S.C.C. FILE NO.: 37627

IN THE SUPREME COURT OF CANADA
**(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)**

BETWEEN:

**ORPHAN WELL ASSOCIATION and ALBERTA ENERGY REGULATOR**

**APPELLANTS**

and

**GRANT THORNTON LIMITED and ATB FINANCIAL (formerly known as Alberta Treasury Branches)**

**RESPONDENTS**

and

**ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF BRITISH COLUMBIA, ECOJUSTICE CANADA SOCIETY, THE CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS, GREENPEACE CANADA, THE ACTION SURFACE RIGHTS ASSOCIATION, THE CANADIAN ASSOCIATION OF INSOLVENCY AND RESTRUCTURING PROFESSIONALS, AND THE CANADIAN BANKERS ASSOCIATION**

**INTERVENERS**

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# FACTUM OF THE RESPONDENT ATB FINANCIAL

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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## PART I - OVERVIEW AND STATEMENT OF FACTS

### 1.1 Overview

1. When an oil and gas licensee in Alberta becomes insolvent, two vitally important statutory regimes are engaged. The key question in this appeal is which regime properly governs the liquidation and distribution of that licensee's assets.

2. At the federal level, Parliament enacted the *Bankruptcy and Insolvency Act* ("***BIA***")[1] based upon measured economic and policy decisions and following significant consultation with the public and other stakeholders to deal with claims against insolvent entities. At the provincial level, Alberta enacted the *Oil and Gas Conservation Act* ("***OGCA***")[2] and the *Pipeline Act* ("***Pipeline Act***")[3] to regulate Alberta's oil and gas industry. The parties agree that both regimes are validly enacted. The dispute concerns whether they conflict.

3. The insolvency regime in Canada provides a system for the monetization of a debtor's assets by a court-appointed receiver or trustee in bankruptcy (collectively, a "**court officer**"), separate and apart from the treatment of the debtor's liabilities. Once that monetization process is complete, the court officer addresses the debtor's liabilities and obligations in accordance with the respective priorities set out in the *BIA*.

4. The Alberta Energy Regulator ("**AER**") and the Orphan Well Association ("**OWA**", and together with the AER, the "**Appellants**") incorrectly attempt to equate the proper exercise of federal rights and powers by a court officer with being immune from provincial regulation and with avoiding abandonment, remediation, and reclamation obligations (collectively, "**abandonment obligations**"). The abandonment obligations of Redwater Energy Corporation ("**Redwater**") remain with its estate. Court officers are appointed to realize value from the estate of insolvent companies and must act in accordance with insolvency laws in an equitable manner for the benefit of all stakeholders.

5. Insolvency is almost never a choice for a debtor. The decision to disclaim or renounce (*i.e.*, not perform) an obligation resides exclusively with court officers and cannot be exercised by a licensee for its own advantage. Redwater receives no "windfall" or improper benefit from a

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[1] *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.
[2] *Oil and Gas Conservation Act*, R.S.A. 2000, c. O-6.
[3] *Pipeline Act*, R.S.A. 2000, c. P-15.

court officer's renouncing certain of its property because the responsibility for abandonment obligations remains with its estate.

6. By the same token, the respondent, ATB Financial (formerly the Alberta Treasury Branches) ("**ATB**"),[4] does not receive any "windfall" either. ATB relies on its validly registered and enforceable security over Redwater's assets. ATB seeks only to have its secured claim paid in accordance with the priorities set out in the *BIA*. As noted by the Court of Appeal of Alberta ("**ABCA**"), this process does give rise to any fairness concerns "because the *BIA* and the general law of priority of claims expressly recognize the priority of secured claims."[5] Confirming the decisions below will provide certainty in commercial dealings for both debtors and creditors, and allow them to arrange their affairs in accordance with recognized insolvency principles regarding the priority of claims.

7. Upholding the decisions below does not nullify the AER's ability to regulate licensees or the oil and gas industry in Alberta. Indeed, the AER has taken specific regulatory steps in response to Chief Justice Wittmann's decision to mitigate the effect of that decision on the transfer of licences.[6] The oil and gas regulatory regime in Alberta is also functioning as devised and intended. The AER has obtained significant security (in excess of $200,000,000) from the most at-risk licensees to mitigate the potential impact of abandonment obligations of insolvent corporations not being satisfied by those licensees. If these regulatory measures have not been successful, that is a shortcoming inherent in the regulatory regime itself and cannot be resolved by reinterpreting the *BIA*. There are other ways to achieve the AER's environmental and regulatory policy objectives without impeding the operation of the *BIA*. For example, other developed countries require that remediation obligations be secured or insured upfront, before companies are permitted to drill.[7] The AER has options. What it cannot do is interfere with the statutory scheme and purpose of the *BIA*.

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[4] The Alberta Treasury Branches' legal name changed to ATB Financial on December 15, 2017, with the passage of Alberta's *Miscellaneous Statutes Amendment Act, 2017*, S.A. 2017, c. 22.

[5] *Orphan Well Association v. Grant Thornton Limited*, 2017 ABCA 124, 47 C.B.R. (6th) 171, at para. 99 ("***Redwater*, Court of Appeal Reasons**") **[Volume 1, Tab 3 of the Appellants' Record]**.

[6] Benjamin Dachis, Blake Schaffer, et al, "All's Well that Ends Well: Addressing End-of-Life Liabilities for Oil and Gas Wells", *C.D. Howe Institute, Commentary No. 492* (2017), at p. 9 ("**Dachis et al**").

[7] Alan V. Hager & Kevin L. Shaw, "Idle and Deserted Wells: Who Plugs and Who Pays?" (1999) 45 Rocky Mt. Min. L. Inst. Paper 12, at pp. 46-47 ("**Hager et al**"); see also Sarah

8. The practical effect of allowing this appeal would be to *increase* the number of orphan wells in Alberta. As the ABCA wrote, if environmental remediation costs enjoy a super priority over the rights of secured creditors, "[t]he prudent lender in the circumstances would simply walk away from its loans [as opposed to appointing a court officer], and all of the wells would truly become "orphaned"."[8] In addition, allowing the appeal would impose the "third-party-pay"[9] principle on secured creditors, reduce the number of court officers prepared to accept mandates, and potentially decrease "the amount of financing available to the oil and gas industry… substantially".[10] As Chief Justice Wittmann observed, these are matters for legislators to weigh:

> [U]nder section 14.06 [of the *BIA*], Parliament balanced a number of competing considerations and if Parliament chooses to reassess, it will legislate. It is not up to this Court to define policy. Statutory interpretation to ascertain purpose and proper application is the role of the Court.[11]

9. When the federal and provincial regimes are properly understood in light of fundamental principles of constitutional and insolvency law, the conclusion that a genuine conflict arises is inescapable. Most significantly, the provincial regime, in substance, clearly disrupts the scheme of priorities set forth in the *BIA* by requiring court officers to expend funds in priority to all other claims, including the claims of secured creditors, by either posting security with the AER or expending funds to remediate uneconomic oil and gas wells. By virtue of the doctrine of federal paramountcy, the provisions of Alberta's *OGCA* and *Pipeline Act* that conflict with the federal *BIA* either operationally or by frustrating the *BIA*'s purpose are "inoperative … to the extent of the conflict".[12]

10. This is what Chief Justice Wittman and the majority of the ABCA concluded. Their decisions are careful, thorough, well-reasoned, and correct. Accordingly, ATB respectfully requests that the appeal be dismissed.

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Hawco, "*Redwater*. Why Are We Still Talking About This Issue?" in Janis P. Sarra & Justice Barbara Romaine, eds., *Annual Review of Insolvency Law 2017* (Toronto: Carswell, 2018) [forthcoming in 2018].

[8] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 20.

[9] *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443, at para. 40 ("***AbitibiBowater***").

[10] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 20.

[11] *Redwater Energy Corporation (Re)*, 2016 ABQB 278, [2016] A.W.L.D. 3023, at para. 133 ("***Redwater***") **[Volume 1, Tab 1 of the Appellants' Record]**.

[12] *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 29 ("***Moloney***").

## 1.2 Background

### *1.2.1 The Statutory and Regulatory Framework*

#### 1.2.1.1 The History and Role of the AER and the OWA

11. Alberta's oil and gas industry is regulated by the AER, which was established pursuant to the *Responsible Energy Development Act* ("***REDA***").[13] Previously, the AER operated as the Energy Resources Conservation Board (the "**Board**"). The AER regulates all aspects of Alberta upstream oil and gas activities, including licensing all parties ("**licensees**") who explore, drill, extract, and produce oil and gas resources in the province. Part of the AER's mandate is to oversee the abandonment and closure of licensed properties at the end of their life cycle in accordance with energy resource enactments.[14]

12. Licensees and their working interest partners ("**WIPs**") are responsible for the costs associated with the abandonment and reclamation of licensed properties. However, if there is no legally responsible or financially able party to perform abandonment obligations, a well will be considered an "orphan". Alberta created an orphan well program to deal with wells stranded by insolvent or defunct licensees. Initially, in the mid-1980s, the program received half of its funding from government. Today, the program is almost entirely funded through the orphan well fund (the "**Orphan Fund**"). The Orphan Fund is established under Part 11 of the *OGCA* and is administered by the AER. It is an industry-funded account established to pay for the abandonment of orphan properties. It was established so the public purse is not held financially responsible for the cleanup and abandonment of wells and production facilities, and to provide a method of funding subsurface abandonment.[15]

13. The Alberta orphan well program now operates as the OWA. The OWA was formed in 2001. It is a non-profit organization that operates under the AER's delegated legal authority. All of its powers and authority are delegated pursuant to the *Orphan Fund Delegated*

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[13] *Responsible Energy Development Act*, S.A. 2012, c. R-17.3.

[14] *OGCA*, *supra* note 2, Part 11.

[15] Alberta, Legislative Assembly, Alberta Hansard, 24th Leg., 4th Sess., (March 20, 2000), at p. 509; Alberta, Legislative Assembly, Alberta Hansard, 24th Leg., 4th Sess., (May 15, 2000), at p. 1565; Alberta, Legislative Assembly, Alberta Hansard, 23th Leg., 2nd Sess., (April 12, 1994), at p. 1111; Questioning of David Wolf, held September 28, 2015, at p. 11, lines 3-6 **[Volume I, Tab 1 of the Respondents' Record]**; *Orphan Fund Delegated Administration Regulation*, Alta. Reg. 45/2001, s. 3.

*Administration Regulation* ("***OFDAR***"),[16] which is a regulation enacted under the *OGCA*.[17] There is also a memorandum of understanding ("**MOU**") between the AER, Alberta Environment and Sustainable Resource Development, and the OWA with respect to Orphan Fund matters.[18] The OWA is primarily funded by the Orphan Fund levy imposed bi-annually on industry participants and collected by the AER.[19] It also receives funding as a result of enforcement activities taken by the AER on its behalf and the sale of salvage from orphaned properties.

