echino v Munro*, 2014 ABCA 422 at para 11:

> Whether the appeal is *prima facie* meritorious is the starting point for the application of s 193(e) (see *Ravelston Corporation Limited (Re)*, 2007 ONCA 268 at para 12, 2007 CarswellOnt 2114). If the appeal has *prima facie* merit, only then will this Court consider the other elements of the test. When considering this factor, the Court of Appeal does not decide the ultimate merits of the proposed appeal, but rather considers whether the appeal raises an arguable case (see *Lechcier-Kimel (Re)*, 2011 ONCA 590 at para 9, 2011 CarswellOnt 10144; *Decker v Canada (Superintendent of Bankruptcy)*, 2009 ABCA 287 at para 9, 464 AR 40; *Re Fantasy Construction Ltd (Bankrupt)*, 2007 ABCA 335 at para 17, 417 AR 255). Rothstein J recently explained the arguable case standard in *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 73, 461 NR 335 stating, "In my view, the common thread among the various expressions used to describe arguable merit is that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law."

[48] DGDP's primary argument is based on a number of premises. First, that a case management judge cannot depart from the terms of the Interim Facility without consent of DGDP when approving the terms of a sale under s. 243(1) of the *BIA*. Second, any decision regarding the sale of assets under s. 243(1) of the *BIA* had to respect DGDP's priority.

[49] This Court has already issued a decision in these proceedings indicating that the case management judge had wide discretion and jurisdiction to depart from the terms in the Interim Facility and the existing priorities if the circumstances warranted under s. 243(1) of the *BIA*. The Court's decision on jurisdiction is consistent with the Ontario Court of Appeal's decision in *Dianor*. DGDP has not identified how the case management judge failed to comply with these authorities.

[50] As a result, given the existing case law, any appeal that engages these premises is unlikely to be successful. The existing case law also suggests that the issues are of little significance to bankruptcy practice generally and this action in particular.

[51] I have reviewed the cases cited by the parties about whether there are hard and fast rules, as suggested by DGDP, around credit bidding: *8527504 Canada Inc v Liquibrands Inc*, 2015

TAB 10

In the Court of Appeal of Alberta

Citation: DGDP-BC Holdings v Third Eye Capital Corp, PricewaterhouseCoopers, 2021 ABCA 33

Date: 20210129
Docket: 2001-0241AC
Registry: Calgary

Between:

DGDP-BC Holdings Ltd.

Applicant

- and -

Third Eye Capital Corporation

Respondent

- and -

PricewaterhouseCoopers Inc.

Respondent

And Between:

Third Eye Capital Corporation

Applicant

- and -

DGDP-BC Holdings Ltd.

Respondent

Reasons for Decision of
The Honourable Mr. Justice Thomas W. Wakeling

Application for Permission to Appeal from the Order by
The Honourable Madam Justice K.M. Horner
Dated the 04th day of December, 2020
Filed on the 04th day of December, 2020
(Docket: 2001-06776)

Reasons for Decision of
The Honourable Mr. Justice Thomas W. Wakeling

I. Introduction

[1] DGDP-BC Holdings Ltd. seeks leave under section 193(e) of the *Bankruptcy and Insolvency Act*[1] to appeal paragraph 4 of a sale approval and vesting order pronounced on December 4, 2020 that extinguished the applicant's security interest in the assets, property and undertakings of Accel Energy Canada Limited, an insolvent corporation.[2]

[2] In the event that this Court grants DGDP leave to appeal under section 193(3) of the *Bankruptcy and Insolvency Act*, Third Eye Capital Corporation seeks an order under section 195

[1] R.S.C. 1985, c. B-3.

