SCC File No.: 37627

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

BETWEEN:

ORPHAN WELLS ASSOCIATION and ALBERTA ENERGY REGULATOR

APPELLANTS
(Appellants)

-and-

GRANT THORNTON LIMITED and ATB FINANCIAL

RESPONDENT
(Respondents)

-and-

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PART I - OVERVIEW AND STATEMENT OF FACTS

1.1 Overview

1. This case considers whether the Alberta Energy Regulator (the "**AER**") is entitled, in bankruptcy and receivership proceedings under the *Bankruptcy and Insolvency Act* ("***BIA***"),[1] to be paid its quantified but unsatisfied environmental remediation claims in priority to all other obligations of the bankrupt, Redwater Energy Corporation ("**Redwater**"), and its estate. It also considers whether the AER can order Grant Thornton Limited ("**GTL**"), the receiver and trustee in bankruptcy (the "**Trustee**", and in both capacities, the "**Receiver**") of Redwater, to perform such obligations in respect of oil and natural gas wells, facilities and pipelines (collectively, the "**PNG Assets**") that GTL renounced under s. 14.06(4) of the *BIA*, and whether GTL has continuing obligations in connection with such PNG Assets notwithstanding such renunciation.

2. The decisions of the Court of Queen's Bench of Alberta (the "***QB Decision***")[2] and of the majority of the Court of Appeal of Alberta (the "***Majority Decision***", and with the *QB Decision*, the "**Redwater Decisions**")[3] both found that the operational effect of certain provisions of the provincial *Oil and Gas Conservation Act* ("***OGCA***")[4], the *Pipeline Act* ("***PLA***")[5], and the regulations, rules and directives issued under those Acts (collectively, the "**Provincial Regime**") conflict with the operation of and defeat the purpose of the relevant provisions of the *BIA* and are therefore inoperative to the extent of that conflict. The Redwater Decisions also found that the environmental remediation obligations associated with the PNG Assets renounced by GTL are in substance monetary claims provable in bankruptcy and subject to the *BIA's* priority rules.

3. Two aspects of Alberta's oil and gas regulatory system create the conflicts with the *BIA*. First, receivers and trustees in bankruptcy (collectively, "**court officers**") of companies holding licences issued by the AER are themselves deemed licensees through their inclusion in the definition of "licensee" in the *OGCA* and *PLA*.[6] Since many liabilities and obligations imposed under the Provincial Regime attach to and bind companies on the basis of their status as

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[1] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*].
[2] *Re Redwater Energy Corporation*, 2016 ABQB 278 [*QB Decision*].
[3] *Orphan Well Association v Grant Thornton Limited*, 2017 ABCA 124 [*Majority Decision*].
[4] *Oil and Gas Conservation Act*, RSA 2000, c O-6 [*OGCA*].
[5] *Pipeline Act*, RSA 2000, c P-15 [*PLA*].
[6] *OGCA*, *supra* note 4, s 1(1)(cc); *PLA*, *supra* note 5, s 1(1)(n).

"licencees", the inclusion of court officers in that definition has profound consequences in an insolvency. On their appointment, court officers become liable in their personal capacity and in their capacity as court officers for all of the insolvent licensee's obligations and liabilities under the Provincial Regime, including suspension, abandonment, reclamation and remediation obligations (we will generally use the verb "**abandon**" and grammatical derivations thereof for these terms) (collectively, "**AR Obligations**"). The Provincial Regime makes no exception or accommodation for the unique role of court officers in the federal insolvency system, including their right under s. 14.06(4) of the *BIA* to renounce interests in real property affected by environmental conditions or damage. The Provincial Regime simply ignores s. 14.06(4) renunciations.

4. Notwithstanding the Redwater Decisions, the AER and the Orphan Well Association (the "**OWA**", and together with the AER, the "**Appellants**") argue that AR Obligations associated with PNG Assets must be paid by court officers before they make any other payments. Further, the Appellants claim that notwithstanding clear and unambiguous language in s. 14.06, court officers are obliged to perform the AR Obligations relating to PNG Assets renounced by court officers pursuant to s. 14.06(4) ("**Renounced Assets**"). If this Court were to find that court officers were liable to abandon PNG Assets notwithstanding their renunciation, there is every likelihood that insolvency practitioners will not accept mandates for insolvent debtors in resource extraction industries that have significant environmental liabilities, thereby defeating a foundational purpose of s. 14.06. In the oil and gas industry, PNG Assets of insolvent producers would simply be left derelict without any court officer making arrangements for their safe transition to the Orphan Well Fund (the "**Orphan Fund**"). This would result in fewer court officers being appointed, and all of a debtor's PNG Assets being placed into the Orphan Fund, rather than just the unsellable ones.

5. The Provincial Regime also conflicts with the *BIA* as a result of the AER's control over the licence transfer process and its employment of that process as a debt collection mechanism. Where a licensee is insolvent, the effect of this is that the AER is paid in priority to all other creditors. As noted in the Redwater Decisions, there is no basis in the *BIA* for this practical super priority.[7]

6. The Redwater Decisions found that the Provincial Regime profoundly conflicts with and

[7] *QB Decision, supra* note 2 at paras 123 and 133; *Majority Decision, supra* note 3 at paras 55, 57 and 61.

frustrates the purposes of the *BIA*.[8] Without the relief granted in the Redwater Decisions, the Provincial Regime would enable the AER to assert claims and impose personal liability on court officers in a manner that is completely contrary to the *BIA* and the underlying single proceeding model. Both Redwater Decisions were thorough, well considered, legally correct and sensible in the context of the applicable legislation and jurisprudence. GTL therefore respectfully requests that the Appellants' appeal be dismissed, with costs payable to the Respondents.

7. For the purposes of this factum, GTL adopts the statements, facts and overview contained in Part I of the factum of ATB Financial ("**ATB**" and the "**ATB Factum**").

1.2 Provincial Regime

8. The AER regulates oil and gas producers in Alberta in relation to exploration, production and environmental protection under the Provincial Regime. It is also the regulator under the *Environmental Protection and Enhancement Act* ("***EPEA***")[9] in respect of energy resource activities pursuant to the *Responsible Energy Development Act* ("***REDA***").[10]

9. In order to operate a PNG Asset in Alberta, a person must be a licensee.[11] A licensee of a well or facility must have a working interest therein, which is a beneficial or legal undivided ownership interest.[12] There can be multiple parties holding working interests in such PNG Assets and they are referred to in the *OGCA* as working interest participants.

10. The AER attempts to prevent the AR Obligations of insolvent licensees and working interest participants from being borne by the public by two means. The first is through the Orphan Fund, which is now largely funded by levies paid by industry.[13] The purpose of the Orphan Fund is to: (i) fund its costs of abandoning orphaned PNG Assets; (ii) reimburse the AER for abandonment costs where it abandons such PNG Assets; or (iii) reimburse working interest participants for costs incurred in excess of their share, which is based on their proportionate

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[8] *QB Decision*, *supra* note 2 at paras 155, 156, 176, 178, 181 and 182; *Majority Decision*, *supra* note 3 at paras 89-91.

[9] *Environmental Protection Enhancement Act*, RSA 2000, E-12 [*EPEA*].

[10] *Responsible Energy Development Act*, SA, 2012, Chapter R-17.3 at s 24(a), (b) [*REDA*].

[11] *OGCA*, *supra* note 4, ss 11(1) and 12(1); *PLA*, *supra* note 5, s 16(1).

[12] *OGCA*, *supra* note 4, ss 1(1)(fff), 16(1) and 17.

[13] *OGCA*, *supra* note 4, ss 73 and 74.

ownership share.[14] The OWA is required to abandon PNG Assets designated by the AER as orphans. The AER can designate a PNG Asset as an orphan[15] when the licensee is insolvent or defunct.

11. The second means is pursuant to a licensee liability rating program (the "**LMR Program**") created pursuant to *Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process* ("***Directive 006***"). Under *Directive 006*, the AER calculates a licensee management rating (the "**LMR**") for every licensee operating in Alberta, which measures the proportion of a licensee's aggregate eligible deemed assets to its aggregate deemed liabilities.

12. The AER calculates the LMR for each licensee based on the licensee's monthly reporting on its PNG Assets.[16] Section 1 of Appendix 5 of *Directive 006* defines "**deemed assets**" as the aggregate reported production volume of oil and gas for the preceding 12 months from the licensee's wells, multiplied by the net back (defined as revenue less expenses) per barrel of oil equivalent as established by the AER in accordance with industry averages, multiplied by an *ad hoc* factor of three years.[17] Previously provided security deposits are treated as deemed assets for the purposes of the LMR calculation. Appendix 6 defines "**deemed liabilities**" as the AER's estimate of the average cost of abandoning the PNG Assets in the areas where the licensee operates, based on the complexity of abandonment.[18]

13. The AER calculates the LMR of each licensee on a monthly basis and upon an application for a licence transfer. If a licensee's aggregate deemed assets plus security deposits exceed its deemed liabilities, the LMR will exceed 1.0 (e.g., $2 million in deemed assets and $1 million in deemed liabilities results in a LMR of 2.0). If the deemed liabilities exceed the deemed assets plus security deposits, the LMR will be less than 1.0 (e.g., $1 million in deemed assets and $2 million in deemed liabilities results in a LMR of 0.5). In the latter scenario the licensee must deposit with

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[14] *Ibid*, ss 1(1)(ss) and 68-77.