14. The history of the OWA is important as some of the concerns now raised by the AER and the OWA were also raised when the Orphan Fund was established in 1991. At that time, industry participants and the Board had concerns about an increase in the number of orphan wells. Substantial consultations ensued. Some of the considerations and concessions made in establishing the Orphan Fund included: (i) the Alberta public should not be at risk because of orphan wells; (ii) the length of the chain of responsibility proposed by the Board and limiting the chain to the current licensee, working interest participants, and receivers; and (iii) the establishment of an industry-sponsored fund to pay for the abandonment costs of bankrupt owners.[20]

15. The AER is responsible for enforcing claims against defaulting licensees under the *OGCA*. Any costs incurred by the AER during the enforcement process constitute debts payable by the defaulting licensee to the AER. Any costs incurred by or owing to the OWA for the abandonment obligations of a licensee also constitute debts payable by the defaulting licensee to the AER. This may include costs of abandonment, costs of enforcing abandonment orders, or any other debts owing to the Orphan Fund.[21]

16. At the end of the enforcement process, if the AER is unable to identify a legally responsible or financially viable party, the AER will designate a property as an orphan.

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[16] *OFDAR*, *supra* note 15, s. 3.
[17] Affidavit of David Wolf, sworn on September 22, 2015, at para. 3 **[Volume IV, Tab 31 of the Appellants' Record]**.
[18] Questioning of David Wolf, held September 28, 2015, at p. 9, lines 24-27, and p. 10, lines 1-3 and Exhibit 1 **[Volume I, Tab 1 of the Respondents' Record]**.
[19] *OGCA*, *supra* note 2, ss. 73 and 74.
[20] J.R. Nicol, "Orphan Wells: Who Is Responsible – For How Long and At What Cost?" (Paper delivered at the CADE/CAODC Spring Drilling Conference, 10-12 April 1991), Paper No. 91-30, at pp. 2-3.
[21] *OGCA*, *supra* note 2, ss. 30(5), 72, 100(3).

A property is considered an orphan when it meets the test under s. 70(2) of the *OGCA*. This test is satisfied if the licensee is insolvent or defunct.[22] The AER attempts to use its own definition of "insolvent" for the purpose of declaring an orphan; however, Chief Justice Wittmann did not accept this definition.[23] If a property is designated an orphan prior to abandonment, then the OWA is required to complete abandonment and reclamation pursuant to the *OFDAR* and the MOU. The OWA cannot refuse to take possession of orphan wells, except in relation to certain types of wells in very limited cases where the AER fails to take certain procedural steps.

**1.2.1.2 The 1992 Amendments to the *BIA***

17. In *Northern Badger*,[24] the ABCA first considered a court officer's liability for an insolvent debtor's environmental obligations. The ABCA found that abandonment obligations could take priority over registered security interests. Soon thereafter, Parliament enacted s. 14.06(2) of the *BIA*.[25] This amendment was intended to, among other things, enhance the protection afforded to trustees and limit their exposure to personal liability arising out of environmental conditions except in cases of negligence occurring after the date of appointment.

18. Section 14.06(2) of the *BIA* also encouraged the acceptance of bankruptcy mandates involving contaminated real property. In the 1990s, the *OGCA* and the *Pipeline Act* were amended to include trustees as "licensees".[26] Section 14.06(2), however, protected trustees from *personal* liability for all abandonment obligations of the insolvent company.[27]

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[22] *OGCA*, *supra* note 2, s. 70; Affidavit of Patricia Johnson, sworn September 8, 2015, Exhibit A, *Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process* (12 March 2013), at Art. 7.1 ("***Directive 006***") **[Volume IV, Tab 30 of the Appellants' Record]**. Please note that since the *Redwater* decision, the AER has released a new version of *Directive 006*.

[23] *Redwater*, *supra* note 11, at paras. 167, 172.

[24] *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 Alta. L.R. (2d) 45 (C.A.) ("***Northern Badger***").

[25] Bill C-22, *An Act to Amend the Bankruptcy Act and to amend the Income Tax Act in consequence thereof*, 3rd Sess., 34 Parl., 1992, cl. 14.06(2).

[26] *OGCA*, *supra* note 2, s. 1(1)(*cc*); *Pipeline Act*, *supra* note 3, s. 1(1)(*n*).

[27] *Standard Trust Co. (Liquidator of) v. Lindsay Holdings Ltd.*, [1995] 3 W.W.R. 181, at para. 14 (B.C. S.C.); *AbitibiBowater*, *supra* note 9, at para. 47; Transcript of the *Redwater* Proceedings, held on December 16 – 17, 2015, at p. 12, lines 35-37 **[Volume V, Tab 5 of the Respondents' Record]**.

#### 1.2.1.3 The 1997 Amendments to the *BIA*

19. The 1992 amendments to the *BIA* were ultimately not broad enough. In response to ongoing concerns, Parliament revisited the protections afforded to court officers again in 1997 through Bill C-5.

20. To provide commercial certainty, expand protection for receivers, encourage court officers to accept mandates, and protect the environment, Parliament considered it necessary to further extend the protection in the 1992 amendments and provide court officers with a mechanism to manage potential liability. In 1997, the *BIA* was subject to one of its most significant amendments, which, among other things, clarified the rights and obligations of court officers.

21. The amendments in Bill C-5 also gave environmental claims an absolute first-ranking priority over secured creditors with respect to real property that is the object of the claim plus any contiguous property related to the activity that caused the contamination.[28] In addition to extending the protection from personal liability (that was granted to trustees in 1992) to court-appointed receivers and managers, Bill C-5 also reduced the standard of care required of court officers in respect of after-appointment environmental damage from negligence to "gross negligence or wilful misconduct".[29]

22. Bill C-5 also introduced a liability management framework. Court officers could now choose whether to comply with regulatory orders affecting real property where such orders required remedying an environmental condition using estate funds.[30] If compliance with the order would create a net benefit to the estate, the court officer could elect to comply and retain such property for future sale. If compliance with the order would not create a net benefit to the estate, the court officer could disclaim the estate's interest in the property subject to the order and it would not be personally responsible for failure to comply with the order. The disclaimer process allowed the regulator to take action directly and rectify the property subject to its order.

23. The objective of this process was to ensure that the question of responsibility would be answered in a timely manner. As explained by Jacques Hains, a director of the Corporate Law

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[28] Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, No. 13 (4 November 1996).

[29] Bill C-5, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act and the Income Tax Act*, 2nd Sess., 35th Parl., 1997, cl. 15 ("**Bill C-5**").

[30] Bill C-5, *supra* note 29.

Review Branch of Industry Canada, who was involved with both the 1992 and 1997 amendments to the *BIA*:

> Bill C-5 then adds two more options. The first is the possibility for trustees or receivers – insolvency practitioners – to seek time from courts to say, "I need to assess the economic viability of the proposal." Regulators would be there to say, "There is a health hazard; therefore, you have 24 hours," or "You can take two to three weeks." The court will give that time. Moreover, knowing that the bill will be too expensive and will not be economically viable, the trustees are then out of it and can abandon that piece of property subject to the order.
>
> That is when the third element of the proposal kicks in. For the first time, the Canadian *Bankruptcy and Insolvency Act* will give environmental claims an absolute first-rank priority over banks, over all secured creditors, over the real property that is the object of the order, plus any contiguous property related to the activity that caused the contamination. They will have an absolute super-priority, recognized in law, over the banks. A super-lien.[31] [Emphasis added.]

24. As with the 1992 amendments, these amendments were the subject of considerable Parliamentary debate and stakeholder submissions. Parliamentary debate clearly evidences the intent to achieve a balance among the lending communities, environmental groups, and the business community.[32] Court officers were given a measure of comfort regarding their potential liability to encourage them to take control of damaged properties and conduct an economic assessment of those properties. Regulators were provided a mechanism to seek reimbursement for steps taken to clean up such properties if disclaimed by court officers.

### *1.2.2 The Redwater Proceedings*

25. Redwater was a publicly-traded junior oil and gas company.[33] ATB first advanced funds to Redwater in 2009. However, by mid-2014, Redwater had suffered financial setbacks and was

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[31] Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, No. 13 (4 November 1996).

[32] House of Commons Debates, Evidence of the Standing Committee on Industry, 35th Parl., 2nd Sess., No. 16 (11 June 1996) per Mr. David Tobin, Director General, Corporate Governance Branch, Department of Industry (Canada) at 1700.

[33] A junior oil and gas company is typically a smaller, emerging company that is often privately held.

unable to meet its obligations to ATB.[34] As the principal secured creditor, ATB commenced enforcement proceedings. On May 12, 2015, Grant Thornton Limited ("**GTL**") was appointed receiver of Redwater's property (the "**Receiver**") pursuant to s. 243 of the *BIA* (the "**Receivership Order**"). On May 14, 2015, the Receiver received a letter from the AER inquiring whether the Receiver would be taking care and control of all of Redwater's assets.[35]

26. Consistent with industry practice, the Receiver conducted an assessment of the economic viability and marketability of Redwater's assets. On July 3, 2015, pursuant to paragraphs 3(a) and 15 of the Receivership Order and s. 14.06(4) of the *BIA*, the Receiver elected to not take possession of approximately 107 of Redwater's wells and facilities (the "**Renounced Assets**"), and assumed possession of approximately 20 wells and facilities (the "**Retained Assets**"). The Renounced Assets had been shut-in by Redwater prior to the appointment of the Receiver and were no longer producing.[36] In response, the AER issued abandonment orders (the "**Abandonment Orders**"), dated July 15, 2015 and August 7, 2015, respectively, requiring the abandonment of the Renounced Assets.

27. On October 28, 2015, a bankruptcy order was issued in respect of Redwater, which appointed GTL as trustee in bankruptcy (the "**Trustee**", and together with the Receiver, the "**Receiver/Trustee**"). On November 2, 2015, GTL again disclaimed the Renounced Assets in its capacity as Trustee, and notified the AER that it did not intend to comply with the Abandonment Orders since it had properly disclaimed the Renounced Assets.

**1.2.2.2 The AER's Refusal to Transfer the Licences**

28. Pursuant to the terms of the Receivership Order, the Receiver was empowered to market and sell Redwater's assets for the benefit of creditors and other stakeholders.[37] However, to complete such a sale would require the AER's approval, as oil and gas licences can be transferred only with the AER's consent.[38] In Redwater's case, the AER advised that it would not permit the transfer of the Retained Assets unless the Renounced Assets were sold with them, the Receiver

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[34] Affidavit of Jacqueline Gauthier, sworn May 8, 2015, at paras. 6-7 **[Volume III, Tab 27 of the Appellants' Record]**; Receiver's First Report, filed July 22, 2015, at paras. 8-9 (the "**Receiver's First Report**") **[Volume II, Tab 2 of the Respondents' Record]**.

[35] Receiver's Second Report, filed October 5, 2014, at Appendix 2 (the "**Receiver's Second Report**") **[Volume II, Tab 3 of the Respondents' Record]**.

[36] Receiver's Second Report, *supra* note 35, at para. 9.

[37] Affidavit of Patricia Johnson, sworn August 13, 2015, Exhibit A, paras. 3 and 15 **[Volume IV, Tab 29 of the Appellants' Record]**.