[2] This is a brief background overview. Accel Energy Canada Limited and Accel Canada Holdings Limited are private Canadian companies engaged in oil and natural gas production and development. On October 21, 2019 the two companies were insolvent and filed notices of intention to make proposals to their creditors under the *Bankruptcy and Insolvency Act*. On November 27, 2019 the *Bankruptcy and Insolvency Act* proceedings were continued under the *Companies' Creditors Arrangement Act*. The Court of Queen's Bench appointed PricewaterhouseCoopers Inc. as the monitor of Accel Energy and Accel Canada Holdings. On November 27, 2019 the Court of Queen's Bench granted an amended and restated initial order. A term of this order allowed Accel Energy and Accel Canada Holdings to enter into debtor-in possession financing and to continue to operate during the *Companies' Creditors Arrangement Act* proceedings. Third Eye Capital Corporation was the administrative and collateral agent under the court-approved debtor-in possession financing term sheet. A court-ordered priority charge secured the interim lenders' charge. On December 13, 2019 the Court of Queen's Bench authorized Accel Energy and Accel Canada Holdings to conduct a sales and solicitation process. On May 29, 2020 the Court of Queen's Bench approved Third Eye Capital's bid for substantially all the assets of Accel Energy and Accel Canada Holdings. During the *Companies' Creditors Arrangement Act* proceedings, Accel Energy borrowed $14,126,159.33 and Accel Canada Holdings borrowed $21,885,840.67 under the debtor-in-possession loan. On June 10, 2020 DGDP acquired an interest in the debtor-in-possession loan. On June 12, 2020 the Court of Queen's Bench appointed PricewaterhouseCoopers as the receiver over all the assets, properties and undertakings of Accel Energy and Accel Canada Holdings. The receiver needed to borrow more funds to continue the operation of Accel Energy and Accel Canada Holdings. DGDP declined an invitation to participate in this loan. Third Eye Capital agreed to provide the additional funds and requested a receiver's borrowings charge to secure its funding, ranking in priority to other charges, including the interim lenders' charge. Over the objection of DGDP, the Court granted the order Third Eye Capital requested. DGDP sought leave to appeal the order that granted priority to the receiver's borrowing charge over the interim lenders' charge. On December 2, 2020 Justice McDonald granted leave to appeal. 2020 ABCA 442. On October 30, 2020 Third Eye Capital informed the Court of Queen's Bench that Third Eye Capital and the receiver would close the Third Eye Capital en bloc bid in two stages. The first sale would be the assets of Accel Energy. The assets of Accel Canada Holdings would be sold in the second stage. On December 4, 2020 the Court of Queen's Bench approved the purchase and sale agreement relating to the assets of Accel Energy between the purchaser Conifer Energy Inc. and the receiver. DGDP objected on the basis that the interim lenders' charge should remain on the Accel Energy assets until the amount Accel Canada Holdings borrowed was repaid in full. On December 14, 2020 DGDP applied for leave to appeal paragraph 4 of the December 4, 2020 order.

of the *Bankruptcy and Insolvency Act*[3] vacating the stay of proceedings associated with a successful leave to appeal application. DGDP takes no position on this application.

II. Questions Presented

A. Leave To Appeal Application

[3] Should this Court grant the DGDP leave to appeal?

[4] To answer this general question, more specific questions must be posed.[4]

[5] Is the question the applicant seeks permission to appeal of significance to those who practice at the insolvency bar?

[6] Is the question of significance to the parties to the appeal?

[7] There is a merit-based component to the test. It makes no sense to grant an applicant permission to appeal if the likelihood of success is extremely low or hopeless. But is the standard more onerous? Must the prospects of success exceed fifty percent? If this is too high a standard, what is the appropriate standard?

[8] Will the appeal unduly hinder the progress of the insolvency proceedings?

B. Stay Application

[9] Should this Court exercise its authority under section 195 of the *Bankruptcy and Insolvency Act* and cancel the stay of proceedings created by section 195?[5]

[10] Has Third Eye Capital demonstrated that there is a serious issue to be tried?

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[3] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 195 ("Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper").

[4] See *2003945 Alberta Ltd. v. 1951584 Ontario Inc.*, 2018 ABCA 48, ¶ 41; 57 C.B.R. 6th 272 (chambers) & *Alternative Fuel Systems Inc. v. EDO (Canada) Ltd.*, 1997 ABCA 273, ¶ 12; 206 A.R. 295, 299 (chambers). See also *Mudrick Capital Management LP v. Lightstream Resources Ltd.*, 2016 ABCA 401, ¶¶ 48-63; 43 C.B.R. 6th 175, 201-09 (chambers).

[5] See *Harper v. Canada*, 2000 SCC 57, ¶ 4; [2000] 2 S.C.R. 764, 768; *RJR-MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311, 334; *Quebec v. 143471 Canada Inc.*, [1994] 2 S.C.R. 339, 376 & *Manitoba v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, 128-29.

[11] Will it suffer irreparable harm if a stay is not granted?

[12] Will the harm Third Eye Capital suffers, if a stay is not granted, exceed the harm DGDP will suffer if a stay is granted?

III. Brief Answers

A. Leave To Appeal Is Granted

[13] I grant DGDP leave to appeal against paragraph 4 of the December 4, 2020 order.

1. The Question Is of Significance to the Insolvency Bar

[14] In its memorandum of argument DGDP identified the question it wished to present to the Court of Appeal this way:[6]

> The question of whether an interim lender, with a standard, Court-ordered, super-priority Interim Lenders' Charge and Court-ordered status as an unaffected creditor in any CCAA plan of arrangement or compromise, can have those protections and "certainties" stripped from it when the CCAA proceeding is converted into a receivership proceeding, and, if so, under what conditions … .

[15] This question must be of significance to the insolvency practice. Interim lenders advance funds relying on the protection prescribed by the super-priority interim lenders' charge. In doing so, they are not unlike the professionals and directors who derive a benefit from the provisions in the initial order under the *Companies' Creditors Arrangement Act*[7] proceedings.

[16] Those who rely on protection provided in the "Validity and Priority of Charges" parts of an initial order must know if their reliance is misplaced.