[15] Alberta Energy Regulator, *Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process* (17 February 2016), s 7.1 [*Directive 006*]; *OGCA, supra* note 4, s 70(2).

[16] *Directive 006, supra* note 14, s 5.

[17] *Ibid, supra* note 14 at Appendix 5, s 1.

[18] *Ibid, supra* note 14 at Appendix 6.

the AER cash or a letter of credit security[19] for the amount by which the deemed liabilities exceed the deemed assets plus previously provided security (the "**LMR Deficiency**"), failing which the AER is empowered to order that all of the licensee's PNG Assets be abandoned.

14. The AER can require a security deposit from a licensee (i) before approving a transfer of a licence, (ii) if a licensee has a LMR Deficiency, (iii) if the AER considers it appropriate in order to offset the estimated AR Obligations in respect of a PNG Asset, (iv) at any time the AER considers it appropriate to offset the estimated costs of providing care and custody for a PNG Asset, and (v) at any time the AER considers it appropriate to offset the estimated costs of ensuring the protection of the public and the environment.[20]

15. While a working interest can be transferred without the consent of the AER, a licence can only be transferred with the prior written consent of the AER.[21] The AER can either consent, impose conditions, or refuse consent. On receiving a licence transfer application, the AER calculates the post-transfer LMR of the transferor and transferee. If the LMR of either is less than 1.0, a security deposit for the LMR Deficiency is required.[22] If the post-transfer LMR of the transferee is less than 2.0, the AER can refuse the transfer application, or require security deposits or other evidence of the transferee's ability to satisfy AR Obligations.[23]

1.3 Facts

16. The Receiver was appointed over the property, assets and undertaking of Redwater on May 12, 2015.[24] On May 14, 2015, the Receiver received a letter from the AER stating, *inter alia*, that (a) the AER was not a creditor of Redwater and did not assert a provable claim, (b) the licensee remained obligated to comply with all regulatory requirements, including all AR Obligations, (c)

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[19] *Oil and Gas Conservation Rules*, Alta Reg 151/1971, s 1.100(6) [*OGC Rules*], Alberta Energy Regulator, *Directive 068: ERCB Security Deposits* (September 17, 2010), s 3 [*Directive 068*].

[20] *OGC Rules*, *supra* note 19, s 1.100(2).

[21] *OGCA*, *supra* note 4, s 24; *PLA*, *supra* note 5, s 18; *Directive 006*, *supra* note 17 at Appendix 2, s 10.

[22] *Directive 006*, *supra* note 14 at Appendix 2, s 8.

[23] Alberta Energy Regulator, *Bulletin 2016-21: Revision and Clarification on Alberta Energy Regulator's Measures to Limit Environmental Impacts Pending Regulatory Changes to Address the Redwater Decision* (July 8, 2016).

[24] First Report of the Receiver, dated July 21, 2015 at Appendix 1 [First Report] [**Volume I, Tab 2, Page 15, of Grant Thornton's Record**] [**GTL Record**]; Second Report of the Receiver, dated October 3, 2015 at para 1 [Second Report] [**Volume I, Tab 3, Page 47 of GTL Record**].

the Receiver was legally and statutorily obligated to fulfill these obligations prior to distributing any funds or finalizing any proposal to creditors, secured or otherwise, and (d) the AER asserted that Alberta and federal law supported this position because suspension and abandonment address primarily public safety issues as opposed to environmental concerns, and that they are duties owed by the licensee to the public. The AER also required the Receiver to confirm by June 15, 2015 that it had taken possession of Redwater's PNG Assets (the "**Redwater Assets**").[25]

17. Upon its appointment, the Receiver carried out an assessment of the Redwater Assets to determine their economic viability. Seven days after its appointment, the Receiver received a letter from the AER advising it that gas was leaking from a Redwater well head (the "**Leaking Well**") and requesting that the Receiver confirm that it had taken possession of such well. The Receiver asked the AER to confirm that the Receiver's remediation work would not be relied on by the AER as a basis for arguing that it was in possession of and liable for the Leaking Well. The AER initially refused but the Receiver nonetheless investigated the leak and determined that it was minor and longstanding. The AER later relented and the Receiver abandoned the Leaking Well at a cost of approximately $45,000, of which approximately one half was borne by the estate.[26]

18. Redwater illustrates the problems with inactive wells under the Provincial Regime. The Redwater Assets included 84 wells, 7 facilities and 36 pipelines.[27] Of those, only 19 wells were producing or operating, the lease for one well had expired and was therefore suspended by the Receiver after its appointment, and the remaining wells were inactive and suspended prior to the appointment of the Receiver. [28]

19. Redwater's LMR did not drop below 1.0 until after the Receiver was appointed, and therefore no security was required to be posted with the AER. As of September 2015, Redwater's LMR had deteriorated to 0.93, and it had an LMR Deficiency of $552,824.[29] The aggregate deemed asset value of the producing Redwater Assets was $6,399,762 and the corresponding aggregate

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[25] Affidavit of Patricia Johnston sworn August 18, 2015 at Exhibit "C" [**Volume IV, Page 29 of the App. Record**].

[26] Second Report at paras 18 and 21(c) [**Volume I, Tab 3, Pages 53 & 55 of GTL Record**].

[27] First Report at para 11 [**Volume I, Tab 2, Page 10 of GTL Record**]; Second Report at Appendix 2 [**Volume 1, Tab 3, Page 78 of GTL Record**].

[28] First Report at para 11 [**Volume I, Tab 2, Page 10 of GTL Record**]; Second Report at para 9 [**Volume I, Tab 3, Page 48 of GTL Record**]).

[29] Second Report at paras 11 and 12 [**Volume I, Tab 3, Pages 49 & 50 of GTL Record**].

deemed liabilities were $2,247,716. Therefore, if the LMR was calculated on the basis of the producing Redwater Assets, it would have been 2.85.

20. By contrast, the aggregate deemed asset value of the non-producing Redwater Assets was $547,107 and aggregate deemed liabilities were $5,251,977, resulting in a notional LMR of 0.10.[30]

21. Although the LMR Program required that Redwater's LMR be 1.0 or greater (both prior to and after a transfer of Redwater Assets), the AER takes the administrative position that it only requires that sales by court officers do not result in a deterioration of the debtor's LMR.[31] In these circumstances, the AER required, in order for a licence transfer by the Receiver to be approved, that the Receiver: (i) post security in the amount of the increase in LMR Deficiency; (ii) perform abandonment and reclamation work using funds of the estate to reduce Redwater's deemed liabilities; or (iii) bundle for sale both economically viable and nonviable PNG Assets in a manner that does not cause a deterioration in Redwater's LMR.[32]

22. On completing its economic assessment, the Receiver concluded, for the reasons set out below, that it could not sell the Redwater Assets on a commercially reasonable basis while complying with the AER requirements set out in paragraph 21.

23. First, any sale of PNG Assets having a notional LMR greater than 1.0 (because their deemed assets exceed their deemed liabilities) would reduce Redwater's LMR and rapidly increase its LMR Deficiency. Hence, if the Receiver sold Redwater's six most productive wells (which have the highest deemed asset values), Redwater's LMR Deficiency would increase from $552,824 to $4,265,204. The AER would require, as a condition to approving the licence transfers for those wells, security deposits equal to either $3,712,380 (the deterioration in the LMR Deficiency) or $4,265,204 (the full LMR Deficiency).[33]

24. Second, the security deposit must be received by the AER before the AER approves the

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[30] Second Report at paras 7 and 11 [**Volume I, Tab 3, Pages 48 & 49 of GTL Record**]

[31] Second Report at para 12 [**Volume I, Tab 3, Page 50 of GTL Record**]; Questioning of Patricia Johnston, held September 29, 2015, p 97 at lines 1-7 and p 106 at lines 6-25 [Johnston Questioning] [**Volume II, Tab 4A, Page 106 of GTL Record**]; *QB Decision*, *supra* note 2 at para 28.

[32] Johnston Questioning pp 106-107 [**Volume II, Tab 4A, Pages 106-107 of GTL Record**]; *QB Decision*, *supra* note 2 at para 28.

[33] Second Report at paras 13, 20(c) and (d) [**Volume I, Tab 3, Pages 50, 55 & 56 of GTL Record**]; *Directive 006*, *supra* note 14, Appendix 2, Article 8.

transfer of the licences, which approval would be a closing condition. Hence, the AER would be paid before there were any sale proceeds, effectively collecting gross proceeds rather than net.

25. Deemed asset values are based on historical production figures and an *ad hoc* valuation of this production established by the AER. Such values therefore do not reflect actual market value.[34] Actual realizations can and often do vary significantly from these notional values.