[38] *OGCA*, *supra* note 2, s. 24; *Pipeline Act*, *supra* note 3, s. 18.

completed the abandonment and reclamation work associated with the Renounced Assets, or the Receiver posted security to cover the estimated deemed liabilities associated with the Renounced Assets.[39]

29. When considering whether to approve or refuse the transfer of licences, the AER considers the rules and guidance set out in *Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process*.[40] *Directive 006* created the licensee liability rating program ("**LLR Program**"). Under the LLR Program, the AER calculates a liability management ratio ("**LMR**") for each licensee. The LMR is the ratio of the licensee's aggregate deemed assets to deemed liabilities. Deemed assets are calculated using the cash flow derived from oil and gas production (as reported to the AER) from the previous 12 months.[41] Deemed liabilities are the AER's estimate of the cost of abandoning wells and facilities in the areas where the licensee operates.[42]

30. If a licensee's LMR is greater than 1.0, this means the AER has determined that the licensee has more deemed assets than deemed liabilities. If a licensee's LMR is less than 1.0, its deemed liabilities are greater than the total value of its deemed assets. If a licensee's LMR is less than 1.0, the AER will require the licensee to pay a security deposit in the amount necessary to increase its LMR to 1.0.[43] This security deposit is a financial obligation. It is a financial representation of the estimated abandonment obligations owed by the licensee, which the AER demands be paid to it (*e.g.*, for a licensee with deemed assets of $500,000 and deemed liabilities of $1,500,000, the AER would require that the licensee immediately pay a security deposit of $1,000,000, or face a number of enforcements steps by the AER).[44]

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[39] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 16.
[40] *Directive 006*, *supra* note 22.
[41] *Directive 006*, *supra* note 22, Appendix 5 at s. 1.
[42] Receiver's Second Report, *supra* note 35, at para. 11.
[43] *Redwater*, *supra*, note 11, at para. 28; *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 16.
[44] See, for example, the Affidavit of Patricia Johnson, sworn August 13, 2015, at paras. 14-15, where the AER discusses these obligations as financial obligations by references to "costs" and having "sufficient funds" **[Volume IV, Tab 29 of the Appellants' Record]**.

31. In insolvency, the AER will approve a licence transfer only if the sale of assets does not deteriorate a company's LMR.[45] If either party's post-transaction LMR is lower than 1.0, the AER will either deny the licence transfer application or require additional security to be posted before the transaction can proceed.[46]

32. In September 2015, Redwater's LMR was 0.93.[47] The AER advised that, to secure its consent to a licence transfer, the Receiver/Trustee could: (i) post a security deposit; (ii) expend funds (as a cost of administration) to abandon some of the Renounced Assets to reduce the deemed liabilities; or (iii) bundle and sell the Retained Assets and the Renounced Assets in a way that did not deteriorate Redwater's LMR.[48]

**1.2.2.3 The Applications before Chief Justice Wittmann and his Decision**

33. On September 22, 2015, the Appellants filed an application for a declaration that the Receiver's disclaimer of the Renounced Assets was void. The Appellants also sought an order compelling the Receiver, as a licensee, to comply with all of Redwater's regulatory obligations, including the abandonment obligations associated with the Renounced Assets prior to any payment being made to any creditors.

34. The Receiver brought a cross-application for the approval of a sale process that excluded the Renounced Assets and a determination of the constitutionality of the AER's deeming the Receiver/Trustee a licensee and requiring it to comply with all aspects of the licensing regime under the *OGCA*, the *Pipeline Act*, and *Directive 006*.

35. Chief Justice Wittmann dismissed the AER's and OWA's application, and granted the Receiver/Trustee's application to commence a sale process to dispose of the Retained Assets.[49] He concluded that requiring the Receiver/Trustee to comply with the Abandonment Orders triggered the doctrine of federal paramountcy.[50] Chief Justice Wittmann found that there was an operational conflict between s. 14.06(4) of the *BIA* and the definition of "licensee" in the *OGCA*

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[45] Receiver's Second Report, *supra* note 35, at para. 19(b); Questioning of Patricia Johnston, held September 29, 2015, at p. 99, lines 10-26, and p. 106, lines 24-27 ("**Johnston Questioning**") **[Volume III, Tab 4 of the Respondents' Record]**.
[46] *Redwater*, *supra* note 11, at para. 28.
[47] Receiver's Second Report, *supra*, note 35, at para. 12.
[48] *Redwater*, *supra* note 11, at para. 30; Johnston Questioning, *supra* note 45, at p. 106, lines 13-23.
[49] *Redwater*, *supra* note 11, at para. 179.
[50] *Redwater*, *supra* note 11, at para. 180.

and the *Pipeline Act*. Section 14.06(4) allowed the Receiver/Trustee to renounce some of Redwater's assets and not be responsible for the related environmental obligations. Conversely, the *OGCA* and the *Pipeline Act* did not permit the Receiver/Trustee to renounce any of Redwater's assets and imposed personal liability on the Receiver/Trustee for compliance with the Abandonment Orders. Dual compliance was not possible.[51]

36. After applying the three-part test from *AbitibiBowater* to conclude that the Abandonment Orders and abandonment obligations constitute a claim that is provable in bankruptcy and subject to the insolvency process (a "**Provable Claim**"), Chief Justice Wittmann found that the provincial legislation frustrated the purpose of the *BIA* in several ways, most significantly by effectively reordering the scheme of priorities established by the *BIA*.[52] Finding both an operational conflict and frustration of purpose, Chief Justice Wittmann held that various provisions of the *OGCA*, the *Pipeline Act*, *Directive 006*, and the Abandonment Orders are inoperative to the extent of their conflict with the *BIA*.[53] The AER and the OWA appealed.

**1.2.2.4 The ABCA's Decision**

37. The ABCA upheld Chief Justice Wittman's decision. The Court found that the obligations imposed on the Receiver/Trustee as a "licensee" under the *OGCA* and the *Pipeline Act* resulted in an operational conflict with the provisions of the *BIA* that (i) exempt court officers from personal liability, (ii) allow court officers to disclaim assets, and (iii) set out the priority of the cost of abandonment obligations.

38. The ABCA also found that the provincial regime frustrates the federal purpose of "managing the winding up of insolvent corporations and settling the priority of claims against them."[54] Because the Abandonment Orders are a Provable Claim pursuant to the *AbitibiBowater* test, the AER could not insist that the Receiver/Trustee "devote substantial parts of the bankrupt estate in satisfaction of the environmental claims in priority to the claims of the secured creditor."[55] In other words, "[t]he Regulator cannot establish a parallel process to collect claims."[56]

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[51] *Redwater*, *supra* note 11, at para. 181.
[52] *Redwater*, *supra* note 11, at para. 182.
[53] *Redwater*, *supra* note 11, at para. 183.
[54] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 89.
[55] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 91.
[56] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 88.

39. Justice Martin (as she then was) dissented. She disagreed that the Abandonment Orders are Provable Claims and found that Alberta's regulatory regime did not conflict with the *BIA*, either operationally or by frustration of purpose.[57]

### *1.2.3 The Redwater Decisions are a Symptom of Alberta's Cyclical Economy and the Structure of Alberta's Regulatory Regime*

40. Any strains on Alberta's regulatory regime are not the result of the ABCA's decision, as suggested by the Appellants.[58] Rather, any increase in the number of orphan wells is due to other factors, including low commodity prices and the structure of Alberta's regulatory regime. These factors reduce the liquidity of oil and gas companies and impair their ability to fulfill their financial obligations, including abandonment obligations.

41. The economic downturn in the oil and gas industry resulted in a corresponding decrease in Redwater's liquidity such that it could no longer comply with its regulatory and financial obligations.[59] Redwater's licensed assets would have been designated "orphan" regardless of whether a court officer was appointed over those assets. Redwater did not have sufficient funds to continue its operations and ATB was not prepared to continue to provide additional funds.[60]

42. Unlike many other jurisdictions, the AER does not require licensees to provide security for abandonment obligations when wells are drilled or facilities and pipelines are built. Other jurisdictions require producers to post financial bonds to secure their abandonment obligations. The AER's system is atypical because security for abandonment obligations is required only when a licensee's LMR dips below 1.0 and its aggregate deemed liabilities exceed its deemed assets.[61] Most often, this occurs at the end-of-life of the assets (*i.e.*, after producing all of the oil or gas from a well without drilling new wells to replace the lost production) or when there has been a significant decrease in commodity prices. As production declines or is deemed to have less value, a licensee's LMR will be negatively impacted.

43. Under the LLR Program, if a company's LMR drops below 1.0, it will be required to post security to the AER instead of spending those funds in a manner that could improve its economic

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[57] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 160, *per* Martin J.A.
[58] Dachis et al, *supra* note 6, at p. 16.
[59] Receiver's First Report, *supra* note 34, at para. 8.
[60] Affidavit of Jacqueline Gauthier, sworn May 11, 2015, at para. 17 **[Volume IV, Tab 28 of the Appellants' Record]**; Receiver's First Report, *supra* note 34, at para. 9.
[61] Lucija Muehlenbachs, University of Calgary, "80,000 Inactive Oil Wells: A Blessing or a Curse?" (February 2017), at pp. 4-5 ("**Muehlenbachs**").

viability (*e.g.*, by increasing production through drilling additional wells or abandoning shut-in or suspended wells). This significantly reduces available cash flow and further pushes such companies towards insolvency. Accordingly, it is not surprising that most of the licensees below the 1.0 LMR threshold are junior companies whose wells are at a higher risk of becoming orphans.[62] It was inevitable that the AER's demands to post security deposits would eventually conflict with demands for payment from other creditors of licensees.

44. Another atypical aspect of Alberta's regulatory regime is the allowance for indefinite well suspension periods. Non-producing wells are often kept in a state of inactive suspension. Licensees are not required to abandon suspended wells within a specific period nor to post security for abandonment obligations associated with those wells. This policy is purportedly justified on the basis that industry covers the abandonment costs of orphaned wells through the Orphan Fund.[63] However, it is these suspended wells that are most likely to become orphaned, particularly during economic downturns in the oil and gas sector.[64] This risk of increased orphan wells during economic downturns was known at the time the current regulatory regime was established.[65]

45. The increase in orphan wells in Alberta is directly attributable to the AER's own policies. In 2012, the AER changed its internal procedures to streamline the orphan designation process, which increased the number of wells being designated as orphans.[66] In 2013, the AER significantly increased the well abandonment costs used to calculate the deemed liabilities of licensees. This increase was a result of the AER's realizing it had been underestimating the costs of abandonment.[67] This led to a substantial increase in security deposits required from individual licensees and increased pressure on many junior licensees who did not have sufficient funds to pay the increased security deposits. In 2017, the AER forced Lexin Resources Ltd. into

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[62] Jesse Synder, Alberta Oil Magazine, "Alberta's New Abandoned-Well Program Makes Compliance Impossible for Some" (27 October 2015).
[63] Muehlenbachs, *supra* note 59, at p. 5.
[64] Muehlenbachs, *supra* note 59, at p. 4.
[65] 2004-2005 Annual Report to the Legislative Assembly by the Auditor General, at pp. 175-176.
[66] Johnston Questioning, *supra* note 45, at pp. 50-53.
[67] *Directive 006*, *supra* note 22; see also Energy Resources Conservation Board, *Bulletin 2013-09: Licensee Liability Rating (LLR) Program Changes and Implementation Plan* (12 March 2013).

receivership, which resulted in approximately 1,400 wells being transferred to the OWA directly due to the AER's actions.[68]

46. The structure of Alberta's regulatory regime and the AER's own decision-making demonstrate that the AER generally takes action *reactively* – not proactively. As a result, it was inevitable that the AER's regime for enforcing its claims against licensees for abandonment obligations would come into conflict with other creditors and the insolvency regime under the *BIA*, particularly in this economic climate.