[17] Mr. Aversa, co-counsel for DGDP, argued that "[n]o lender would risk participating in such a loan if the Court-ordered priority was subject to variation later in the process".[8] This strikes me as a sound observation. The form of security a lender has is a vital consideration when assessing the merits of a loan. Justice Brown, as he then was, forcefully reinforced this proposition in *Re First Leaside Wealth Management Inc.*:[9]

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[6] Memorandum of Argument of the Appellant, DGDP-BC Holdings Ltd., ¶ 17.

[7] R.S.C. 1985, c. C-36, s. 9.

[8] Memorandum of Argument of the Appellant, DGDP-BC Holdings Ltd., ¶ 14.

[9] 2012 ONSC 1299, ¶ 51.

> [A]bsent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a *CCAA* proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges.

2. The Question Is of Significance to The Parties

[18] Christopher Morris, DGDP's president, expressed the opinion in his November 30, 2020 affidavit, that DGDP's position would be "significantly" prejudiced if the only collateral for its outstanding loan was the assets of Accel Canada Holdings.[10] He relies on two telephone conversations with the chief executive officer of Third Eye Capital[11] to the effect that "TEC intended to offer only equity to the Interim Lenders in satisfaction of the obligations TEC allocated to ... [Accel Canada Holdings Limited] under the DIP facility".[12]

[19] I note that others have expressed the opinion that DGDP will be paid in full.

[20] Taking everything into account, I am satisfied that paragraph 4 of the contested order may adversely affect the interests of DGDP. As such, the question is of significance to DGDP.

3. The Proposed Appeal Passes the Merit-Based Component of the Test

[21] The parties could not agree on the level of scrutiny required in the merit-based component of the test.

[22] Ms. Cameron, counsel for PricewaterhouseCoopers Inc., argued that the leave-to-appeal applicant must convince the adjudicator-gatekeeper that its appeal was more likely to succeed than fail.

[23] I do not agree.

[24] The merit-based component of the test requires the applicant to satisfy the adjudicator-gatekeeper that its appeal is not frivolous. In a comparable context, I opined that "[a] position is

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[10] Affidavit of Christopher Morris sworn November 30, 2020, ¶ 3.

[11] Id. ¶¶ 48 & 59.

[12] Id. ¶ 59.

frivolous if … the likelihood it will succeed is extremely low. It makes no sense to ask an appeal court to hear appeals that are frivolous".[13]

[25] The more onerous standard that Ms. Cameron favored places unrealistic demands on the adjudicator-gatekeeper. Asking an adjudicator-gatekeeper to decide if the applicant's appeal is more likely to succeed than fail without the assistance of facta and full oral argument in a compressed time period is unreasonable.[14]

[26] In my opinion, the DGDP's prospects of succeeding on appeal meet the low merit-based standard I have adopted.

4. The Proposed Appeal Will Not Unduly Hinder the Insolvency Proceedings

[27] The fourth component of the leave-to-appeal test focuses on the effect granting leave to appeal will have on the insolvency process. Will an appeal unduly hinder the progress of the insolvency proceedings?

[28] It will not.

[29] The applicant has not asked PricewaterhouseCoopers Inc., in its capacity as the Court-appointed receiver and manager of Accel Canada Holdings and Accel Energy, to refrain from closing the transaction involving the sale of substantially all the assets of Accel Energy to Conifer Energy Inc.[15] In addition, the applicant takes no position on the application by Third Eye Capital to lift the stay of proceedings, in effect, as a result of section 195 of the *Bankruptcy and Insolvency Act*.

[30] Ms. Cameron informed me that PricewaterhouseCoopers and Conifer Energy Inc. will close the Accel Energy-Conifer Energy Inc. transaction if I grant DGDB's application for permission to appeal and Third Eye Capital's stay application.[16]

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[13] *Mudrick Capital Management LP v. Lightstream Resources Ltd.*, 2016 ABCA 401, ¶ 51; 43 C.B.R. 6th 175, 202-03 (chambers).

[14] I have adopted the onerous standard in bail-pending appeal applications. In that context counsel are usually in a position to provide sufficient argument that the adjudicator is comfortable assessing the merits of an appeal using a more demanding measure. *The Queen v. Fuhr*, 2017 ABCA 266, ¶ 49; 58 Alta. L.R. 6th 1, 19-20, (chambers). This position is consistent with the principles that the English Court of Appeal, the High Court of Australia, and the American federal law apply in bail-pending-appeal applications.

[15] Affidavit of Damian Lu sworn January 25, 2021, ¶ 3.