26. The Receiver had no funds available to pay security deposits before sales were completed, and no party was willing to finance such amounts. It also believed that the AR Obligations for the non-producing Redwater Assets exceeded any likely realization from the producing Redwater assets.[35] Unless the AER agreed to be paid on closing from the gross proceeds after it approved the licence transfers, there would be no sale. Even if a lender financed the security deposit, that financing would have to be repaid out of the gross proceeds. If the gross sale proceeds did not exceed the security deposit securing the LMR Deficiency, the transaction could not close without the lender suffering a shortfall in the funds advanced for the security deposit. Even if it did close, the AER would receive the entire benefit of the sales process and bear none of its costs.[36]

27. Under the Provincial Regime, in situations like Redwater's it would be pointless for a court officer to try to sell the debtor licensee's assets. Court officers incur significant professional fees and costs in sales processes and if they have no assurance of payment from gross sale proceeds, a rational court officer would not accept the risk of the engagement. The AER's position, based on the Provincial Regime, creates unacceptable regulatory risks for court officers.[37]

28. Further, secured creditors would have no incentive to commence proceedings to appoint a receiver, fund a receivership or sale process if the entire benefit of the proceedings went to the AER. In this case, by October 2015, ATB had advanced $1.2 million to the Receiver pursuant to receiver's certificates which are secured by a prior ranking charge.[38] This amount has increased to $2.2 million as at the current date.

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[34] Second Report at para 11 [**Volume I, Tab 3, Page 49 of GTL Record**].
[35] Second Report at para 14 [**Volume I, Tab 3, Page 51 of GTL Record**].
[36] Second Report at para 20(e) [**Volume I, Tab 3, Page 58 of GTL Record**].
[37] Second Report at para 20(i) [**Volume I, Tab 3, Page 59 of GTL Record**].
[38] Order Increasing Receiver's Borrowing Powers, dated and filed October 21, 2015 [**Volume I, Tab 1, Page 1 of GTL Record**].

29. The Receiver's commercial judgment was that a deterioration in Redwater's LMR from the sale of PNG Assets was unavoidable.[39] For the LMR not to deteriorate, a purchaser would have to accept bundles of (i) producing PNG Assets whose deemed asset value exceeded their deemed liabilities ("**Positive Assets**"), plus (ii) non-producing PNG Assets whose deemed liabilities exceeded their deemed assets ("**Negative Assets**"). Such a sale either would not happen or would provide no net benefit to the creditors, because (a) the deemed liabilities of the Negative Assets greatly exceeded their deemed asset values, (b) the deemed asset values associated with the Negative Assets were illusory (they represented a historical accounting for the trailing twelve month revenue prior to ceasing operations, which number would decrease to zero over the ensuing months),[40] (c) the Negative Assets had little or no economic reserve value and therefore a purchaser would only be "buying" a liability, not a potentially valuable asset,[41] and (d) the deemed liabilities, being the Negative Assets' estimated AR Obligations, are substantial and if a person was willing to purchase such a bundle, the purchase price would be reduced by the AR Obligations, negating any net benefit of such sale to the estate.[42]

30. In light of the foregoing, the Receiver advised the AER by letters dated July 3, 2015, July 22, 2015 and August 6, 2015 (which letters, together with the letter from GTL as Trustee referred to in paragraph 33, are collectively the "**Renunciation Letters**") that: (a) it was only taking possession of Redwater's 19 producing wells, the associated facilities and pipelines listed therein, and the Leaking Well (collectively, the "**Retained Assets**"); and (b) the Receiver was not taking possession of any other Redwater Assets (such other Redwater Assets being the "**Renounced Assets**").[43]

31. A week after the Receiver sent its first Renunciation Letter to the AER, the AER issued the Abandonment Orders requiring Redwater to abandon, reclaim and remediate the Renounced Assets in accordance with the requirements of the AER, immediately where there were no other working interest participants, and by September 18, 2015 where there were other working interest

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[39] Second Report at para 20 [**Volume I, Tab 3, Page 55 of GTL Record**].
[40] Second Report at para 11 and 13(a) [**Volume I, Tab 3, Pages 49 & 50 of GTL Record**].
[41] Second Report at para 13(b) [**Volume I, Tab 3, Page 50 of GTL Record**].
[42] Second Report at para 20(c) [**Volume I, Tab 3, Page 55 of GTL Record**].
[43] Second Report at Appendix 7 and 8 [**Volume I, Tab 3, Pages 93 & 96 of GTL Record**].

participants.[44]

32. The AER was not aware of any immediate threat to public safety posed by the Renounced Assets.[45] Notwithstanding that, on September 22, 2015 the Appellants filed an application to declare the Receiver's renunciation of the Renounced Assets void, and to require the Receiver to comply with the Abandonment Orders and the AR Obligations.[46] The Receiver brought a cross-application to determine the constitutionality of certain parts of the Provincial Regime and to allow the Receiver to pursue a sales process that excluded the Renounced Assets.[47]

33. GTL was appointed as Trustee on October 28, 2015[48] and issued a Renunciation Letter to the AER on November 2, 2015 pursuant to s. 14.06(4)(a)(ii) of the *BIA*.

PART II - STATEMENT OF ISSUE

34. GTL adopts the statement of issues set out in Part II of the ATB Factum.

PART III - ARGUMENT

3.1 ATB Factum Standard of Review and Arguments

35. GTL agrees with and adopts the Standard of Review set out in s. 3.1 of the ATB Factum and the arguments set out in Part III of the ATB Factum.

3.2 The Doctrine of Federal Paramountcy

3.2.1 The application of the doctrine of paramountcy

36. The doctrine of paramountcy applies where there is a genuine inconsistency or conflict between validly enacted federal and provincial laws. There are two branches: (1) operational conflict, under which there is actual conflict in the operation of a federal and provincial provision, so that it is impossible to comply with both laws, or both laws cannot operate side by side without conflict; and (2) frustration of purpose, where although dual compliance is possible, the operation

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[44] Second Report at para 21(i) and Appendix 9 [**Volume I, Tab 3, Page 101 of GTL Record**].

[45] Johnston Questioning at p 103 lines 13-20 [**Volume II, Tab 4A, Page 103 of GTL Record**].

[46] Amended Application by Alberta Energy Regulator, Orphan Well Association and Canadian Association of Petroleum Producers for Declaration for Receiver to Comply with Disclosure Orders, filed September 22, 2015 [**Volume II, Page 40 of the App. Record**].

[47] Notice of Application of GTL, filed October 5, 2015 [**Volume II, Page 43 of the App. Record**].

[48] Bankruptcy Order, dated and filed October 28, 2015 [**Volume II, Page 147 of the App. Record**].

of the provincial law frustrates the purpose of the federal.[49] A conflict must be narrowly defined but if it is an actual, genuine conflict, the provincial law will remain valid but be inoperative to the extent of the conflict.[50] Consistent with cooperative federalism, courts apply the doctrine with restraint. If a federal statute can be properly interpreted so as to not interfere with a provincial law, that interpretation is preferred[51] provided it is reasonably open to the court and not repugnant to the text and content of the federal legislation.[52]

37. In the proceedings below the Appellants did not challenge the validity of s. 14.06 of the *BIA* and GTL did not challenge the validity of the Provincial Regime.

3.3 Section 14.06 of the *BIA* in the context of the Insolvency System

3.3.1 Parliament's balancing of public policies in the BIA

38. Insolvency law provides stability and predictability in a crisis where debtors have insufficient liquidity and resources to operate, pay creditors or satisfy obligations. Without an effective insolvency system, debtors lacking sources of liquidity would simply close their doors, leaving a frenzied, chaotic race among creditors and other stakeholders exercising self-help with respect to their unpaid trade accounts, debts, wages, rents and taxes.

39. One of the *BIA*'s foundational purposes is the equitable treatment of creditors. This is implemented through (i) the single proceeding model which requires that creditors prove and pursue their claims in a single proceeding so as to maximize the global recovery of all creditors and stakeholders and avoid the chaos inherent in parties exercising individual enforcement and self-help, and (ii) the priorities given to them in the *BIA* so that there is certainty and predictability with respect to legal entitlement. Under the model, all creditors and other stakeholders are stayed from exercising remedies against the debtor or its assets otherwise than in accordance with the

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[49] *Alberta (Attorney General) v Moloney*, [2015] 3 SCR 327 at paras 18 and 19 [*Moloney*].

[50] *Ibid* at para 27, referring to *Canadian Western Bank v Alberta*, [2007] 2 SCR 3 at paras 74-75 [*Canadian Western Bank*]; *AG Can v Law Society of BC*, [1982] 2 SCR 307 [*Law Society of BC*]; *Rothmans, Benson & Hedges Inc v Saskatchewan*, [2005] 1 SCR 188 at para 21 *[Rothmans]; Husky Oil Operations Ltd v Minister of National Revenue*, [1995] 3 SCR 453 at para 162 [*Husky*].

[51] *Moloney, supra* note 49 at para 86; *Canadian Western Bank, supra* note 50 at para 75; *Law Society of British Columbia v Mangat*, [2001] 3 SCR 113 at para 37 [*Mangat*]; *Marine Services International Ltd v Ryan Estate*, [2013] 3 SCR 53 at para 69 [*Marine Services*]; *Saskatchewan (Attorney General) v Lemare Lake Lodging Ltd*, [2015] 3 SCR 419 at para 20 [*Lemare*].

[52] *R v Zundel*, [1992] 2 SCR 731 at 771.

mandatory priority and distribution rules of the *BIA*.[53] Parties are not permitted to defeat the priority of distribution through self-help.

40. The inescapable reality of insolvency is that the debtor's obligations are rarely satisfied in full. Hence, Parliament balances the competing and important public policies underlying the myriad of obligations of debtors through a variety of mechanisms, the most important of which is the priority rankings governed by the *BIA*. All claims rank equally pursuant to s. 141 of the *BIA* unless other provisions of the *BIA* stipulate a different priority. In each case where claims are given higher priority, they are subject to express limits which reflect Parliament's crucial balancing role.