### *1.2.4 The Magnitude of the Orphan Well Issue*

47. It is important to understand the relative magnitude of Alberta's orphan well issue. The Appellants state that the total number of orphan wells and sites currently exceeds 1,800 with another 1,100 orphans soon expected.[69] This is a relatively small percentage (less than 0.7%) of the approximately 427,650 wells and facilities in the province.[70] While robust environmental regulation is essential in the oil and gas industry, the extent of this issue should not be overstated.

48. The Appellants suggest that, "[t]he potential cost as a result of the [ABCA's decision] is up to $8.6 billion." This is a dramatic overstatement that has no basis in reality. The $8.6 billion figure is taken from a commentary (the "**Commentary**") produced by the C.D. Howe Institute (the "**Institute**") following the *Redwater* decision in 2017.[71] The Commentary conducts a stress test for financial exposure in Alberta based on various estimated ranges of future bankruptcy rates and well cleanup costs. The result of the stress test estimates future remediation costs ranging from $338 million to $8.6 billion. The $8.6 billion amount is completely hypothetical and is not tied to any metric recognized by the AER in its own calculation of deemed assets and deemed liabilities under the LMR regime.

49. To illustrate, the $8.6 billion number: (i) reflects twice the OWA's average costs of abandonment and reclamation; (ii) assumes the abandonment and remediation of all active, inactive, suspended, and abandoned wells of companies with an LMR ratio below 2.0; and (iii) includes social costs (*i.e.*, opportunity costs to landowners, not actual amounts paid by the AER or the OWA). This estimated cost is not related specifically to orphan wells renounced by court officers or even just orphan wells in general and is a criticism more broadly of the

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[68] Dachis et al, *supra* note 6, at p. 2, footnote 1.
[69] Appellants' SCC Factum, at para. 21.
[70] Appellants' SCC Factum, at para. 10.
[71] Dachis et al, *supra* note 6, at p. 2.

operation of the entire regulatory regime. It also assumes that every well of such licensees has no value (*i.e.*, could not be sold), which is an unsupported assertion. The Appellants' reliance on this $8.6 billion figure is extremely misleading.

## PART II - STATEMENT OF ISSUE

50. In their factum, the Appellants raise four issues, which all relate to one key question, namely, how should Redwater's abandonment obligations be addressed? Put differently, is there a conflict – in operation or through frustration of the federal purpose – between the federal bankruptcy and insolvency regime and the provincial regulatory regime?

51. ATB answers this question in the affirmative by: (i) articulating the standard of review; (ii) outlining the doctrine of federal paramountcy; (iii) interpreting the *BIA*; (iv) interpreting the *OGCA*, *Pipeline Act*, and *Directive 006*; (v) assessing the conflict between the federal and provincial regimes; and (vi) discussing the practical effect of dismissing the appeal. ATB will also briefly address the inapplicability of the doctrine of interjurisdictional immunity. Please see **Appendix "A"** for the three constitutional questions at issue.

## PART III - ARGUMENT

### 3.1 Standard of Review

52. The proper interpretation of the statutory regimes at issue and the articulation of the applicable constitutional and insolvency law principles are legal questions reviewed for correctness.[72] The factual findings underpinning these legal questions are reviewed for palpable and overriding error.[73] The palpable and overriding error standard should also be applied to the determination of whether a legislative conflict exists on the facts of this case, as this is a question of mixed fact and law that necessitates a consideration of the legal principles in the context of the totality of the evidence.[74]

53. The conclusions reached by the courts below are defensible on any standard.

### 3.2 The Doctrine of Federal Paramountcy

54. When "the operational effects of provincial legislation are incompatible with federal legislation", the doctrine of federal paramountcy provides that the provincial legislation is

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[72] *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8 ("***Housen***").
[73] *Housen*, *supra* note 72, at para. 10.
[74] *Housen*, *supra* note 72, at para. 36.

"inoperative … to the extent of the conflict".[75] A conflict between federal and provincial legislation arises in two circumstances: (i) there is an "operational conflict", or (ii) "the operation of the provincial law frustrates the purpose of the federal enactment".[76]

55. Cooperative federalism, which balances regional diversity and national unity, requires the doctrine of paramountcy to be applied with restraint. Unless there is a "genuine inconsistency" between the two regimes, "courts will favour an interpretation of the federal legislation that allows the concurrent operation of both laws".[77]

56. That being said, "there comes a point where legislative overlap jeopardizes the balance between unity and diversity".[78] When a genuine inconsistency exists, paramountcy is engaged. Importantly, in assessing whether an inconsistency arises, the focus is "on the effect of the provincial law, rather than its purpose" (emphasis added).[79] As this Court observed in *Husky Oil*:

> [T]here need not be any provincial intention to intrude into the exclusive federal sphere of bankruptcy … in order to render the provincial law inapplicable. It is sufficient that the effect of the provincial legislation is to do so. [Emphasis added.][80]

57. In other words, the substance of the provincial law grounds the analysis, not its form or objective. The province cannot do indirectly what it is precluded from doing directly.[81]

### 3.3 Environmental Claims in Bankruptcy – Interpreting Section 14.06 of the *BIA*

#### *3.3.1 The BIA at a Glance*

58. Parliament has exclusive jurisdiction over matters of bankruptcy and insolvency under s. 91(21) of the *Constitution Act, 1867*. Parliament enacted the *BIA* pursuant to this exclusive jurisdiction.

59. As this Court recently observed in *Moloney*, "the *BIA* is a complete code governing bankruptcy. It sets out which claims are treated as provable claims and which assets are

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[75] *Moloney*, *supra* note 12, at paras. 16, 29, quoting *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53, at para. 65 ("***Marine Services***").
[76] *Moloney*, *supra* note 12, at para. 18.
[77] *Moloney*, *supra* note 12, at para. 27.
[78] *Moloney*, *supra* note 12, at para. 16.
[79] *Moloney*, *supra* note 12, at para. 28.
[80] *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 39 ("***Husky Oil***").
[81] *Moloney*, *supra* note 12, at para. 28.

distributed to creditors, and how."[82] In doing so, the statute seeks to achieve two primary goals: (i) the equitable distribution of a bankrupt's assets among creditors, and (ii) the bankrupt's financial rehabilitation.[83] Where, as in this case, the bankrupt is a corporation, it is incapable of discharge unless all of its liabilities are satisfied. As such, only the first goal – the equitable distribution of assets – is relevant.

60. The *BIA* achieves the equitable distribution of assets through a single proceeding model, under which Provable Claims are addressed. Court officers are tasked with liquidating the estate's assets and distributing the proceeds to creditors in accordance with the scheme of distribution set out in s. 136 of the *BIA*. This scheme accords priority to secured creditors to the bankrupt's assets (subject to certain trust claims), followed by various other creditors and remaining stakeholders. This priority scheme and single proceeding model "avoid[s] inefficiencies and chaos", thereby "maximiz[ing] global recovery for all creditors".[84]

61. Court officers fulfill their duties in accordance with this federal regime on behalf of all stakeholders. They are bound by the duty to act impartially and in good faith. Section 71 of the *BIA* provides that, upon bankruptcy, the bankrupt's property vests in the trustee in bankruptcy. Pursuant to s. 40 of the *BIA*, trustees return property that is "incapable of realization" to the bankrupt's estate. In this way, trustees have always had the ability to renounce assets both at common law and under the *BIA*. There is nothing exceptional or out-of-the-ordinary about this. It is "commonplace".[85]

62. Given the *BIA*'s objective of achieving the equitable distribution of property, "the *BIA* cannot operate without affecting property and civil rights" – an area of provincial legislative jurisdiction. For this reason, it is not surprising that the *BIA* itself contains an internal paramountcy mechanism: s. 72(1) states that the *BIA* prevails where provincial laws regarding property and civil rights conflict with federal bankruptcy legislation.[86]

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[82] *Moloney*, *supra* note 12, at para. 40.
[83] *Moloney*, *supra* note 12, at para. 32.
[84] *Moloney*, *supra* note 12, at para. 33.
[85] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 47.
[86] *Moloney*, *supra* note 12, at para. 40.

63. Courts have repeatedly held that the *BIA* should be interpreted in a large and liberal fashion.[87] Similarly, this Court has written that "to interpret [the *BIA*] using an overly narrow, legalistic approach is to misinterpret it."[88]

### 3.3.2 *Interpreting Section 14.06 of the BIA*

#### 3.3.2.1 Overview of the Correct Interpretation of Section 14.06 – The Power to Renounce

64. Section 14.06 of the *BIA* deals expressly with environmental liabilities in insolvency proceedings and is at the heart of this appeal. Please see **Appendix "B"** for the full text of the provision. Section 14.06 deals with more than the personal liability of court officers and provides for the handling of environmental liabilities in insolvency proceedings. Despite being referred to as a "complete code", as the ABCA wrote, environmental liabilities remain subject to the *BIA* generally:

> Section 14.06 does not except environmental claims out of the general bankruptcy regime; on the contrary, it tries to incorporate them within that regime. While these provisions should be regarded as a "complete code", in the sense that they provide the only exceptions to the general bankruptcy regime applicable to environmental claims, they are not a "stand-alone code". They assume that the general bankruptcy regime applies to environmental claims, except for the particular rules found in s. 14.06 itself. [Emphasis added][89]

65. In approaching the interpretation of s. 14.06, this Court has directed that modern practice requires the words of the provision "to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[90]

66. The words, scheme, and object of s. 14.06 support the following fundamental feature of the federal regime: assuming the timing and notice requirements of s. 14.06 are complied with, a court officer has the power to renounce affected property both *before* or *after* an environmental

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[87] *Mercure v. A. Marquette & Fils Inc.*, [1977] 1 S.C.R. 547, at p. 556 ("***Mercure***"); *Ford Motor Company of Canada, Limited v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, [2011] 8 W.W.R. 221, at para. 43.

[88] *Mercure*, *supra* note 87, at p. 556.

[89] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 57.

[90] *Marine Services*, *supra* note 75, at para. 77, quoting E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87.

remediation order is made, *regardless* of whether a court officer is at risk of personal liability. Specifically:

(a) Power to Abandon Before Order. Pursuant to s. 14.06(4)(*c*) of the *BIA*, before an environmental remediation order is made, the court officer has the power to abandon, renounce, or be divested of any interest in any real property affected by the environmental condition. Personal liability is not a condition precedent to this power.

(b) Power to Abandon After Order. Pursuant to s. 14.06(4)(*a*)(*ii*) of the *BIA*, when an order is made which has the effect of requiring a court officer to remedy any environmental condition or environmental damage affecting property involved in a bankruptcy, proposal, or receivership, the court officer has the power to abandon, dispose of, or otherwise release any interest in that property affected by the condition or damage within a specified timeframe. Once again, personal liability is not a condition precedent to this power.