[16] See Affidavit of Rhonda Lastockin sworn January 24, 2021, exhibit E (January 21, 2021 letter from Borden Ladner Gervais LLP to Aird & Berlis LLP) ("Should either i) DGDP's application for leave be dismissed, or ii) its application for leave be granted, but the Court of Appeal grants TEC/Conifer's application to lift the automatic stay of

TAB 11

SUPREME COURT OF CANADA

CITATION: R. *v.* Kirkpatrick, 2022 SCC 33

APPEAL HEARD: November 3, 2021
JUDGMENT RENDERED: July 29, 2022
DOCKET: 39287

BETWEEN:

Ross McKenzie Kirkpatrick
Appellant

and

Her Majesty The Queen
Respondent

- and -

Attorney General of Ontario, Attorney General of Alberta, HIV & AIDS Legal Clinic Ontario, HIV Legal Network, Barbra Schlifer Commemorative Clinic, West Coast Legal Education and Action Fund Association, Women's Legal Education and Action Fund Inc. and Criminal Lawyers' Association (Ontario)
Interveners

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

REASONS FOR JUDGMENT: (paras. 1 to 108)	Martin J. (Moldaver, Karakatsanis, Kasirer and Jamal JJ. concurring)
JOINT CONCURRING REASONS: (paras. 109 to 310)	Côté, Brown and Rowe JJ. (Wagner C.J. concurring)

Ross McKenzie Kirkpatrick *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario,
Attorney General of Alberta,
HIV & AIDS Legal Clinic Ontario,
HIV Legal Network,
Barbra Schlifer Commemorative Clinic,
West Coast Legal Education and Action Fund Association,
Women's Legal Education and Action Fund Inc. and
Criminal Lawyers' Association (Ontario) *Interveners*

Indexed as: R. *v.* Kirkpatrick

2022 SCC 33

File No.: 39287.

2021: November 3; 2022: July 29.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

was sabotaged, then they can revoke their subjective consent, the *actus reus* of sexual assault is made out, and there is no need to consider the fraud analysis.

Per Wagner C.J. and **Côté**, **Brown** and **Rowe** JJ.: There is agreement with the majority that the appeal should be dismissed. However, there is disagreement that *Hutchinson* is distinguishable. *Hutchinson* squarely applies to the case at bar. It held, categorically, that condom use is not part of "the sexual activity in question" contemplated in s. 273.1(1) of the *Criminal Code*. When a person agrees to have sex on the condition that their partner wear a condom, but that condition is circumvented in any way, the sole pathway to criminal liability is the fraud vitiating consent analysis under s. 265(3)(c). Applying *Hutchinson* to the present case, there is some evidence that the complainant consented to the sexual activity in question, but a new trial is required to determine whether her apparent consent was vitiated by fraud.

The case at bar is indistinguishable from *Hutchinson* for several reasons. First, the binding *ratio decidendi* of all the decisions of the Court, as an apex court, is necessarily wider than the majority acknowledges. When the question of law is one of statutory interpretation, the *ratio of* the binding precedent at issue must be understood in the context of the Court's role: to provide a clear and uniformly applicable interpretation of how a statutory provision is to be understood and applied by lower courts across Canada. Second, the interpretation of *Hutchinson* advanced by the majority is contradicted by a plain reading of the decision, by the *Hutchinson* minority opinion, and by *Hutchinson*'s treatment by courts across the country. Third, the

distinction the majority draws between *Hutchinson* and the case at bar is both incoherent and illogical. Distinguishing *Hutchinson* on the basis of no condom versus sabotaged condoms obscures the bright line of criminality established in *Hutchinson*. By arguing that the *Hutchinson* majority referred only to effective condom use, the majority in the instant case introduces needless uncertainty into the criminal law. It follows from the foregoing that the majority's attempt to distinguish *Hutchinson*, in substance, effects an overturning of that precedent. *Hutchinson* conclusively determined the meaning of "the sexual activity in question" under s. 273.1(1) as excluding all forms of condom use, not only condom sabotage.

As *Hutchinson* cannot be distinguished, it must either be applied or overturned. To assess whether *Hutchinson* can be overturned, it is necessary to examine the Court's horizontal *stare decisis* jurisprudence and articulate a framework for assessing whether the Court can overturn a prior precedent. According to the foundational doctrine of s*tare decisis* — to stand by previous decisions and not to disturb settled matters — judges are to apply authoritative precedents and have like matters be decided by like. There are two forms of *stare decisis*: vertical and horizontal. Vertical *stare decisis* requires lower courts to follow decisions of higher courts, with limited exceptions. Horizontal *stare decisis*, which binds courts of coordinate jurisdiction in a similar manner, operates differently at each level of court. As the apex court, the Court's decisions often require the elaboration of general principles that can unify large areas of the law and provide meaningful guidance to the legal community and the general public. Such guidance is given effect in a variety of circumstances and

for an indefinite period. Eventually, these frameworks may need to be revisited to ensure that they remain workable and responsive to social realities. The framework for horizontal *stare decisis* at the Court must take account of its institutional role and how that role relates to the rationale for *stare decisis*.