41. For instance, the deemed trust claims of the Crown for employee withholding payments under the *Income Tax Act*, *Canada Pension Plan*, *Employment Insurance Act*[54] and equivalent provincial legislation (collectively, "**Withholding Claims**") all rank in priority to all other secured and unsecured claims. Yet with some limited exceptions, most other Crown claims are unsecured pursuant to s. 86 of the *BIA*. Secured creditors rank in priority to preferred claims under s. 136 of the *BIA* and to ordinary unsecured claims, but subsequent in priority to Withholding Claims, wage claims secured under ss. 81.3 and 81.4 of the *BIA* (which themselves are limited in quantum and type), pension claims for sums deducted from employee remuneration, normal costs and other amounts secured under ss. 81.5 and 81.6 of the *BIA* (but excluding unfunded deficiencies), and certain types of lien claims. The wage and pension charges rank subsequent to Withholding Claims. No stakeholder achieves absolute, unlimited priority over other stakeholders in this carefully calibrated and balanced system.

42. Section 14.06 was enacted following troubling decisions where court officers were found to be personally liable for environmental obligations of debtors. The decision in *Panamericana de Bienes y Servicios S.A. v Northern Badger Oil & Gas Ltd*. ("***Northern Badger***") is an example,[55] and notably dealt with the same AR Obligations at issue in these proceedings. In enacting s. 14.06, Parliament balanced the public's interest in remediating environmental damage against the rights

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[53] *Moloney*, *supra* note 49 at paras 32-33.

[54] *Income Tax Act*, RSC 1985 c-1, s 224(1.2); *Canada Pension Plan*, RSC 1985 c C8, s 23; *Employment Insurance Act*, SC 1996 c 23, s 86.

[55] *Panamericana de Bienes y Servicios v Northern Badger Oil & Gas Limited*, 1991 ABCA 181 [*Northern Badger*].

of all other creditors to be treated equitably. Parliament also provided a complete code for defining various matters that are central to the federal insolvency system, including affording court officers protection from personal liability for environmental liabilities, the powers of court officers with respect to contaminated property, limits on when remediation costs can be costs of administration, and the scope, limits and priority of a charge securing environmental remediation costs of governments.

43. The Appellants seek to overturn the careful balancing by Parliament in s. 14.06 and the *BIA* through a tortured and narrow interpretation of s. 14.06 that is contrary to the interpretative approach of courts towards the *BIA*.[56]

44. If the arguments of the Appellants are accepted, (a) court officers will be exposed to the very liabilities that s. 14.06 was enacted to protect them from, (b) court officers will be denied the power expressly contemplated in s. 14.06(4) to renounce properties affected by environmental conditions and damage, even when such properties offer no positive benefit to the estate, and (c) the AER will be given an absolute, unqualified priority over all other creditors for quantified remediation obligations that satisfy the tests articulated by this Court in *Newfoundland and Labrador v AbitibiBowater Inc*. ("***Abitibi***") for inclusion as provable claims in bankruptcy.[57] Further, because the AER argues that AR Obligations must be paid before any other amounts are paid out of an estate, the AER will receive the entire benefit of the receivership or bankruptcy proceedings and bear none of its costs.

45. This is particularly troublesome because as noted in *Abitibi*, Parliament already balanced the competing policy considerations in enacting s. 14.06 and limiting the Crown's prior ranking charge to specific property rather than all of the debtor's assets.[58] In doing so, Parliament was mindful of the significant costs of environmental remediation and chose to balance the public's interest in enforcing environmental obligations and the interests of third-party creditors in being treated equitably.[59] As noted in the *Majority Decision*, in addition to environmental considerations, Parliament was likely concerned that giving environmental claims an unlimited priority over

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[56] *Moloney*, *supra* note 49 at paras 23 and 61.

[57] *Newfoundland and Labrador v AbitibiBowater Inc*, [2012] 3 SCR 443 [*Abitibi*].

[58] *Ibid*, at paras 19 and 33; *QB Decision*, *supra* note 2 at para 133; *Majority Decision*, *supra* note 3 at paras 55, 57 and 61.

[59] *Abitibi*, *supra* note 57 at paras 32 and 60.

secured creditors would deter lenders from financing highly leveraged industries such as oil and gas.[60]

3.3.2 The operation of s. 14.06

46. GTL adopts the arguments in ss. 1.2.1.2, 1.2.1.3 and 3.3.1 of the ATB Factum including with respect to the legislative purpose and history of s. 14.06 and the *BIA*.[61]

3.3.3 Powers to renounce pre-existed ss. 14.06(4) and 20

47. A court officer can renounce assets at common law and under the *BIA*.[62] While ss. 14.06(4) and 20 of the *BIA* may not expressly create the authority, they convert the common law power of a court officer to renounce assets into a statutory right.

48. Sections 14.06(4) and 20 of the *BIA* assume the existence of the right to renounce.[63] Paragraph 3(a) of the Alberta Model Receivership Order (which is included in the Receivership Order granted in these proceedings) expresses that right by authorizing, but not obliging, a receiver to take possession of the debtor's properties, assets and undertakings.[64] In her dissent, Martin J.A. did not dispute that court officers can renounce interests in real property, but rather disputed the circumstances under which they are permitted to do so.[65]

49. By renouncing valueless liability laden property, court officers are able to efficiently administer the estate and avoid significant costs of administration that would substantially reduce creditor recoveries.[66] Renunciation permits the maximization of global recovery for all creditors and is a tool employed by court officers in implementing the *BIA*'s fundamental purpose of equitable treatment of creditors,[67] the specific purposes of s. 14.06 discussed in paragraphs 19 to 24 and 80 to 88 of the ATB Factum, and the single proceeding model.

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[60] *Majority Decision, supra* note 3 at para 96.

[61] ATB Factum at paras 17-24 and 58-63.

[62] ATB Factum at para 61.

[63] *Majority Decision, supra* note 3 at para 63.

[64] First Report at Appendix 1 [**Volume I, Tab 2, Page 16 of GTL Record**]

[65] *Majority Decision, supra* note 3 at para 210.

[66] Roy Goode, *Principles of Corporate Insolvency Law*, 4th ed (London: Sweet & Maxwell, 2011) at 200.

[67] ATB Factum at paras 60-63; *BIA, supra* note 1, s 247; *Re Coffey* (2004), 2004 CarswellNfld 160, 2 CBR (5th) 121 (NLTD) [*Coffey*]

50. If creditors are able to recover little if anything because court officers must discharge liabilities with respect to valueless property, creditors would have no incentive to seek their appointment, leaving a procedural vacuum to be filled by the very chaos the single proceeding model seeks to avoid. It would also leave abandoned (in the non-*OGCA* sense) the now derelict contaminated sites of the debtors that s. 14.06 was in part enacted to prevent. [68]

51. Finally, even if court officers cannot renounce PNG Assets, when the receivership ends on discharge of the Receiver, they inevitably end up with the OWA if they have not been sold.[69]

3.3.4 Subsections 14.06(4) and (5) are not limited to personal liability

52. The Appellants' interpretation of s. 14.06(4) is contrary to the grammatical structure of the section. They argue personal liability is a condition precedent. The section affords the court officer protection against personal liability as a consequence of **(1)** complying with the order within the time periods set out in s. 14.06(4)(a)(i), **(2)** renouncing any interest in the real property on notice to the person who issued the order within such time periods, or **(3)** renouncing such interest before an order is made. A consequence follows from conditions being satisfied. Thus, the compliance or renunciation must have already occurred in order for the court officer to benefit from the consequence of not being personally liable. It also makes no sense that a court officer can renounce an interest in property to avoid personal liability for gross negligence and wilful misconduct pursuant to s. 14.06(2).

53. Section 14.06(5) clearly permits a court officer to consider factors beyond personal liability when determining whether to renounce property because it permits a court to extend the time within which property must be renounced to permit the court officer to assess the economic viability of complying with the order. If property can only renounced where there is potential for personal liability, and not because it is not economically viable, such assessment would be pointless. In any event, Parliament would have referred to personal liability rather than economic viability in section 14.06(5).

3.3.5 The meaning of abandon, dispose, release, renounce and divest

54. Section 14.06(4) does not define "**abandons**", "**disposes**", "**otherwise releases**",

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[68] *House of Commons Debates*, 35th Parl, 2nd Sess, No 16 (11 June 1996).

[69] *Majority Decision, supra* note 3 at para 47; ATB Factum at para 61.

"**renounced**" or "**divested**" (this factum generally uses "**renounce**" for these words). The definitions of these words in *Black's Law Dictionary* ("***Blacks***")[70] convey the concept of unilateral relinquishment of possession, management and control of any interest of the debtor, accompanied by a cessation of any liability, obligations or responsibilities for the subject property.