**3.3.2.2 The Grammatical and Ordinary Meaning of Section 14.06**

67. The Appellants argue that the risk of personal liability to a court officer and the existence of an environmental remediation order are conditions precedent to a court officer's exercising its power to abandon or renounce affected property. The grammatical and ordinary meaning of s. 14.06 belies this proposition.

68. Personal liability of court officers is addressed in ss. 14.06(1.2) and (2). These sections speak specifically to when and for what a court officer can be personally liable. These provisions effectively limit a court officer's personal liability to environmental matters that occurred after appointment *and* as a result of the court officer's gross negligence or wilful misconduct. The circumstances where personal liability will arise are exceedingly narrow and are dealt with almost exclusively by these two sub-sections.

69. Section 14.06(4) expressly recognizes that a trustee may renounce affected property (see ss. 14.06(4)(*c*) and 14.06(4)(*a*)(*ii*)). At paragraph 101 of their factum, the Appellants argue that s. 14.06 "does not provide receivers with the power to renounce anything but their personal liability". This is clearly not what the section says. Section 14.06 indicates that court officers can renounce any interest in real property; it is not limited to personal liability.

70. Section 14.06(4) does not provide that the court officer may renounce affected property *only if* the court officer is at risk of personal liability. Instead, s. 14.06(4) says that the court officer is not at risk of personal liability if the court officer renounces affected property. Accordingly, the words of s. 14.06 indicate that no personal liability is a *result* of s. 14.06 – not a *condition precedent.* This is an important distinction. As the ABCA wrote, s. 14.06 "does not appear to create a right to disclaim assets, but assumes that the right exists".[91] Since court officers have always enjoyed a general right to disclaim assets, this assumption is sound.

71. The grammatical and ordinary meaning of s. 14.06(4)(*c*) clearly indicates that a court officer has the power to abandon affected property *before* an environmental remediation order is made. Section 14.06(4)(*c*) is triggered "if the trustee had, before the order was made, abandoned or renounced or been divested of any interest in any real property" (emphasis added). If a court officer's renouncement power does not arise until after a remediation order is made, s. 14.06(4)(*c*) would be "mere surplusage."[92]

72. One final aspect of the language of s. 14.06 bears special mention: both ss. 14.06(2) and 14.06(4) operate "[n]otwithstanding anything in any federal or provincial law." This is a strong indication that Parliament was aware that certain aspects of these provisions may contradict other statutory enactments and that, in such a case, Parliament intended s. 14.06 to take precedence. Although "[i]t is presumed that Parliament intends its laws to co-exist with provincial laws", ss. 14.06(2) and 14.06(4) demonstrate that this presumption is less applicable in relation to s. 14.06 of the *BIA*.[93]

**3.3.2.3 The Scheme of the Federal Regime**

73. Multiple aspects of the scheme of s. 14.06 specifically, and the *BIA* more generally, indicate that court officers possess a broad power to renounce assets, untethered from the risk of personal liability.

74. First, s. 14.06(5) provides that a court may stay an environmental remediation order to "enabl[e] the trustee to assess the economic viability of complying with the order" (emphasis added). Assessing the economic viability of complying with an order is considerably broader than determining whether there is a risk of personal liability. If personal liability is truly a

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[91] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 68.
[92] *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 28.
[93] *Moloney*, *supra* note 12, at para. 27.

condition precedent to renouncement, the words of s. 14.06(5) would make little sense and would serve no purpose. Thus, s. 14.06(5) demonstrates that court officers have a broad power to renounce affected assets.

75. Second, under s. 14.06(2), the *only* time a court officer is liable for a debtor's environmental liabilities is when the liabilities arose "as a result of the trustee's gross negligence or wilful misconduct". Section 14.06(4), the provision that gives court officers the power to renounce affected assets before or after an environmental remediation order, is expressly subject to the limitation of liability imposed by s. 14.06(2). If, as the Appellants contend, renouncement can occur only when there is a risk of personal liability, a court officer could renounce the interest in real property giving rise to the personal liability only when it acted with gross negligence or wilful misconduct. In other words, the pre-requisite for exercising the power to renounce would be the court officer's gross negligence or wilful misconduct. In light of s. 14.06(2), s. 14.06(4) must be dealing with more than personal liability.[94]

76. Third, s. 14.06(6) provides that upon a court officer's abandoning affected property "claims for costs of remedying the condition or damage shall not rank as costs of administration". This is contrary to the Appellants' assertions. If environmental claims had a general super priority, this subsection would not be required "because in that event [environmental claims] would rank prior to administrative costs as well."[95]

77. Finally, s. 14.06(7) describes the circumstances in which government claims for environmental remediation will take priority over all other claims. These circumstances are narrow and limited to when the government has already remedied the environmental condition or damage. In these narrow circumstances, the priority attaches only to the affected property or property contiguous thereto. If the Appellants are correct that environmental claims enjoy a general super priority, "s. 14.06(7) would appear to be of little practical effect" other than to attach "contiguous" assets.[96] To give s. 14.06(7) meaning, s. 14.06 must be dealing with more than simply personal liability and environmental claims must not have a super priority over all other claims.

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[94] See *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 69 for further discussion of this point.
[95] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 57(g).
[96] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 57(f).

78. There is nothing in the *BIA* to suggest that Parliament intended environmental claims to enjoy a general super priority over all others. Parliament instead enacted s. 14.06 within the broader scheme of the *BIA*, which clearly sets out the priority of claims in s. 136 ("[s]ubject to the rights of secured creditors") and provides court officers with a general power to renounce any property in s. 40. The Appellants' tortured reading of s. 14.06 cuts against this broader scheme. As this Court observed in *AbitibiBowater*, "[i]f Parliament had intended that the debtor always satisfy all remediation costs, it would have granted the Crown a priority with respect to the totality of the debtor's assets,"[97] which Parliament did not do.

79. The Appellants assert, at paragraph 54 of their factum, that "[n]othing in [s. 14.06] absolves the estate from complying with regulatory orders or obligations respecting the property released, and such a provision should not be read into the legislation" (emphasis in original). This statement displays a fundamental misunderstanding of bankruptcy and insolvency law. No party has submitted that s. 14.06 absolves the estate of any liability. Liability remains with the estate. These regulatory obligations are subject to the *BIA*'s priority scheme and are treated as Provable Claims. Once again, this Court's analysis in *AbitibiBowater* is apposite:

> Subjecting an order to the claims process does not extinguish the debtor's environmental obligations any more than subjecting any creditor's claim to that process extinguishes the debtor's obligation to pay its debts. It merely ensures that the creditor's claim will be paid in accordance with insolvency legislation. [Emphasis added.][98]

**3.3.2.4 The Purpose of the Federal Regime**

80. The intention underlying s. 14.06 specifically, and the *BIA* more generally, is furthered if s. 14.06 is interpreted in a manner that transcends personal liability, allows court officers to renounce assets before or after an environmental order is made, and precludes all environmental claims from enjoying a general super priority over all other types of claims. Adopting a liberal, purposive interpretation of s. 14.06 is important because "to interpret [the *BIA*] using an overly narrow, legalistic approach is to misinterpret it."[99]

81. Chief Justice Wittmann correctly held that s. 14.06 advances multiple interrelated objectives, including the following: (i) "limit[ing] the liability of insolvency professionals, so

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[97] *AbitibiBowater*, *supra* note 9, at para. 33.
[98] *AbitibiBowater*, *supra* note 9, at para. 40.
[99] *Mercure*, *supra* note 87, at p. 556.

that they will accept mandates despite environmental issues"; (ii) "reduc[ing] the number of abandoned sites in the country"; and (iii) "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".[100]

82. As Jacques Hains, the Director of Corporate Law Policy Directorate at the Department of Industry Canada, explained to a Parliamentary committee prior to the 1997 amendments to the *BIA*:

> 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. [Emphasis added.][101]

83. Interpreting s. 14.06 as affirming a broad right to renounce affected assets, regardless of whether there is a risk of personal liability, advances these important aims. Specifically, the right to renounce encourages insolvency professionals to accept mandates despite existing or potential environmental issues, thereby reducing the number of abandoned sites in Alberta. After all, as the uncontradicted evidence demonstrates, court officers would not accept an appointment in situations similar to Redwater if environmental claims had a super priority.[102] If court officers do not accept appointments, then not even the valuable assets can be sold and the total number of orphan wells would *increase*, thereby undermining Parliament's purpose in enacting s. 14.06.

84. An interpretation of s. 14.06 that preserves a court officer's power to abandon affected assets either *before* or *after* an environmental order is made is also consistent with the objects of the federal regime. As the ABCA stated, "[i]t is consistent with the policy behind the various statutes to have trustees signal their intention with respect to non-producing wells as early as possible … Trustees should not be encouraged to disguise their intentions, and wait until the Regulator actually issues an order requiring remediation before disclaiming the assets."[103]

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[100] *Redwater*, *supra* note 11, at paras. 128-129.
[101] House of Commons Debates, Evidence of the Standing Committee on Industry, 35th Parl., 2nd Sess., No. 16 (11 June 1996) at 1549.
[102] Receiver's Second Report, *supra* note 35, at paras. 20(e) and (i).
[103] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 72.

85. The broad right to abandon in s. 14.06 was part of the balance Parliament struck in the 1997 amendments to the *BIA*. In his comments leading up to these amendments, Gordon Marantz, Legal Advisor to the Department of Industry, stated this point succinctly:

> You can't just look at one part of the environmental section, because it's a package. It's designed to ensure that a receiver or a trustee can take control of a property and determine whether or not there's an environmental problem and whether or not it's worth cleaning up, and to provide the trustee with protection from being chased with deep-pocket liability.
>
> The trade-off of the environmental authorities agreeing to give that freedom to a trustee is that the environmental authorities get the lien on the property, so if it's abandoned to them, they have an easy means of getting title, remedying the damage and then recouping their cost out of the sale of the property. But it is a package designed to protect the entire system. [Emphasis added.][104]

86. Providing a super priority to environmental claims in all circumstances and stripping court officers of their renouncement powers were not part of this careful balance. On the contrary, interpreting s. 14.06 in that narrow, technical manner would considerably tip the scales balanced by Parliament.

87. The Appellants' interpretation of s. 14.06 thwarts, rather than furthers, the *BIA*'s goal of advancing the equitable distribution of a bankrupt's assets among creditors.[105] The Appellants' interpretation "would have a direct effect on the scheme of distribution provided under the *BIA*".[106] As this Court wrote in *AbitibiBowater*, "[p]rocessing creditors' claims against an insolvent debtor in an equitable and orderly manner is at the heart of insolvency legislation".[107] Precluding court officers from renouncing affected assets when personal liability is not at issue and shielding associated environmental claims from the bankruptcy regime does not ensure that these claims will be dealt with in an "equitable and orderly manner".[108]

88. ATB submits that s. 14.06 of the *BIA* demonstrates Parliament's intention that court officers should possess the right to renounce affected assets either *before* or *after* an environmental remediation order is made, *regardless* of whether the court officer is at risk of

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[104] House of Commons Debates, Evidence of the Standing Committee on Industry, 35th Parl., 2nd Sess., No. 21 (25 September 1996), at 1715.
[105] *Moloney*, *supra* note 12, at para. 32.
[106] *Redwater*, *supra* note 11, at para. 174.
[107] *AbitibiBowater*, *supra* note 9, at para. 18.
[108] *AbitibiBowater*, *supra* note 9, at para. 18.

personal liability. Even if, as Justice Martin suggests, this renouncement power requires "clear and express articulation",[109] Parliament achieved this degree of clarity through s. 14.06. The *BIA* is a statute of general application throughout Canada and there can be no sector-specific exception to this power for the oil and gas industry. Finally, the spirit of cooperative federalism cannot justify a drastic departure from the interpretation of s. 14.06 that results from the application of foundational principles of statutory construction.