First, *stare decisis* promotes legal certainty and stability, allowing people to plan and manage their affairs. It serves to take the capricious element out of law and to give stability to a society. Second, it promotes the rule of law, such that people are subject to similar rules. Third, *stare decisis* promotes the legitimate and efficient exercise of judicial authority. *Res judicata* prevents re-litigation of specific cases and *stare decisis* guards against this systemically, by preventing re-litigation of settled law. Both doctrines promote judicial efficiency. *Stare decisis* also upholds the institutional legitimacy of courts, which hinges on public confidence that judges decide cases on a principled basis, rather than based on their own views. *Stare decisis* is foundational in that it requires that judges give effect to settled legal principles and depart from them only where a proper basis is shown. The criticisms that *stare decisis* is inherently conservative and that courts only adhere to it when the impugned precedent accords with their personal preference arise from the inconsistent application of *stare decisis*. Both criticisms are answered by its proper application.

Given the disparate nature of the Court's horizontal *stare decisis* jurisprudence and given the importance of *stare decisis*, it is necessary to set out a clear and coherent framework: the Court can only overturn its own precedents if that

precedent (1) was rendered *per incuriam*, that is, in ignorance or forgetfulness of the existence of a binding authority or relevant statute; (2) is unworkable, or (3) has had its foundation eroded by significant societal or legal change.

To overturn a precedent on the ground that it was rendered *per incuriam*, a litigant must show that the Court failed to consider a binding authority or relevant statute and that this failure affected the judgment. This will be a rare basis to overturn a decision because the Court has the benefit of party and intervener submissions, lower court decisions on the issue, and rigorous internal processes, and because the standard to establish that a decision was decided *per incuriam* is high.

An unworkable precedent is one that is unduly complex or difficult to apply in practice and that undermines at least one of the purposes that *stare decisis* is intended to promote (legal certainty, the rule of law, judicial efficiency). Parties seeking to overturn precedent on this basis need to demonstrate that a precedent undermines the goals of *stare decisis*. It is not enough for litigants to assert baldly that a precedent has been applied in an uneven and unpredictable manner, creates uncertainty, or is doctrinally incoherent.

Where fundamental changes undermine the rationale of a precedent, this eroded precedent can be overturned by the Court. This can occur in two ways, through: (1) societal change (e.g., social, economic, or technological change in Canadian society), or (2) legal change, such as constitutional amendments, or, incrementally, when subsequent jurisprudence attenuates a precedent. With respect to societal change,

the Court can overturn its decisions when fundamental changes to societal conditions undermine the decision's rationale, because the changes either render the concerns underlying the precedent moot or inconsistent with contemporary societal norms. Those seeking to overturn precedent based on societal change must demonstrate such change. As for legal change, the need to revisit precedents that conflict with the Constitution is clear but the point at which subsequent decisions have attenuated a precedent sufficiently so as to warrant overturning it is more difficult to define. The jurisprudence reveals a common theme: the precedent relies on principles or gives effect to purposes inconsistent with those underlying the Court's subsequent decisions.

All *per incuriam* decisions should be overturned. But an unworkable or eroded precedent may be upheld if overturning the decision would result in unforeseeable change or expand criminal liability. It should no longer be argued that a precedent should be overturned because it is (1) subject to judicial or academic criticism, (2) diverges from foreign jurisprudence, (3) is wrong in the eyes of some, (4) is a new or old precedent, or (5) was decided by a narrow majority. This framework for horizontal *stare decisis* is intended to apply to all statutory interpretation, common law, and constitutional precedents of the Court. However, differences exist between these types of precedents. In order for the Court to revisit a precedent based on statutory interpretation, it must be shown that the Court misconstrued the legislature's intent. As the meaning of a statute is fixed at the time of enactment, parties cannot argue that social change has altered the meaning of a particular provision. If the passage of time

renders the statute inconsistent with contemporary social reality, it is the legislature that must remedy the statute's deficiencies.

Applying this horizontal *stare decisis* framework, *Hutchinson* meets none of the criteria for overturning precedent. First, it was not rendered *per incuriam* as it cannot be demonstrated that the *Hutchinson* panel ignored binding precedent, much less that the result would have been different had it considered an allegedly overlooked authority. Further, the failure to consider binding precedent would be grounds for overturning *Hutchinson*, not a basis for reading its *ratio* so narrowly that it may be distinguished. Second, *Hutchinson* is not unworkable. Far from creating uncertainty, the *raison d'être* of *Hutchinson* was to provide a bright line rule for interpreting the "sexual activity in question" under s. 273.1(1). The *Hutchinson* rule consigns all forms of deception involving contraception, including condom use or non-use, to the fraud analysis under s. 265(3)(c). Post-*Hutchinson* jurisprudence discloses no difficulty applying it. At most, it may be said that a tiny fraction of reviewing judges simply disagree with *Hutchinson*. Likewise, the academic criticism levied against *Hutchinson* suggests that it was wrongly decided but the existence of criticism alone is insufficient to justify departing from a precedent. Third, no foundational erosion has occurred with respect to *Hutchinson*. Any societal change that may have occurred since *Hutchinson* cannot change Parliament's legislative intent as authoritatively interpreted by the *Hutchinson* Court. The statutory meaning of "the sexual activity in question" set out in *Hutchinson* reflects Parliament's intent at the time of enactment. If the passage of time has rendered this statutory provision inconsistent with contemporary social reality, it is

for the legislature to further study and to remedy any alleged deficiency. Finally, the Crown has not pointed to any legal change that could warrant overturning *Hutchinson*: no constitutional or jurisprudential developments post-*Hutchinson* that would attenuate its precedential value are mentioned. The Court's recent sexual assault jurisprudence does not purport to displace *Hutchinson*'s clear and categorical interpretation of the "sexual activity in question" under s. 273.1(1) as excluding condom use.