55. This interpretation is substantiated by the legislative history in paragraphs 17 to 24 and 80 to 88 of the ATB Factum. Canadian environmental law bases liability and obligations in part on ownership (which passes to and vests in the trustee upon bankruptcy pursuant to s. 71 of the *BIA*) and in part on management and control of a contaminated property (which both trustees and receivers acquire).[71]

3.3.6 Abandonment Orders are "environmental" for the purposes of 14.06(4)

56. The Abandonment Orders require a court officer to remedy an environmental condition or damage within the meaning of s. 14.06 of the *BIA*. The Abandonment Orders state that the AER believes the Renounced Assets should be immediately suspended and abandoned for environmental and public safety reasons in accordance with the requirements of the AER.[72]

57. The *BIA* does not define environmental "**condition**" or "**damage**". *Oxford English Living Dictionaries ("**Oxford**")*[73] defines "**damage**" as physical harm that impairs the value, usefulness, or normal function of something, or detrimental effects. *Oxford* defines "**condition**" as the state of something with regard to its appearance, quality or working order.[74] Applying these definitions, *environmental damage* contemplates physical harm to the environment and *environmental condition* contemplates the broader concept of a property's environmental state or quality.

58. Suspension addresses both environmental conditions and damage. Suspension is defined in the *OGCA* as the temporary cessation of operations of wells and facilities.[75] *Directive 013:*

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[70] *Black's Law Dictionary*, 10th ed, *sub verbo* "abandon", "abandoned property", "abandonment", "disposition", "divest", "divestment", "release", "renounce" [*Blacks*].

[71] *EPEA*, *supra* note 9, s 1(tt).

[72] Second Report at Appendix 9 [**Volume I, Tab 3, Page 101, GTL Record**].

[73] *Oxford English Living Dictionaries, sub verbo* "damage" (January 29, 2018) online: Oxford English Living Dictionaries <https://en.oxforddictionaries.com/definition/damage> [*Oxford*].

[74] *Oxford*, *supra* note 73, *sub verbo* "condition" online: https://en.oxforddictionaries.com/definition/condition (accessed January 29, 2018).

[75] *OGCA*, *supra* note 4, s 1(xx).

Suspension Requirements for Wells provides that suspension involves cleaning up spills or releases at the surface, plugging all outlets at the wellhead (except the surface casing vent), pressure testing the wellhead and chaining and locking the valves on the wellhead.[76]

59. Abandonment also addresses environmental conditions and damage. The *OGCA* defines "**abandonment**" as the permanent dismantlement of a well or facility in the manner prescribed by the regulations or rules and includes measures to ensure it is left in a permanently safe and secure condition.[77] Well abandonment must address all non-saline groundwater and isolate or cover all porous zones[78] by placing impermeable cement in the well above the formerly productive geologic formations, and adjacent to any porous geologic formations. Further, all surface infrastructure must be removed by cutting the well casing a minimum of one metre below the surface, placing a vented cap on top of the well casing, and removing all surface equipment associated with the well within twelve months of capping the well casing.[79] The resulting abandoned well is permanently incapable of oil or gas production and its internal structure is modified to mitigate the risk of contaminating porous or potable water bearing geologic formations with potentially hazardous substances.[80]

3.3.7 Surface leases, oil and gas leases are **profits à prendre***, which are interests in real property within the meaning of s. 14.06.*

60. The Redwater Decisions correctly concluded that Redwater had an *in rem* real property interest in the PNG Assets which could be renounced by the Receiver under s. 14.06(4).[81] Contrary to the arguments in the factum of the Attorney General of Alberta (the "**Alberta AG**" and the "**Alberta Factum**"), s. 14.06(4) by including the phrase "any interest in any real property", expressly permits the renunciation of a broad range of *in rem* rights and is not restricted to fee simple ownership interests. "**Property**" is broadly defined in the *BIA* to include "… land and every

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[76] *OGCA*, *supra* note 4, s 1(xx); Alberta Energy Regulator, *Directive 013: Suspension Requirements for Wells* (December 20, 2016), s 2.3.2.

[77] *OGCA*, *supra* note 4, s 1(1)(a).

[78] Alberta Energy Regulator, *Directive 020: Well Abandonment* (15 March 2016), s 1.1 [*Directive 20*].

[79] Alberta Energy Regulator, "Why are Wells Abandoned" online: Alberta Energy Regulator <https://www.aer.ca/abandonment-and-reclamation/why-are-wells-abandoned>.

[80] *Directive 020*, *supra* note 78, s 5.5.

[81] *Majority Decision*, *supra* note 3 at paras 32-33.

description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property" [emphasis added]. Such interests would include conventional real property leases and *profits à prendre*.

61. The *in rem* rights of Redwater in its PNG Assets consist of (a) mineral leases in the petroleum substances in, on or under the land, granting it a working interest in, and the exclusive right to drill for, recover and remove such substances from specified real property; and (b) surface leases or rights of entry permitting access to that real property. Redwater has licences issued by the AER under the *OGCA* permitting it to drill for and recover petroleum substances from that real property. The licences issued by the AER are not property interests but rather permit operations.

62. Mineral leases, whether freehold or Crown, are *profits à prendre* and constitute *in rem* interests in real property.[82] Similarly, a surface lease is an *in rem* interest in real property.[83] Where a property owner will not enter into a surface lease, an operator may obtain a "right of entry" under the *Surface Rights Act* (the "***SRA***").[84] A right of entry is also an interest in land and is defined in s. 1(m) of the *SRA* as being the right of entry, use and taking of the surface of land. Section 16(1) of the *SRA* provides that a right of entry order vests in the operator the "... exclusive right, title and interest in the surface land ...". The reversionary nature of mineral leases, surface leases and rights of entry is irrelevant because a reversionary interest is also an interest in land.[85]

63. If Parliament had intended to exclude from s. 14.06 *profits à prendre* such as mineral leases, surface leases and rights of entry, or any other *in rem* interest that is a lesser estate than fee simple, it would have done so expressly rather than using the language "any interest in any real property". This section was enacted after *Northern Badger*, where the very issue was a court officer's liability for AR Obligations in respect of PNG Assets. Parliament clearly understood the need for s. 14.06 to apply to a broader range of legal interests than fee simple ownership.

64. If s. 14.06(4) only permitted renunciation of fee simple ownership interests, s. 14.06(4) would have no application to lessees that manufacture or operate on real property owned by the

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[82] *Bank of Montreal v Dynex Petroleum Ltd*, [2002] 1 SCR 146 at paras 9-10.
[83] *Farm Credit Corp v Kerr*, 1995 CanLII 5741 (SK QB) at para 35 [*Farm Credit*].
[84] *Surface Rights Act*, RSA 2000, c S-24 [*SRA*].
[85] *Farm Credit, supra* note 83 at para 23.

Crown or other parties, including companies in the oil and gas, mining and forestry sectors. In effect, court officers would be unable to renounce interests in real property for resource sector debtors, and would have to comply with all remediation orders. There is no policy basis for such an outcome or evidence that Parliament intended to exclude resource industries from the application of that section. This outcome is particularly absurd because of the significant role the resource sector plays in the Canadian economy, and the significant environmental risks associated with that sector.

3.3.8 Claims for the costs of remediating Renounced Assets cannot rank as costs of administration under s. 14.06(6)

65. Section 14.06(6) clearly states that if a court officer renounces affected property, claims for the costs of remediation cannot rank as costs of administration. If a court officer is required to remediate, and the remediation costs cannot be a cost of administration, then they can only be payable by it personally. This renders meaningless the right to renounce in s. 14.06(4) and the general prohibition against personal liability in s. 14.06(2).[86]

66. The use of the words "claims for costs" in s. 14.06(6) does not alter this interpretation. The Appellants argue that the use of the word "claims" restricts the application of the section to claims of third parties, not court officers, because only third party creditors have "claims" against estates.[87] They have misread the *BIA*, however, because there is no definition of "**claim**". The *BIA* employs the terms "**claim provable in bankruptcy**", "**provable claim**" and "**claim provable**" for third creditor claims. Those terms are defined in s. 2 of the *BIA* as "... any claim or liability provable in proceedings under this Act by a creditor." If s. 14.06(6) was intended to be limited to third party claims, one of those defined terms would have been used rather than "claim". Since "provable claim" is used in s. 14.06(8), the use of "claim" in s. 14.06(6) was not an oversight.

67. Section 136(1)(b)'s use of "claim" to describe a cost of administration is consistent with s. 14.06(6). Costs of administration in s. 136(1)(b) include the fees and expenses of the trustee and its legal counsel. Even the heading of s. 136(1) is "Priority of **Claims**" [emphasis added] and costs

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[86] Joseph Marin & Alex Ilchenko, "Amendments to the Bankruptcy and Insolvency Act – Bill C-5 Environmental Liabilities of Trustees and Receivers", (1997) 14:2 National Insolvency Review; Dianne Saxe, "Trustees' and Receivers' Environmental Liability Update", (1998) 49 CBR (3d) 138 (QL).

[87] Appellants Factum at para 64.

of administration are listed as one such "claim".

3.3.9 Section14.06(4) renunciation does not depend on effectiveness of s. 14.06(7) charge

68. Contrary to the statement of Martin J.A. in her dissent from the Majority Decision,[88] there is no language in ss. 14.06(4) or 14.06(7) that would support an interpretation that the right of renunciation in s. 14.06(4) is conditional upon the charge created by s. 14.06(7) attaching to the real property being remediated.

3.4 Operational Conflict

3.4.1 The operational effect of the Provincial Regime

69. GTL adopts the test for operational conflict set out in paragraph 99 of the ATB Factum.

70. The post *Northern Badger* inclusion of receivers and trustees in the definition of licensee under the *OGCA* and *PLA* is the nexus of the Appellants' argument that the Receiver must abandon the Renounced Assets. The effect of court officers being "deemed licensees" is that they have all of the rights, obligations and liabilities of a licensee under the *OGCA* and *PLA*. As a licensee, a court officer can operate PNG Assets (including the Retained Assets)[89] without conflict.