**3.3.2.5 Section 14.06 Applies to the Renounced Assets**

89. Before turning to the interpretation of the provincial regime, ATB will deal briefly with the Appellants' suggestion that s. 14.06 does not apply to the Renounced Assets because they are not "real property".

90. The Appellants write that "[w]hile leases may generally be described as real property interests, they are not real property in the specific sense contemplated in section 14.06".[110] In light of the Appellants' admission that oil and gas leases "may generally be described as real property interests", it is difficult to reconcile how these leases do not fall within s. 14.06(4)'s wide ambit, which encompasses not just fee simple interests, but also "<u>any interest in any real property</u> … affected by the condition or damage" (emphasis added).

91. Oil and gas leases constitute a form of *profit à prendre*. This Court has held that a *profit à prendre* is "an interest in land".[111] It is this *profit à prendre*, as the ABCA observed, that the Receiver/Trustee is ultimately disclaiming.[112] The suggestion that the Receiver/Trustee is disclaiming only the permissive AER licences elevates form over substance and is inconsistent with what the Receiver/Trustee stated it was doing.

**3.4 <u>Interpreting the Provincial Regulatory Regime</u>**

92. The provincial regime at issue includes the *OGCA*, the *Pipeline Act*, and *Directive 006*. Alberta enacted these instruments pursuant to its exclusive jurisdiction over property and civil rights in the province under s. 92(13) of the *Constitution Act, 1867*, and its exclusive jurisdiction to make laws in relation to the development, conservation, and management of non-renewable natural resources under s. 92(A).

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[109] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 114, *per* Martin J.A.
[110] Appellants' SCC Factum, at para. 67.
[111] *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, [2002] 1 S.C.R. 146, at para. 9.
[112] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 81.

93. The *OGCA* and the *Pipeline Act* attempt to limit court officers' powers and expose them to unquantified liability by including court officers in the definition of "licensee". In this case, the Appellants brought an application to require the Receiver to fulfill all of Redwater's obligations as licensee under the *OGCA* and the *Pipeline Act*, including responsibility for abandonment obligations and maintaining a satisfactory LMR. Including court officers as licensees under the provincial regime precludes them from renouncing affected property and subjects them to continuing personal liability with respect to the remediation of renounced assets.[113] The provincial regime also mandates that court officers expend funds in priority to all other claims, including the claims of secured creditors, to remediate renounced oil and gas wells. If a court officer does not comply with an abandonment order of the AER, the court officer may be guilty of an offence.

94. For example, s. 1(1)(*cc*) of the *OGCA* and s. 1(1)(*n*) of the *Pipeline Act* define a "licensee" as including a "trustee or receiver-manager" of the "property of a licensee". This directly subjects court officers to the provincial regime. Section 27(1) of the *OGCA* and s. 23(1) of the *Pipeline Act* require court officers to "suspend or abandon a well or facility when directed by the Regulator or required by the regulations or rules" and to "discontinue or abandon a pipeline when directed by the Regulator or required by the rules." Section 29 of the *OGCA* and s. 25 of the *Pipeline Act* further specify that the abandonment of a well or facility does not relieve the court officer from responsibility for the control or further abandonment of the well or facility or from the responsibility for the costs of doing that work.

95. Importantly, and in contrast to s. 240(3) of Alberta's *Environmental Protection and Enhancement Act*,[114] neither the *OGCA* nor the *Pipeline Act* contains a provision limiting the liability of court officers to the assets in the estate. Under section 30 of the *OGCA*, WIPs may seek contribution from a court officer if they abandon renounced properties of the insolvent licensee and may obtain a judgment against a court officer for those claims.[115] A court officer may be guilty of an offence under s. 106(1) of the *OGCA* or s. 52(2) of the *Pipeline Act* for failing to comply with an order of the AER, including the Abandonment Orders.

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[113] *Redwater*, *supra* note 11, at para. 151.

[114] *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, ss. 137, 240(3) ("***Environmental Protection and Enhancement Act***").

[115] *OGCA*, *supra* note 2, s. 30; Affidavit of Patricia Johnson, sworn September 8, 2015, at para. 8 **[Volume IV, Tab 30 of the Appellants' Record]**.

96. Further, s. 24(1) of the *OGCA* and s. 18 of the *Pipeline Act* provide that a licence can be transferred only with the AER's consent. Pursuant to *Directive 006*, if the post-transfer LMR of the transferor or transferee is less than 1.0, the AER will consent only if a security deposit is provided for the amount by which the deemed liabilities exceed the deemed assets.[116]

97. Having interpreted the federal and provincial regimes at issue, the question becomes whether they conflict.

### 3.5 The Conflicts Between the *BIA* and the Provincial Regime

98. The provincial regime is in operational conflict with the *BIA* and frustrates the *BIA*'s purpose in multiple substantive ways. Chief Justice Wittmann and the ABCA were correct in this conclusion.

#### *3.5.1 Operational Conflicts*

99. An operational conflict arises where there is an "actual conflict in operation", including "where one enactment says "yes" and the other says "no"".[117] In other words, "compliance with one is defiance of the other."[118]

100. The Receiver/Trustee was entitled to renounce the Renounced Assets under s. 14.06(4) of the *BIA*, including the corresponding abandonment obligations, where the necessary timing and notice requirements of the section were satisfied. This is precisely what the Receiver/Trustee did. In doing so, the Receiver/Trustee eliminated its risk of personal liability.

101. However, the *OGCA* and the *Pipeline Act* provide that, notwithstanding the Receiver/Trustee's lawful renouncement, the Receiver/Trustee remains responsible for the "control or further abandonment of the well or facility or [for] the responsibility for the costs of doing that work" (*OGCA*, s. 29), despite the limitations on liability contained in the *BIA*.

102. Moreover, the provincial regime mandates that the Receiver/Trustee comply with the Abandonment Orders. If the Receiver/Trustee does not comply, it is guilty of an offence, in which case the AER may "require the submission of abandonment and reclamation deposits in an amount determined by the Regulator" (*OGCA*, s. 106(3)(e)). This is exactly the type of ongoing obligation and personal liability that s. 14.06 sought to avoid.

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[116] *Directive 006*, *supra* note 22, at Art. 5 and Appendix 2.
[117] *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191 ("***Multiple Access***").
[118] *Multiple Access*, *supra* note 117, at p. 191.

103. To borrow and adapt this Court's phrase from *Moloney*, "[t]hus, the laws at issue give inconsistent answers to the question whether [the Receiver/Trustee can renounce the Renounced Assets and corresponding abandonment obligations]: one law says yes and the other says no."[119] Fundamentally, "[i]n a case like this one, 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".[120] Renouncing the protection afforded by the federal law is precisely what the AER is demanding of the Receiver/Trustee by arguing that the Receiver/Trustee cannot renounce the Renounced Assets and must comply with the Abandonment Orders, the *OGCA*, and the *Pipeline Act*. On the reasoning of *Moloney*, an operational conflict exists.

104. As the ABCA wrote, the provisions of the provincial regime that impose enhanced duties and liabilities on the Receiver/Trustee "are in operational conflict with the provisions of the *BIA* that exempt a trustee and receiver from personal liability, the provisions allowing a trustee and receiver to disclaim assets, and the provisions respecting the priority of remediation costs."[121] No plausible interpretation of s. 14.06 avoids these "genuine inconsistenc[ies]".[122] This conclusion alone is sufficient to dispose of this appeal.

### *3.5.2 Frustration of the BIA's Purpose*

105. A provincial law frustrates the purpose of a federal law if the "operation of the provincial Act is [in]compatible with the federal legislative purpose".[123] In this case, the provincial regime frustrates the *BIA*'s purpose in at least two distinct ways.

#### 3.5.2.1 Expanding the Liability of Court Officers

106. First, by imposing duties and liabilities on the Receiver/Trustee where the *BIA* expressly relieves the Receiver/Trustee of these duties and liabilities, the provincial regime frustrates s. 14.06's objective of limiting court officers' liability so that they will accept mandates. It is no answer that the AER's practice is to impose liability only up to the value of the estate. Practices can change without notice. Unlike s. 137 of Alberta's *Environmental Protection and*

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[119] *Moloney*, *supra* note 12, at para. 60.
[120] *Moloney*, *supra* note 12, at para. 60.
[121] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 89.
[122] *Moloney*, *supra* note 12, at para. 27.
[123] *Moloney*, *supra* note 12, at para. 25, quoting *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, at p. 155.

*Enhancement Act*, neither the *OGCA* nor the *Pipeline Act* contain a provision limiting a court officer's liability to the assets in the estate.

107. As discussed, the unchallenged evidence on the record is that court officers would not accept an appointment in situations similar to Redwater if environmental claims had a general super priority.[124] Section 14.06 of the *BIA* embodies a precise balance between the respective powers of environmental authorities and court officers. By disrupting this balance, the provincial regime frustrates Parliament's purpose in enacting s. 14.06.

**3.5.2.2 Interfering with the Equitable Distribution of Assets**

108. Second, by effectively reordering the priority scheme prescribed by the *BIA*, the provincial regime frustrates the *BIA*'s objective of the equitable distribution of the debtor's assets. To appreciate why, this Court's tripartite test from *AbitibiBowater* must be applied to ascertain whether, in substance, the Abandonment Orders amount to a Provable Claim. In making this determination, the courts below refused to allow the provincial regime to frustrate the *BIA*'s legislatively mandated scheme of distribution.

109. In *AbitibiBowater*, this Court established the test to determine "whether orders issued by a regulatory body with respect to environmental remediation work can be treated as monetary claims".[125] Although the Court's analysis in *AbitibiBowater* took place under the *Companies' Creditors Arrangement Act*,[126] the test is equally applicable to regulatory orders rendered in the context of proceedings under the *BIA*.[127]

110. The *AbitibiBowater* test is comprised of the following three elements:

> 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.][128]

111. The test is concerned with the substance of the provincial regulatory order, not its form. "Considering substance over form prevents a regulatory body from artificially creating a priority

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[124] Receiver's Second Report, *supra* note 35, at paras. 20(e) and (i).
[125] *AbitibiBowater*, *supra* note 9, at para.1.
[126] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.
[127] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 58; *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 24.
[128] *AbitibiBowater*, *supra* note 9, at para. 26.

higher than the one conferred on the claim by federal legislation" (emphasis added).[129] A focus on the substance of the provincial regime is also consistent with the effects-driven approach that must be adopted when interpreting provincial legislation for the purpose of a paramountcy analysis.[130]

112. The ABCA's 1991 decision in *Northern Badger*,[131] on the other hand, "cannot survive the 1997 amendments to the *BIA*" and is of "limited assistance".[132] The ABCA in *Northern Badger* concluded that a regulator's environmental claims can never be Provable Claims. However, following the enactment of s. 14.06(8) of the *BIA* and *AbitibiBowater*, it is clear that environmental claims can, in fact, be Provable Claims.