Even if *Hutchinson* were unworkable or if its precedential foundation had eroded, there are at least two compelling reasons to uphold it. First, overturning *Hutchinson* would raise concerns regarding the retrospective expansion of criminal liability. Second, overturning *Hutchinson* may lead to unforeseeable consequences. Suddenly re-orienting the law to expand the scope of consent would be a major legal change engaging potentially wide-reaching policy issues. *Hutchinson* therefore governs the case at bar, such that the two-step fraud vitiating consent analysis under s. 265(3)(c) is engaged, rather than the consent analysis under s. 273.1(1).

At the first step of the *Hutchinson* framework, there is some evidence that the complainant voluntarily agreed to the sexual activity in question. However, at the second step, there is also some evidence that the complainant's apparent consent may have been vitiated by fraud. On the low threshold of a no-evidence motion, there was at least some evidence of dishonesty by omission and risk of deprivation through the risk of pregnancy. Accordingly, a new trial is required.

Cases Cited

II. Analysis

A. *Hutchinson Applies to This Appeal*

[119] Our colleague treats the legal effect of the appellant's "failure to wear a condom" as an open question, and suggests the answer to this question is unresolved in the jurisprudence (para. 25). She contends that, based on "well-established principles" of *stare decisis*, *Hutchinson* is a case "chiefly concerned with the delineation of deception under the criminal law" (para. 82). She says the *ratio decidendi* of *Hutchinson* relates solely to "sabotaged" condoms, not the absence of a condom (paras. 84-87). *Hutchinson* is, she says, "a classic case of deception" (para. 82). She says that this Court did not canvas the broader issues of a refusal to wear a condom or non-consensual condom removal (at para. 85), and, as such, *Hutchinson* "did not establish mandatory rules for all future cases involving a condom" (para. 76).

[120] None of this is remotely so. Indeed, it is demonstrably to the contrary. As we will explain, the case at bar is indistinguishable from *Hutchinson* for several reasons. First, the binding *ratio* of all the decisions of the Court, as an apex court, is necessarily wider than our colleague acknowledges, undermining her attempt to confine *Hutchinson* to its particular facts. Second, the interpretation of *Hutchinson* she advances is contradicted by a plain reading of the decision, by the *Hutchinson* minority opinion, and by *Hutchinson*'s treatment by courts across the country. Third, the distinction our colleague would draw between *Hutchinson* and the case at bar is both incoherent and illogical. And finally, we say, respectfully but adamantly, it follows

from the foregoing that our colleague's attempt to "distinguish" *Hutchinson*, in substance, effects an overturning of that precedent. Although the facts are "bound to change in every case", as our colleague says (at para. 40), the applicable legal framework does not. With respect, our colleague claims her analysis is "grounded in the time-honoured tradition of interpreting the scope of a previous decision" (para. 97), when she in fact overturns *Hutchinson*, if not in form then in substance.

(1) This Court's Decisions Are Intended to Apply Broadly

[121] Our colleague purports to distinguish *Hutchinson* by narrowly confining it to its highly unusual facts. While the facts of *Hutchinson* included a sabotaged condom (as opposed to no condom at all), the *ratio* of *Hutchinson*, as is typical of all cases decided at this Court, is broader than its facts. Our colleague's methodology is wholly inconsistent with this Court's established jurisprudence on interpreting the binding *ratio* of its decisions. She reinterprets *Hutchinson* on the narrow basis that the decision is "limited by its factual context" involving a sabotaged condom (para. 84). As we will explain, her emphasis on these aspects of the majority reasons overlooks the principles to be applied to ascertain the *ratio* of a case.

[122] Not all judicial decisions are created equal. The breadth of a decision's *ratio* varies according to the level of court rendering it. While trial courts are rarely called upon to break new legal ground, intermediate appellate court decisions, generally speaking, concern the application of a point of law to the facts found by the trial court. This reflects the respective roles of the lower courts within our common law system

(see, e.g., D. J. M. Brown, with the assistance of D. Fairlie, *Civil Appeals* (loose-leaf), at §§ 1:1-1:7; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 11-18; *R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at paras. 35-36; *Salomon v. Matte-Thompson*, 2019 SCC 14, [2019] 1 S.C.R. 729, at paras. 105-8, per Côté J., dissenting, but not on this point).