71. However, as soon as the court officer renounces PNG Assets under s. 14.06(4), there is a direct conflict. The provisions of the Provincial Regime described below illustrate that a court officer's s. 14.06(4) renunciations are not recognized and are completely disregarded thereunder.

72. The AER may order the court officer to abandon the Renounced Assets under s. 27 of the *OGCA* and s. 23 of the *PLA* when (a) required by the regulations or rules, or (b) the AER considers it necessary to do so in order to protect the public or the environment. Section 3.012 of the *OGC Rules* requires the court officer to abandon a Renounced Asset if there is any contravention of the Provincial Regime, if the AER has suspended or cancelled the licence, or if the AER believes the Renounced Asset may constitute an environmental or safety hazard.

73. The court officer is liable to reimburse anyone who does abandonment work on the Renounced Assets, and remains responsible for the control or further abandonment of the Renounced Assets and for the costs of doing the work (ss. 29 of the *OGCA* and 25 of the *PLA)*. If

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[88] *Majority Decision*, *supra* note 3 at paras 217-218, Martin JA dissenting.

[89] *OGCA*, *supra* note 4, s 12; *PLA*, *supra* note 5, s 16.

the court officer fails to pay the debtor's proportionate share of the costs of abandoning the Renounced Assets, those costs, together with a 25% penalty, are a debt payable by the court officer to the AER (ss. 30(1), 30(3) and 30(5) of the *OGCA*) or to any person who performed the work (s. 30(4) of the *OGCA*).

74. The court officer continues to be liable to pay the Orphan Fund the levy for Renounced Assets, together with a 20% penalty if it fails to do so (s. 74 of the *OGCA*).

75. The AER may direct the court officer to take steps the AER considers necessary to contain and clean up oil, crude bitumen, water or any other substance that escapes from Renounced Assets, and do anything else the AER considers necessary to ensure the safety of the public and environment (s. 104(1)(a) of the *OGCA*). These obligations extend to every officer and employee of the court officer or debtor licensee (s. 105 of the *OGCA*). The court officer is liable for any costs incurred by the AER (s. 103(6) of the *OGCA*).

76. If the AER enters the site of a Renounced Asset to take such steps directly, the court officer must obey orders and directions of the AER (s. 104(1)(b) of the *OGCA*) and pay the AER any costs and expenses allocated to it by the AER (s. 104(3) of the *OGCA*).

77. If the court officer fails to comply with an order to abandon Renounced Assets, or fails to pay a debt relating to the abandonment of Renounced Assets, the AER may (a) suspend any operations of the court officer in respect of any other PNG Assets (which could even apply to unrelated insolvency proceedings), (b) refuse to consider an application to transfer a licence, (c) require the court officer to submit abandonment deposits prior to granting any consent to a licence transfer being given, and (d) require the court officer to submit abandonment deposits in an amount determined by the AER for any PNG Assets of the debtor licensee (s. 106(1) of the *OGCA*).

78. The AER may require the court officer to provide a security deposit under s. 1.100(1) of the *OGC Rules* at any time if (a) the debtor licensee has a LMR Deficiency, (b) the AER deems it appropriate to offset the estimated costs of abandoning or taking care and custody of a Renounced Asset, or (c) the AER considers it appropriate to offset the estimated costs of carrying out any other activities in respect of the Renounced Assets to protect the public and the environment.

79. A court officer is guilty of an offence if it does not comply with the Provincial Regime and the orders of the AER thereunder, or causes another person to not comply, or instruct any officer, agent or employee not to comply (ss. 108(1) of the *OGCA* and 52 of the *PLA*), for which the

potential fines are up to $500,000 for corporations and $50,000 for individuals (ss. 110(1) of the *OGCA* and 54(1) of the *PLA*). The only statutory defence available is a due diligence defence under ss. 110(2) of the *OGCA* and 54(2) of the *PLA*, where the court officer must show that, on a balance of probabilities, it took all reasonable steps to prevent the commission of the offence.

3.4.2 Operational conflicts between the Provincial Regime and s. 14.06

80. If the words used in s. 14.06(4) are given their obvious and ordinary meaning, the power of a court officer to renounce is a positive right under the *BIA* and is not a mere permission or freedom. A permission or freedom can be restricted without giving rise to an operational conflict, but a positive right cannot.[90] Section 14.06(4) recognizes the pre-existing renunciation power and this Court has found such a recognition creates or implies a positive right.[91] Stated differently, a specific grant of the power is unnecessary because the power already exists. The power to renounce, when combined with the protections from personal liability, is a federally created positive right being denied by provincial legislation.[92]

81. Further, as described in paragraphs 17 to 24 and 80 to 88 of the ATB Factum, s. 14.06(4) is remedial legislation addressing serious concerns of insolvency practitioners with respect to decisions such as *Northern Badger*.[93] Subsections 14.06(2) and (4) are also exceptions to the general rule that statutory regulations of general application are personally binding upon a court officer.[94] There is an operational conflict to the extent that the effect of the Provincial Regime is to deny the effective exercise of this right.[95]

82. Including court officers in the definition of licensee operates to entirely disregard and nullify the Receiver's renunciation under s. 14.06(4 by imposing all obligations and liabilities for the Renounced Assets under the Provincial Regime on the Receiver. By contrast, s. 14.06(4)

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[90] *Québec (AG) v Lacombe*, [2010] 2 SCR 453, at para 118, Deschamps J dissenting [***Lacombe***].

[91] *OPSEU v Ontario (Attorney General)*, [1987] 2 SCR 2 at para 134; *McKay v The Queen*, [1965] SCR 798 at para 805.

[92] *Quebec (AG) v Canadian Owners and Pilots Association*, [2010] 2 SCR 536 [***COPA***]; *Rothmans, Benson & Hedges Inc v Saskatchewan*, [2005] 1 SCR 188 [***Rothmans***]; *114957 Canada Ltée (Spraytech, Société d'Arrosage) v Hudson (Town)*, [2001] 2 SCR 241 [***Spraytech***].

[93] *Northern Badger*, *supra* note 55.

[94] *Canada Trust Company v Bulora Corporation* (1980), 34 CBR (NS) 145 (Ont SC) at 152, aff'd (1981) 39 CBR 153 (Ont CA).

[95] *Lacombe*, *supra* note 90 at para 121; *Canadian Western Bank*, *supra* note 50 at para 100.

operates to permit the renunciation of the Renounced Assets, whereupon the Receiver has no further obligations with respect to environmental conditions or damage affecting the Renounced Assets. This is an express, direct conflict because one law says there is no liability, and the other law says there is. A court cannot apply both laws without conflict to determine whether the Receiver is liable and therefore the concurrent application of these provisions is impossible.[96] They cannot operate side by side without conflict[97] and the conflict is direct and explicit.[98] If the Receiver relies on its protections under ss. 14.06(2) and (4), it is not in compliance with the Provincial Regime.[99]

83. The liabilities of the court officer under the Provincial Regime are personal liabilities because the legislation contains no provision equivalent to s. 240(3) of the *EPEA*,[100] which limits the liability of court officers to estate assets unless they acted with gross negligence or wilful misconduct.

84. GTL is at real risk. It is an offence to contravene the *OGCA*, the *PLA*, the *OGC Rules* or the Abandonment Orders. It has not complied with the Abandonment Orders by abandoning the Renounced Assets. It is not carrying out the obligations of a licensee under the Provincial Regime with respect to the Renounced Assets.

85. Further, liability for a fine arising from an "offence" is legally distinct from the personal liability to remediate that a court officer is protected from by s. 14.06(2). In absence of provisions to the contrary, the liability is personal. GTL can have no further obligation to remediate under s. 14.06(4), and yet face potential conviction for failing to remediate. These are two conflicting directions to the court as to the scope of the liabilities. If conflicting laws are recast as directives to the court, there is a contradiction[101] because a court cannot decide that a court officer is protected from liability under the federal law but is liable under provincial law. For the court, dual

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[96] *Canadian Western Bank*, *supra* note 50 at para 72.

[97] *Marine* Services, *supra* note 51 at para 76.

[98] *Moloney*, *supra* note 49 at para 92; *407 ETR v Canada (Superintendent of Bankruptcy)*, [2015] 3 SCR 397 at para 25 [*407 ETR*].

[99] *Moloney*, *supra* note 49 at para 60; *Bank of Montreal v Hall*, [1990] 1 SCR 121 at para 155.

[100] *EPEA*, *supra* note 9, s 240(3).

[101] *M & D Farm v Manitoba Agricultural Credit Corp*, [1999] 2 SCR 961 at para 41; Peter Hogg, *Constitutional Law of Canada*, 4th ed (Toronto: Thomson Reuters Canada Limited, 1997).

compliance is impossible and therefore there is an express contradiction.

86. Similarly, the defences available to court officers for personal liability are different under the federal and provincial statutes. The defences in ss. 110(2) of the *OGCA* and 54(2) of the *PLA* are that the court officer took all reasonable steps to prevent the commission of the offence. In s. 14.06(2), a court officer is only liable for gross negligence and wilful misconduct. Again, these are conflicting directions to a court.