113. At paragraph 103 of their factum, the Appellants rely on the following passage from *Northern Badger*, which plainly illustrates the outdated nature of that decision:

> [The provincial regime] is not aimed at subversion of the scheme of distribution under the *Bankruptcy Act* though it may incidentally affect that distribution in some cases. It does so, not by a direct conflict in operation, but because compliance by the receiver with the general law means that less money will be available for distribution. [Emphasis added.][133]

114. As this passage demonstrates, the ABCA in *Northern Badger* did not have the benefit of modern paramountcy principles, namely, that the *effects* – not the "aim" – of the provincial legislation should guide the analysis, and that frustration of Parliament's legislative *purpose* – not just a "direct conflict in operation" – will engage the paramountcy doctrine (emphasis added). These are key principles that would have undoubtedly impacted the ABCA's conclusion. Moreover, *Northern Badger* preceded the enactment of s. 14.06 of the *BIA*, *AbitibiBowater*, and the new provisions in the provincial regime that create a debt payable to the AER. For these reasons, *Northern Badger* is not helpful.

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[129] *AbitibiBowater*, *supra* note 9, at para. 19.
[130] *Husky Oil*, *supra* note 80, at para. 39; see also *Moloney*, *supra* note 12, at para. 28.
[131] *Northern Badger*, *supra* note 24.
[132] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 63.
[133] *Northern Badger*, *supra* note 24, at para. 63.

115. *Northern Badger* was decided in a unique factual context that is readily distinguishable from the present case. In particular, the decision in *Northern Badger* was reached on the basis that, among other things:

(a) the receiver-manager had complete control, including operating control, of the wells at issue for over three years (all Renounced Assets in the present case were shut-in prior to the Receiver/Trustee's appointment and renounced within two months of the Receiver's appointment and within days of the Trustee's appointment);

(b) the receiver-manager had generated substantial revenue from the operation of the very properties it sought to renounce (the Receiver/Trustee in this case earned no revenue from the Renounced Assets);

(c) the receiver-manager had sold all of Northern Badger Oil and Gas Limited's assets but seven wells were "returned" by the purchaser to the receiver-manager, in respect of which the receiver-manager proposed to renounce its interest (same comment as (a) above); and

(d) the orphan well program as it exists today, which is now largely industry funded, was not operating at that time and the cost of abandonment for the returned wells could potentially have been borne by the Alberta public.[134]

116. In *AbitibiBowater*, this Court dismissed the import of *Northern Badger* in these terms:

> [I]nsolvency legislation has evolved considerably over the two decades since [*Northern Badger*]. At the time of [*Northern Badger*], none of the provisions relating to environmental liabilities were in force. Indeed, some of those provisions were enacted very soon after, and seemingly in response to, that case. In 1992, Parliament shielded trustees from the very liability imposed on the receiver in [*Northern Badger*]… [Emphasis added.][135]

117. Accordingly, the focus in this appeal should be on whether the Abandonment Orders amount, in substance, to a Provable Claim pursuant to the three-part *AbitibiBowater* test. Each part is addressed in turn.

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[134] *Northern Badger*, *supra* note 24, at paras. 7, 8, 11, 19, 55, 56, 64.
[135] *AbitibiBowater*, *supra* note 9, at para. 47.

(i) Part I – The AER is a Creditor

118. A regulatory body "identifies itself as a creditor" when "the regulatory body has exercised its enforcement power against a debtor."[136] This first prong of the *AbitibiBowater* test is satisfied here.

119. The Appellants conceded before both Chief Justice Wittmann and the ABCA that an obligation exists to the AER as a creditor.[137] The AER acted in a manner consistent with its status as an enforcing creditor in various pieces of correspondence and in its evidence.[138] It is clear that the AER was acting as a creditor in the course of issuing the Abandonment Orders and seeking payment of a security deposit prior to approving any licence transfers. In doing so, the AER exercised its "enforcement power against a debtor [*i.e.*, Redwater]."[139] As Justice Gascon (as he then was) wrote in *AbitibiBowater*, "looking at the true substance over the apparent form, it is not the public "enforcer" taking steps to enforce the general law. It is, to the contrary, the enforcing authority clothed as a creditor."[140]

120. Justice Martin's attempt to distinguish *AbitibiBowater* on the basis that "the LLR program applies to all licensees and pre-dates any bankruptcy"[141] should be rejected, as the environmental obligations at issue in *AbitibiBowater* would similarly "also have been known and anticipated the first day the mine was opened and the pulp and paper mills commenced operation."[142]

(ii) Part II – The AER's Claim Arose Prior to Redwater's Bankruptcy

121. At this second stage, "the creditor's claim will be exempt from the single proceeding requirement if the debtor's corresponding obligation has not arisen as of the time limit for inclusion in the insolvency process."[143] The Abandonment Orders were issued prior to Redwater's bankruptcy and the attendant abandonment obligations existed prior to Redwater's

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[136] *AbitibiBowater*, *supra* note 9, at para. 27.
[137] *Redwater*, *supra* note 11, at para. 164 ("In this case, it is clear, as conceded by the OWA and the AER, that the first and second prongs of the *AbitibiBowater* test are met"); *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 73.
[138] Transcript of the *Redwater* Proceedings, held on December 16 – 17, 2015, at p. 19, lines 22-28, *supra* note 27; Johnston Questioning, *supra* note 45, at p. 103, lines 11-12, and p. 110, lines 2-3 (regarding the AER's claim being subject to the stay in the Receivership Order).
[139] *AbitibiBowater*, *supra* note 9, at para. 27.
[140] *AbitibiBowater, Re*, 2010 QCCS 1261, 68 C.B.R. (5th) 1, at para. 259.
[141] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 187, *per* Martin J.A.
[142] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 64.
[143] *AbitibiBowater*, *supra* note 9, at para. 27.

receivership. The debtor's liability, therefore, arose before the insolvency process commenced. This point was also conceded by the AER and the OWA before the ABCA.[144] Accordingly, the second part of the test is also satisfied.

(iii) Part III – It is Possible to Attach a Monetary Value to the Abandonment Orders

122. The third branch of the *AbitibiBowater* test asks "whether orders that are not expressed in monetary terms can be translated into such terms."[145] When the environmental remediation has yet to occur, "there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed."[146] Consistent with this Court's substance-driven approach to the assessment of Provable Claims, at this final stage courts should consider "the effect that requiring the debtor to comply with the order would have on the insolvency process" (emphasis added).[147]

123. The AER conditioned the sale of the Retained Assets on (i) the Receiver/Trustee's posting security for the Renounced Assets (which security deposit would ultimately be used to perform the remediation work) prior to any sale of the Retained Assets being completed, or (ii) the Receiver/Trustee's expending estate funds to abandon and reclaim the Renounced Assets. It is difficult to imagine a more concrete or certain monetary obligation than the requirement to either post a specified quantum of money or expend funds from the estate to perform abandonment work. Such a requirement has an immediate and tangible impact on the value of the debtor's estate and on the distribution of funds to other creditors – that is, a direct and profound "effect … on the insolvency process."[148]

124. In finding that the third branch of the *AbitibiBowater* test had been satisfied in both a "technical and substantive way",[149] the ABCA outlined the high degree of certainty of the AER's claim:

> Requiring the depositing of security, or diverting value from the bankrupt estate to ensure that the remediation will be done, clearly meets the standard. There is nothing more certain than "cash on the

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[144] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 73.
[145] *AbitibiBowater*, *supra* note 9, at para. 30.
[146] *AbitibiBowater*, *supra* note 9, at para. 36.
[147] *AbitibiBowater*, *supra* note 9, at para. 38.
[148] *AbitibiBowater*, *supra* note 9, at para. 38.
[149] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 76.

> table". This not only reduces the claim to a specific monetary amount, it has an immediate effect on the distribution of the bankrupt estate. Any purchaser who assumes the remediation obligations will naturally adjust the purchase price. The level of "certainty" on this record is considerably higher than the "certainty" found to be sufficient by the majority in *AbitibiBowater*, and would even meet the stricter test proposed by the minority. [Emphasis added.][150]

125. Further, Chief Justice Wittmann found as a fact that the AER does not have any realistic alternatives to performing the remediation work itself, aside from deeming the Renounced Assets to be orphan wells, in which case the OWA will perform the work under the authority delegated to it by the AER.[151] The AER controls the entire process and the work will be performed in one of two ways:

(a) AER Performs Work. The AER expressly communicated in its cover letter to the Abandonment Orders an intention to seek reimbursement for the costs of abandoning the Renounced Assets and indeed "has performed the work on occasion".[152] On this point, the AER should be taken at its word. If the AER performs the work itself, the costs of doing so "constitute a debt payable to the Regulator" pursuant to s. 30(5) of the *OGCA*.

(b) OWA Performs Work. The AER could exercise its powers to declare the Renounced Assets "orphans" under s. 70(2) of the *OGCA* and the OWA would be obligated to perform the work of abandoning the wells. In this scenario, once again, the costs of doing so "constitute a debt payable to the Regulator" pursuant to s. 30(5) of the *OGCA*. This is because s. 30(5) creates a debt to the AER when the work is performed by the AER itself or if the work is completed "by a person authorized by the Regulator" like the OWA.

126. Regardless of whether the AER or the OWA performs the work, the debt will be payable to, and recoverable by, the AER. Further, the work will have been performed either by the AER itself or pursuant to the AER's delegated authority to the OWA. This situation demonstrates that

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[150] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 80.
[151] *Redwater*, *supra* note 11, at para. 172.
[152] *Redwater*, *supra* note 11, at paras. 168, 172; Affidavit of Patricia Johnston, sworn September 8, 2015, at paras. 9-10; Johnston Questioning, *supra* note 45, at p. 44, lines 20-27, p. 45, line 1, and p. 65, lines 1-14.

it is sufficiently certain – at minimum, a "likelihood approaching certainty"[153] – that the AER (including its delegate) will perform the work, and that the AER will assert a monetary claim for reimbursement. Following an extensive review of the evidence, the courts below made findings of fact that the AER's claim is a Provable Claim.

127. The factual findings of the courts below regarding the AER's Provable Claim do not reduce all regulatory orders to unsecured monetary claims. This conclusion does affect those orders that require a court officer to expend estate funds to rectify an environmental condition as a prerequisite to selling assets of the estate or to pay to the AER (in priority to all other creditors) the amount of the LMR deficiency associated with the Renounced Assets. For assets that are retained, compliance with environmental and safety regulations and regulatory orders is mandatory, even where those orders require an expenditure of funds. These types of regulatory obligations are specifically carved out of the stay of proceedings in the Receivership Order at paragraph 8 and receivers must comply with them. For example, if a well is leaking, a court officer must bring that well back into conformity with the regulatory regime in order to continue to operate. The AER would not be stayed from enforcing these types of obligations under the terms of the Receivership Order.