[123] By contrast, apex courts consider broader legal questions (Brown, at § 1:7; B. Laskin, "The Role and Functions of Final Appellate Courts: The Supreme Court of Canada" (1975), 53 *Can. Bar Rev.* 469, at p. 475; *Housen*, at para. 9; *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 34). The decisions of this Court "resonate through the legal system" by enunciating, as they often do, general principles meant to apply broadly to the system as a whole (P. Daly, "Introduction", in P. Daly, ed., *Apex Courts and the Common Law* (2019), 3, at pp. 4-5; M. Rowe and L. Katz, "A Practical Guide to *Stare Decisis*" (2020), 41 *Windsor Rev. Legal Soc. Issues* 1, at p. 9). Accordingly, where this Court "turns its full attention to an issue and deals with it definitively", its "guidance . . . should be treated as binding", even where those comments were not strictly necessary for resolving the particular facts of that case (Rowe and Katz, at p. 10).

[124] Indeed, where once it was thought that "a case is only an authority for what it actually decides", identifying the *ratio* of a decision of a modern apex court is a more expansive undertaking (*R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 53;

Daly, at p. 4). Apex courts do not merely resolve individual cases; they expound general principles intended to guide — and bind — lower courts. The institutional position of our Court thus precludes an unduly narrow understanding of the law as we pronounce it, confined to the facts of each individual case. It requires instead a broader approach that produces general legal principles with the power to "unify large areas of the law and provide meaningful guidance to the legal community" (Daly, at pp. 4-5). For example, this Court's decision in *R. v. Oakes*, [1986] 1 S.C.R. 103, stands for more than the proposition that s. 8 of the *Narcotic Control Act*, R.S.C. 1970, c. N-1, is unconstitutional. As such, it is not open to this Court to reinvent the framework of analysis for s. 1 of the *Charter* each time a constitutional appeal arises with facts different from those in *Oakes*.

[125] Despite the foregoing, our colleague, as we say, maintains that "[c]ases are only authorities for what they 'actually decide[d]'" (para. 85). But this view, stated over 120 years ago by the Earl of Halsbury L.C. at the House of Lords in *Quinn v. Leathem*, [1901] A.C. 495, at p. 506, has been explicitly *rejected* by this Court. Indeed, in *Henry*, Binnie J., writing for the Court, explained at length, at para. 53, why this obsolete approach of the Lord Chancellor Halsbury and our colleague no longer applies:

> The caution [that a case is only an authority for what it actually decides] was important at the time, of course, because the House of Lords did not then claim the authority to review and overrule its own precedents. This is no longer the case. . . . In Canada in the 1970s, the challenge became more acute when this Court's mandate became oriented less to error correction and more to development of the jurisprudence (or . . . to deal with questions of "public importance"). The amendments to the *Supreme Court Act* had two effects relevant to this question. Firstly, the Court took fewer appeals,

> thus accepting fewer opportunities to discuss a particular area of the law, and some judges felt that "we should make the most of the opportunity by adopting a more expansive approach to our decision-making role": B. Wilson, "Decision-making in the Supreme Court" (1986), 36 *U.T.L.J.* 227, at p. 234. Secondly, and more importantly, much of the Court's work (particularly under the *Charter*) required the development of a general analytical framework which necessarily went beyond what was essential for the disposition of the particular case. . . . It would be a foolhardy advocate who dismissed Dickson C.J.'s classic formulation of proportionality in *Oakes* as mere *obiter*. Thus if we were to ask "what *Oakes* actually decides", we would likely offer a more expansive definition in the post-*Charter* period than the Earl of Halsbury L.C. would have recognized a century ago. [Emphasis added.]

[126] We agree with Binnie J.'s statement that the "strict and tidy demarcation" between the narrow *ratio decidendi* of a case, which is binding, and *obiter*, which is not, is an "oversimplification" of how the law develops (*Henry*, at para. 52). The legal point decided by the Court may be narrow or broad, depending on its proximity to the *ratio* of the case. The focus remains on the words this Court uses in its reasons, read in the context of the decision as a whole, as well as "the basic fundamental principle" that the law "develops by experience" (*Henry*, at para. 57).

[127] That said, in statutory interpretation cases, the context of the decision as a whole must not stray beyond its appropriate limits. While context remains relevant, it cannot be used to achieve different outcomes for different litigants. Statutory interpretation of *Criminal Code* provisions engages questions of law, which must be answered consistently for all types of offenders. For example, the meaning of "the sexual activity in question" cannot differ from one offender to the next. The *ratio decidendi* of a decision is a statement of law, not facts, and "[q]uestions of law forming

part of the *ratio* . . . of a decision are binding . . . as a matter of *stare decisis*" (*Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 71, per Côté and Brown JJ., dissenting, but not on this point; *R. v. Arcand*, 2010 ABCA 363, 264 C.C.C. (3d) 134, at para. 413, per Hunt and O'Brien JJ.A.; *Osborne v. Rowlett* (1880), 13 Ch. D. 774, at p. 785). A question of law cannot, therefore, be confused with the various factual matrices from which that question of law might arise.