87. Even if personal liability was not an issue, serious operational conflicts remain. The Appellants argue that court officers, while not personally liable, are required to abandon the Renounced Assets, regardless of the renunciations under s. 14.06(4), until all value in the estate has been exhausted. The Provincial Regime requiring this conflicts directly with s. 14.06(6) because the costs to remediate Renounced Assets cannot rank as costs of administration. A court officer cannot comply with the Provincial Regime by paying these costs as costs of administration and at the same time comply with s. 14.06(6) by not paying them as costs of administration. The inability to comply with the laws of one level of government without violating the laws of the other is a classic formulation of the impossibility of dual compliance.[102]

88. Finally, by expressly stating that ss. 14.06(2) and (4) operate despite any federal or provincial law, Parliament clearly intended to override conflicting federal and provincial laws. This ought to satisfy the requirement under the doctrine of paramountcy that there is explicit statutory language recognizing the potential for conflict.[103]

3.5 Frustration of the purpose of s. 14.06 and the *BIA*

3.5.1 Test for frustration of purpose

89. GTL adopts the test for frustration of purpose set out in s. 3.5.2 of the ATB Factum.

90. The operation of the Provincial Regime frustrates the purposes of s. 14.06 and the *BIA* in two ways. **First**, it defines court officers as licensees in the *OGCA* and *PLA*, making them liable for the AR Obligations for Renounced Assets. **Second**, it requires payment of AR Obligations for Renounced Assets in priority to all other claims.

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[102] *Multiple Access Ltd v McCutcheon*, [1982] 2 SRC 161 at 191.

[103] *GMAC Commercial Credit Corp - Canada v TCT Logistics Inc*, [2006] 2 SCR 123 at para 51.

3.5.2 Court Officers remain liable for Renounced Assets

91. As discussed above, in paragraphs 17 to 24 and 80 to 88 of the ATB Factum, the purposes underlying s. 14.06, based on the available extrinsic evidence and the actual words and structure of that section, were to enhance the protections afforded to court officers and limit their personal exposure to environmental liabilities. This was intended to encourage insolvency professionals to accept mandates as court officers where a debtor has interests in property affected by environmental conditions or damage. It also permitted court officers to manage potential liabilities and obligations by assessing whether it was more beneficial to the general body of creditors to renounce such property or retain and sell it. Section 14.06 also impacts on the equitable treatment of creditors, which we will review in section 3.5.7 of this factum.

92. The Provincial Regime operates to frustrate these federal purposes because (a) under the Provincial Regime, court officers remain liable as "licensees" for all obligations and liabilities associated with Renounced Assets, (b) the liability is personal, and (c) as a result of that liability, and the likelihood that the entire benefit of realizations would go to the AER, insolvency practitioners and professionals have no incentive to accept mandates. Indeed, the uncontroverted evidence in these proceedings is that insolvency practitioners would not agree to become court officers in situations similar to Redwater[104] if the Appellants' positions are correct. If insolvency professionals are unwilling to accept mandates, all of the insolvent licensee's PNG Assets, whether producing or inactive, would end up in the Orphan Fund. This would create the very risk that caused Parliament to enact s. 14.06 in the first place.

93. As discussed in paragraphs 80 and 81, the renunciation power is a positive right rather than a mere permission or freedom and therefore when the Provincial Regime disregards that right, it frustrates the purpose underlying s. 14.06.[105]

94. Finally, requiring the Receiver to abandon Renounced Assets pursuant to the Abandonment Orders frustrates s. 14.06(4)'s purpose because it renders renunciation purposeless.

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[104] Second Report at paras 20(e) and (i) [**Volume I, Tab 3, Page 58 & 59 of GTL Record**].

[105] *Rothmans*, *supra* note 50 at paras 18 and 19; *COPA*, *supra* note 92 at para 66; *Lacombe*, *supra* note 90 at paras 124 and 125; *Spraytech*, *supra* note 92 at para 34; *Canadian Western Bank*, *supra* note 50 at para 103.

3.5.3 Interfering with the equitable treatment of creditors

95. As described above in paragraph 39, one of the *BIA*'s core purposes is the equitable distribution of assets through the single proceeding model. The equitable treatment of creditors is implemented through the complex priority system described in paragraphs 40 and 41 above.

96. Subsections 14.06(2), (4), (6) and (7) directly impact on priority questions and balance the important policy goals of protecting the environment and ensuring that creditors do not unduly bear the burden of a debtor's environmental liabilities. If Parliament had intended that the debtor always satisfy all remediation costs, it would have granted the government a priority with respect to the totality of the debtor's assets.[106]

97. Under s. 14.06(2), if a court officer is liable because of gross negligence or wilful misconduct, the liability is personal. Such a liability generally cannot be reimbursed from the estate. Alternatively, if the Appellants are correct that a court officer is obliged to pay or perform AR Obligations notwithstanding that there has been no gross negligence or wilful misconduct, the estate must reimburse the court officer as a cost of administration. Costs of administration are paid before any pre-bankruptcy or receivership claims of creditors. Hence, if remediation obligations are costs of administration, they enjoy a practical, super priority over all other claims. However, if remediation obligations relate to Renounced Assets, then they cannot be paid as costs of administration and are subject to the *BIA's* priority scheme.

98. The costs of remediating the Renounced Assets are secured by the s. 14.06(7) charge, and any excess would be an unsecured claim ranking ratably with other unsecured claims under s. 141 of the *BIA*. Even if remediation costs are contingent, they can be proven under s. 14.06(8), which relaxes the timing rule in s. 121(1) of the *BIA* for proving contingent claims.

99. The Alberta Factum incorrectly states that the charge granted pursuant to s. 14.06(7) has no value with respect to PNG Assets. The charge could have real value where oil or natural gas fields intermix both producing PNG Assets and inactive but unabandoned PNG Assets, because it attaches not only to the property affected by environmental conditions and damage, but also to contiguous property related to the activity causing the condition or damage. The extent to which there are contiguous producing and inactive unabandoned Redwater Assets is not in evidence.

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[106] *Abitibi*, *supra* note 57 at para 33; *Majority Decision*, *supra* note 3 at para 61

100. The AER seeks to enforce the obligation to pay or perform AR Obligations by (a) requiring the payment of security deposits, either (i) as a condition to agreeing to a licence transfer application, or (ii) at any time the AER determines that there is a LMR Deficiency, and (b) issuing Abandonment Orders that require a licensee to abandon PNG Assets. However, the AER's claim for AR Obligations can only frustrate the equitable treatment of creditors if the AR Obligations are provable claims in these various forms and subject to the *BIA*. To determine this, one must apply the test articulated by this Court in *Abitibi*.

3.5.4 The Abitibi test

101. If an obligation owed to a regulator is not in substance a monetary claim, it will not be subject to the single proceeding model in the *BIA* or its rules governing the recovery and priority of claims. However, if the obligation is in substance monetary, based upon an examination of the applicable factual matrix surrounding the claim, or it will ripen into a monetary liability,[107] it will be treated as a "provable claim" that is subject to the single proceeding model and will have the priority assigned to environmental claims under the *BIA*.[108]

102. In *Abitibi*, Deschamps J. applied the three part test for inclusion of contingent liabilities as provable claims. **First**, there must be a debt, liability or obligation to a creditor. **Second**, the debt, liability or obligation must be incurred before the debtor becomes bankrupt (which, in the case of environmental obligations, is relaxed by s. 14.06(8) of the *BIA*). **Third**, it must be possible to attach a monetary value to the debt, liability or obligation.[109] The Appellants conceded that the first two parts of the test were satisfied before Wittmann C.J.[110]

103. Martin J.A., referring to *Northern Badger*, wrote that the AER was acting in its capacity as a regulator rather than a creditor and therefore did not satisfy the first part of the test. However, Deschamps J. emphasized that the question, in that first stage of analysis, is whether the regulator is empowered to enforce the obligations the statute imposes and has in fact exercised its enforcement power against the debtor. If so, it will be characterized as a creditor.[111] In this case,

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[107] *Abitibi*, *supra* note 57 at para 3.
[108] *Ibid* at para 19.
[109] *Ibid* at paras 26-28.
[110] *QB Decision*, *supra* note 2 at para 164.
[111] *Abitibi*, *supra* note 57 at para 27.

as soon as the AER issued the Abandonment Orders and required the payment of security deposits, it exercised its statutory enforcement powers and identified itself as a creditor.

104. The second part is also satisfied. The Renounced Assets were shut in before the Receiver was appointed and the AR Obligations associated with them pre-existed that appointment. In fact, pursuant to the LMR system, the AER estimates the dollar amount of the AR Obligations associated with PNG Assets on a monthly basis from the time they are first constructed and put into operation. Deschamps J. said that the second part will not be satisfied if the debtor's activities giving rise to environmental obligations will continue after it is reorganized. In these proceedings, however, the uncontroverted evidence is that Redwater will be liquidated rather than reorganized, and the Renounced Assets will never be operated again.[112]

105. The third part focusses on orders that are not expressed in monetary terms. When a regulator frames its order in monetary terms, the court need go no further because what is being claimed already clearly falls within the definition of a monetary claim.[113]

3.5.5 LMR security deposit obligations

106. The obligation to pay security deposits in the LMR Program is framed in monetary terms and therefore is clearly a monetary claim provable in bankruptcy.