128. The AER has complete control over the orphan process. To allow the AER to subvert the *BIA*'s scheme of distribution by delegating the remediation work to its own captive entity (the OWA) or delaying the timing of when it asserts a claim for such remediation work would encourage regulatory manipulation and would amount to a triumph of form over substance. The AER also cannot be allowed to "hold the claim in its pocket for tactical reasons"[154] and not assert it at the time.

129. This Court noted in *AbitibiBowater* that the test for Provable Claims "is grounded in the facts of each case" (emphasis added).[155] Chief Justice Wittmann's reasons exemplify this notion, as his analysis of the *AbitibiBowater* test is deeply contextual and connected to the evidence before him. This Court should show deference to Chief Justice Wittmann's findings applying the *AbitibiBowater* test, as these findings involved purely factual questions.

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[153] *AbitibiBowater*, *supra* note 9, at para. 86, *per* McLachlin C.J.
[154] *AbitibiBowater*, *supra* note 9, at para. 57, quoting Gascon J. (as he then was) at first instance.
[155] *AbitibiBowater*, *supra* note 9, at para. 38.

(iv) The AER's Provable Claim Frustrates Equitable Distribution under the *BIA*

130. Section 136 of the *BIA* sets out the priority of claims and requires that secured creditors be paid prior to the AER's Provable Claims. In this case, the AER's application of the provincial regulatory regime seeks to trump the *BIA*'s priority scheme by insisting that the AER's unsecured Provable Claims be satisfied in priority to the claims of secured creditors. As a result, the provincial regime frustrates the *BIA*'s objective of ensuring the equitable distribution of the debtor's assets.

131. The *BIA* bars a bankrupt's creditors from enforcing their Provable Claims individually outside of the collective proceeding. The application of the LLR Program by the AER, including the demand for payment of the LMR deficiency associated with the Renounced Assets and the refusal to transfer licences associated with the Retained Assets without posting a deposit, attempts to do just that.

132. Respecting the scheme of priorities set out in the *BIA* does not, as the Appellants suggest, extinguish Redwater's environmental obligations and thwart the "polluter-pay" principle. In *AbitibiBowater*, this Court explained:

> Subjecting an order to the claims process does not extinguish the debtor's environmental obligations any more than subjecting any creditor's claim to that process extinguishes the debtor's obligation to pay its debts. It merely ensures that the creditor's claim will be paid in accordance with insolvency legislation. Moreover, full compliance with orders that are found to be monetary in nature would shift the costs of remediation to third-party creditors, including involuntary creditors, such as those whose claims lie in tort or in the law of extra-contractual liability. In the insolvency context, the Province's position would result not only in a super-priority, but in the acceptance of a "third-party-pay" principle in place of the polluter-pay principle. [Emphasis added.][156]

133. The provincial regime does not simply conflict operationally with the *BIA* and frustrate s. 14.06's objective of encouraging court officers to accept mandates. The provincial regime also frustrates one of the *BIA*'s fundamental tenets: the equitable distribution of assets pursuant to a single proceeding model. Each of these conflicts alone is sufficient to dispose of this appeal.

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[156] *AbitibiBowater*, *supra* note 9, at para. 40.

### 3.6 The Inoperative Nature of the Provincial Regime

134. This is not a case where there is a single isolated conflict. Both lower courts found that numerous provisions of the provincial regime are inoperative to the extent of their conflicts with the *BIA* by virtue of the doctrine of federal paramountcy.[157]

### 3.7 The Doctrine of Interjurisdictional Immunity Does Not Apply

135. The doctrine of interjurisdictional immunity precludes the application of an otherwise valid law to the extent that it impairs a vital or essential part of a constitutional head of power.[158] While the Appellants initially raised the doctrine of interjurisdictional immunity as a constitutional question in this appeal, the Appellants have not addressed this issue in their factum.

136. The doctrine of interjurisdictional immunity has a "limited application today" and is generally reserved for situations already covered by precedent.[159] The use of the doctrine by a provincial regulator to preclude the application of a federal law relating to insolvency was previously considered and rejected in *AbitibiBowater*. This Court held: "I also find that the interjurisdictional immunity doctrine is not applicable. A finding that a claim of an environmental creditor is monetary in nature does not interfere in any way with the creditor's activities. Its claim is simply subjected to the insolvency process."[160] Likewise, the finding that the AER has a Provable Claim and is subject to the *BIA* priority regime does not significantly impair Alberta's exclusive jurisdiction over natural resources. There are proactive steps the AER can take to achieve its regulatory objectives. The doctrine of interjurisdictional immunity does not apply.

### 3.8 Consequences of Dismissing the Appeal

137. Much has been said about the consequences of the decisions of the courts below for the environment and the oil and gas industry. ATB agrees that the protection of Canada's natural environment is important. It does not concede, however, that allowing the appeal is the better outcome for the environment, let alone the oil and gas industry. In fact, the contrary is true. As the ABCA found:

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[157] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 89; *Redwater*, *supra* note 11, at paras. 180-183.

[158] *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 33.

[159] *Marine Services*, *supra* note 75, at para. 50.

[160] *AbitibiBowater*, *supra* note 9, at para. 18.

> If the remediation costs do enjoy a super priority, there would be no point to the Alberta Treasury Branches retaining and paying an insolvency professional to wind up the Redwater estate. The prudent lender in the circumstances would simply walk away from its loans, and all of the wells would truly become "orphaned". [Emphasis added.][161]

138. The Appellants' position would reduce the number of court officers willing to accept appointments when environmental issues are looming. As a result, it would *increase* the total number of orphan wells. This is exactly what Parliament intended to avoid by enacting s. 14.06.

139. The decisions below confirmed that court officers can sell economic assets, even when the debtor's post-transaction LMR is less than 1.0, and can renounce uneconomic assets. This outcome benefits all parties. Effecting the transfer and continued operation of economic assets to a viable licensee is a far more desirable alternative than a situation that would see all of a debtor's assets become orphans.

140. If lenders, like ATB, are confronted with the kind of contingent risk that arises from the Appellants' position, "the amount of financing available to the oil and gas industry can only decline substantially."[162]

141. Dismissing the appeal will safeguard the foundational principles and the integrity of Canada's bankruptcy and insolvency regime – a regime of general application throughout the country. Instead of reordering this federal regime and reinterpreting its foundational principles to provide a temporary band-aid solution for issues that have arisen in the regulation of Alberta's oil and gas industry, dismissing the appeal may encourage the AER to target these issues at their root. Indeed, it is commendable that the "Alberta government is in the midst of consultations on reforming" the provincial regime.[163]

### 3.9 Conclusion

142. The "dominant tide"[164] of Canada's constitutional division of powers has been to allow for a considerable degree of overlap between federal and provincial legislative schemes. Doing so preserves the promise of regional diversity – a central component of Canada's constitutional compromise. But this dominant tide, "however strong its pull may be, cannot

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[161] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 20.
[162] *Redwater*, Court of Appeal Reasons, *supra* note 5, at para. 20.
[163] Dachis et al, *supra* note 6, at p. 1.
[164] *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, at p. 669.

sweep designated powers out to sea nor erode the constitutional balance inherent in the Canadian federal state."[165] Genuine conflicts between federal and provincial legislation must be acknowledged and addressed.

143. When the substance and effect of Alberta's oil and gas regulatory regime are properly understood, it is clear that the regime frustrates key objectives of the federal *BIA* and conflicts operationally with its scheme.

144. This conclusion does not result in a "windfall" for ATB. It is true that ATB was aware of Redwater's regulatory obligations prior to advancing credit. However, ATB reasonably expected that its secured claim would be paid in accordance with the *BIA*'s scheme of priorities.

145. Likewise, this conclusion does not nullify Alberta's ability to regulate and protect the environment. One option open to Alberta would be to require remediation obligations to be paid up front, before companies are permitted to drill. Other developed countries have pursued this avenue.[166] But when the commodity cycle hits bottom and a debtor becomes insolvent, the AER cannot take action reactively and require that its Provable Claims be satisfied before all others. Doing so impedes too severely on Parliament's jurisdiction over bankruptcy and insolvency and unduly privileges regional diversity at the expense of national unity.

146. ATB submits that the first two constitutional questions should be answered in the affirmative, and that the third constitutional question should be answered in the negative.

**PART IV - SUBMISSION AS TO COSTS**

147. ATB respectfully requests its costs of this appeal.

**PART V - ORDER SOUGHT**

148. ATB respectfully requests that the appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30th day of January, 2018.

**BLAKE CASSELS & GRAYDON LLP**

Per: _____

Kelly Bourassa / Ryan Zahara
Brendan MacArthur-Stevens / Chris Nyberg
*Counsel for the Respondent, ATB Financial*

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[165] *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at para. 62.

[166] Hager et al, *supra* note 7, at pp. 46-47.

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# APPENDIX A

**APPENDICES**

## Appendix "A"

The Appellants assert that the appeal raises the following constitutional questions:

1. Do sections 1(1)(cc), 27, 29, 30, and 106 of the *Oil and Gas Conservation Act*, RSA 2000, c O-6 ("***OGCA***"), sections 1(1)(n), 23, 25, 26, and 51 of the *Pipeline Act*, RSA 2000, c P-15 ("***Pipeline Act***"), Article 6 of the Alberta Energy Regulator *Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process* ("***Directive 006***") and Articles 4, 8, and 10 of Appendix 2 of *Directive 006* conflict with or frustrate the powers enumerated under section 14.06 of the *Bankruptcy and Insolvency Act*, RSC, c B-3 (the "***BIA***") such that the above listed provincial laws are inoperative by virtue of the doctrine of federal paramountcy?

2. Do sections 1(1)(cc), 27, 29, 30, and 106 of the *OGCA*, sections 1(1)(n), 23, 25, 26, and 51 of the *Pipeline Act*, Article 6 of *Directive 006* and Articles 4, 8, and 10 of Appendix 2 of *Directive 006* established pursuant to Alberta's exclusive jurisdiction to regulate its natural resources under section 92A(1) of the *Constitution Act*, 1867, 30 & 31 Vict, c 3 (the "***Constitution Act***") conflict with or frustrate the scheme of priorities enumerated under section 136 of the *BIA* such that the above listed provincial laws are inoperative by virtue of the doctrine of federal paramountcy?

3. Does section 14.06 of the *BIA*, as interpreted by the Alberta Court of Appeal, impermissibly impair the Province of Alberta's exclusive jurisdiction and legislative authority to regulate natural resources under section 92(13) or 92A of *the Constitution Act* such that section 14.06 of the *BIA* is inapplicable by virtue of the doctrine of interjurisdictional immunity?

# APPENDIX B

## Appendix "B"

### Full Text of Section 14.06 of the *BIA*

**No trustee is bound to act**

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

**Application**

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

**(a)** an interim receiver;

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

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

**No personal liability in respect of matters before appointment**

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

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

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

**Status of liability**

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

**Liability of other successor employers**

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

**Liability in respect of environmental matters**

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

**(a)** before the trustee's appointment; or

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

**Reports, etc., still required**

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

**Non-liability re certain orders**

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

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

**(i)** complies with the order, or

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

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

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

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

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

**Stay may be granted**

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

**Costs for remedying not costs of administration**

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

**Priority of claims**

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

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

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

**Claim for clean-up costs**

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