[128] In our respectful view, our colleague's reasons are flawed because the core issue on appeal (the statutory interpretation of "the sexual activity in question" in s. 273.1(1)) is a straightforward question of law that this Court categorically resolved in *Hutchinson*. Our colleague relies on the argument that this case is *factually* distinguishable. But this is irrelevant, as the underlying question of law is identical across both appeals.

[129] Further, when the question of law is one of statutory interpretation, the *ratio decidendi* of prior jurisprudence of this Court must be understood in the context of the Court's role: to provide a clear and uniformly applicable interpretation of how a statutory provision is to be understood and applied by lower courts across Canada. When this Court is presented with a statutory interpretation question for the first time, its role is to "give effect to the intention of the legislature insofar as that intention is discoverable from the language of the text" and further assisted by the rules of statutory interpretation (R. Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 38).

TAB 12

In the Court of Appeal of Alberta

Citation: 2003945 Alberta Ltd v 1951584 Ontario Inc, 2018 ABCA 48

Date: 20180202
Docket: 1703-0337-AC
Registry: Edmonton

Between:

2003945 Alberta Ltd. and 2021090 Alberta Ltd.

Respondents/Applicants
(Appellants)

- and -

1951584 Ontario Inc. operating as Maxium Financial Services and PricewaterhouseCoopers Inc. LIT, in its capacity as Receiver and Manager of the Corporate Defendants in the Court of Queen's Bench Action 1603 13294

Applicants/Respondents
(Respondents)

- and -

Loder Group of Companies Ltd., 1407004 Alberta Ltd., 1624165 Alberta Ltd., 1450816 Alberta Ltd., 733856 Alberta Ltd., S A Pharmacy Ltd., Quant Sat Holdings Ltd., 1401865 Alberta Ltd., North East Pharmacy (2013) Ltd., North East Clinic (2013) Ltd., Crossroads Pharmacy (1969) Ltd., 1441333 Alberta Ltd., and Harold Douglas Loder

Other Parties
(Not Parties to the Appeal)

Reasons for Decision of
The Honourable Madam Justice Sheila Greckol

Application to Strike Appeal
Cross-Application to Extend Time to File Notice of Appeal and for Leave to Appeal

Reasons for Decision of
The Honourable Madam Justice Sheila Greckol

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

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

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

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

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

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

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

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

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

Analysis

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

[9] The Receiver submits that the RX appeal is from a decision made in receivership proceedings instituted under the *BIA*. It submits that whether RX has an automatic appeal or requires leave to appeal is determined by the *BIA* and the *BIA Rules,* rather than the *Rules of Court*: see *Alberta Treasury Branches v Conserve 1st Oil Corporation*, 2016 ABCA 87 at paras 1, 23, 35 CBR (6th) 6; *Canada (Superintendant of Bankruptcy) v 407 ETR Concession Company Limited*, 2012 ONCA 569 at para 19, 295 OAC 373.

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

[11] The chambers judge's decision was made within receivership proceedings. Any appeal of that decision is governed by the *BIA* and the *BIA Rules*. The Court in the receivership proceedings approved the contract that is the subject of the action. Further, the style of cause in the RX claim for damages, and in the order setting it down for summary trial, make it clear that the chambers judge's decision was made in receivership proceedings.

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

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

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

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

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

6. *Should the Court grant RX leave to appeal*?

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

[41] The factors to be considered in an application for leave to appeal under s 193(e) of the *BIA* are set out in *Alternative Fuel Systems Inc v EDO (Canada) Limited*, 1997 ABCA 273 at para 12, 206 AR 295:

a. Is the point of appeal of significance to the bankruptcy practice?

b. Is the point of significance to the action itself?

c. Is the appeal *prima facie* meritorious?

d. Will the appeal unduly hinder the progress of the action or the insolvency proceedings?

e. Does the judgment appear to be contrary to law, amount to an abuse of judicial power, or involve an obvious error causing prejudice, for which there is no other remedy?

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

[43] Certain factors favour granting leave to appeal. First, the RX appeal has apparent merit. Second, there is no evidence that an appeal will delay or hinder the progress of the receivership. At best, the Receiver's submissions show that if the appeal goes ahead, the Receiver will incur costs that will ultimately be borne by the secured creditor. Of course, if the Receiver succeeds on appeal,

it will receive a costs award for some, but probably not all, of those costs. I am not satisfied that the RX appeal will delay the receivership, "unduly" or otherwise. Third, the issue on appeal is a matter of procedural fairness – the right of RX to prove its case through calling witnesses – and is significant to the action itself.

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

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

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

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

Conclusion

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

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

Application heard on February 1, 2018

Reasons filed at Edmonton, Alberta
this 2nd day of February, 2018

Greckol J.A.