107. In *Moloney*, Gascon J. confirmed that the three part test articulated in *Abitibi* also applied to a broader class of obligations than "orders", being based as it is on the test for contingent liabilities under s. 121(1) of the *BIA*. This reasoning was also applied in *407 ETR Concession Co. v Canada (Superintendent of Bankruptcy)*.[114] The regulatory action being examined in those cases was the denial of driving licences, and was not in any sense a formal regulatory order. The AER's requirement under *Directive 006* that a court officer pay a security deposit in order to obtain licence transfer approval is just such an informal "order". Further, the AER is employing the licence transfer approval process in order to collect a claim that is provable in bankruptcy.

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[112] Second Report at para 13(b) [**Volume I, Tab 3, Page 50 of GTL Record**].

[113] *Abitibi*, *supra* note 57 at para 30.

[114] *Moloney*, *supra* note 49 at paras 54 and 55; *407 ETR*, *supra* note 98.

3.5.6 Abandonment Orders

108. In applying the third requirement to a regulatory order that is not framed in monetary terms, courts examine its substance and apply the rules applicable to the assessment of contingent claims.[115] For an environmental order, there must be sufficient indications that the regulator that triggered the enforcement mechanism will ultimately perform the remediation work and assert a monetary claim for the reimbursement of its costs,[116] which is referred to as the "sufficient certainty test". The court scrutinizes the regulator's actions, but only to the limited extent of determining whether the factual matrix indicates that the regulator is enforcing a provable claim.[117]

109. Deschamps J. then said that the following factors may lead a court to determine that the sufficient certainty was satisfied: **first**, whether the activities at issue are ongoing; **second**, whether the regulator is simply delaying the framing of an order as a claim to improve its position in relation to other creditors; **third**, whether the property is under the debtor's control; **fourth**, whether the debtor has the means to perform the remediation work, and **fifth**, the effect that requiring the debtor to comply with the order would have on the insolvency process.[118] In the context of a receivership, the first, third and fourth considerations could be expressed as whether the property is in the control of the receiver, whether the receiver has the means to perform the work, and the effect of requiring the receiver to comply with the order on the insolvency process.

110. Applying these factors to Redwater, it is clear that the Abandonment Orders are in substance monetary claims. First, all operations in connection with the Renounced Assets ceased before the Receiver was appointed. The renunciation under s. 14.06(4) means the Renounced Assets will never be operated again.[119] Further, Redwater is being liquidated and will not be reorganized.

111. Second, in the cover letter to the Abandonment Orders, the AER stated that if Redwater did not comply with the orders, the AER would exercise its enforcement powers to abandon the Renounced Assets and seek reimbursement of the costs from Redwater.[120] Later, the AER claimed

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[115] *Abitibi*, *supra* note 57 at para 31.
[116] *Ibid* at para 36.
[117] *Ibid* at para 37.
[118] *Ibid* at paras 37-38.
[119] Second Report at para 13(b) [**Volume I, Tab 3, Page 50 of GTL Record**].
[120] Second Report at Appendix 9 [**Volume I, Tab 3, Page 101 of GTL Record**].

it had no intention of abandoning the Renounced Assets, but Wittmann C.J., in a finding of fact, rejected this claim.[121] In any event, if a regulator withholds an otherwise monetary claim, the court may conclude that this course of action is inconsistent with the insolvency process.[122]

112. Third, the Receiver never took possession or control of the Renounced Assets, and therefore has no means by which it can carry out the abandonment work required under the Abandonment Orders. The renunciation under section 14.06(4) should be a strong indication that a regulator will have to carry out remediation work.

113. Fourth, Redwater is entirely insolvent and has no means to fund the abandonment of the Renounced Assets. The Receiver also has no funding to carry out the abandonment work. If the Receiver was required to carry out the abandonment work, it would immediately seek a discharge, surrendering all remaining PNG Assets to the OWA.[123] The fifth factor (i.e., the effect of requiring the debtor to abandon the Renounced Assets on the insolvency process) will be discussed in the next section.

114. All of these factors overwhelmingly demonstrate that the sufficient certainty test has been satisfied and that the Abandonment Orders are in substance monetary claims as they relate to Renounced Assets.

115. Decisions subsequent to *Abitibi* do not alter this conclusion. In *Re Nortel Networks Corp*. ("***Nortel***"),[124] Juriansz J.A. of the Ontario Court of Appeal determined that remediation orders in respect of properties no longer owned by the debtor did not satisfy the sufficient certainty test because there were purchasers who could carry out the remediation work. Because the purchasers and the debtor were jointly and severally liable to remediate those properties, it was not sufficiently certain that the regulator would remediate them.[125] However, the sufficient certainty test was satisfied with respect to a property still owned by the debtor because (a) there was no other party that was jointly and severally liable with the debtor, (b) the debtor was being liquidated so there was no going forward entity, and (c) the property was worth less than the remediation costs so it

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[121] *QB Decision*, *supra* note 2 at para 101.

[122] *Abitibi*, *supra* note 57 at para 37.

[123] Second Report at para 34 [**Volume I, Tab 3, Page 68 of GTL Record**].

[124] *Nortel Networks Corp (Re)*, 2013 ONCA 599, leave to appeal to SCC refused, 35642 (17 April, 2014) [*Nortel*].

[125] *Ibid,* at para 39.

was probable that the property would be abandoned.[126] While not impacting on the correctness of the decision, it is noteworthy that at paragraph 22, Juriansz J.A. did not list the fifth factor discussed above, which Deschamps J. indicated in *Abitibi* could be considered.[127]

116. In *Re Northstar Aerospace Inc*. ("***Northstar***"),[128] Juriansz J.A. found that the sufficient certainty test was satisfied in respect of a regulator's orders against a bankrupt debtor where: (a) the trustee had walked away from the premises, (b) there was no purchaser on the horizon that the regulator could order to do the work, and (c) the regulator had commenced some remediation work and had filed a claim in the proceedings.[129] Juriansz J.A.'s conclusion was not changed by the regulator's efforts to compel former directors and officers to remediate the property. Juriansz J.A. noted that even if the regulator was successful, the regulator would be acting as a regulator only as against the directors and officers. As against the debtor, it would be acting as a creditor.[130]

117. The QB Decision determined that it made no difference to the outcome that third party working interest participants (the "**WIPs**") held working interests in 20% of the Renounced Assets (the "**WIP Assets**").[131] Although the AER is permitted to order WIPs to abandon the WIP Assets under s. 27(2)(a) of the *OGCA*, under s. 30(1) a WIP is ultimately only responsible for its proportionate share of the abandonment costs based on the proportion of its ownership interest to all ownership interests. Of particular importance, a WIP that incurs costs in excess of its proportionate share is entitled to reimbursement of the excess from the Orphan Fund under s. 70(1)(c). Hence, in contrast to the situation in *Nortel*, the WIPs are severally liable for the AR Obligations, not jointly and severally liable.

118. Ultimately, the WIPs have no economic responsibility for Redwater's proportionate share of AR Obligations even if they abandon the Renounced Assets. Even if WIPs are compelled to abandon the Renounced Assets and seek reimbursement from the Orphan Fund for Redwater's proportionate share, the AER is, as against the Receiver and Redwater, acting as a creditor rather

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[126] *Ibid*, at para 41.
[127] *Abitibi*, *supra* note 57 at para 38.
[128] *Northstar Aerospace Inc (Re)*, 2013 ONCA 600 [*Northstar*].
[129] *Ibid*, at paras 16 and 19-21.
[130] *Ibid*, at para 22.
[131] *QB Decision*, *supra* note 2 at para 171.

than as a regulator.

119. Further, the Receiver has renounced the Renounced Properties, and therefore the Receiver has no capacity to physically abandon them. If the AER wishes to recover the costs of abandonment, it must submit a provable claim in the *BIA* proceedings.

120. It makes no difference that the OWA may abandon the PNG Assets rather than the AER. Section 28(b) of the *OGCA* empowers the AER to abandon PNG Assets. Section 3(1)(b) of the *Orphan Fund Delegated Administration Regulation* ("***OFDAR***") delegates the AER's Abandonment power to the OWA and thereby permits the OWA to abandon PNG Assets.[132] It therefore should not matter, for the purposes of the test in *Abitibi*, which of these body exercises that regulatory power.

121. It is misleading for the Appellants to assert that the OWA does not have the power to claim the costs of abandoning the Renounced Assets in the bankruptcy. Under s. 29 of the *OGCA*, the licensee remains liable for abandonment costs even if the AER or a person authorized by the AER has performed the abandonment work. Under s. 30(5) those costs are a debt payable to the AER. Under s. 72, for enforcement purposes, a debt payable to the AER to the account of the Orphan Fund is the same as any other debt owing to the AER. Therefore, the AER could at any time file a claim for the OWA's costs, including on a contingent basis in accordance with s. 14.06(8).

3.5.7 The AER's provable claim frustrates the equitable treatment of creditors

122. Priority questions in paramountcy cases are generally determined under the frustration of purpose branch except where federal and provincial laws expressly create conflicting priorities.[133]

123. Given that the Abandonment Orders and security deposit requirements satisfy the test for provable claims set out in *Abitibi*, they are subject to the distribution and priority rules set out in the *BIA*. According to this Court in *Century Services Inc. v Canada* (A.G.) ("***Century***"),[134] where Parliament has granted priority to Crown claims, it has done so explicitly and elaborately. Therefore, unless the AER's claim in respect of AR Obligations is entitled to a specific priority, it is an ordinary unsecured claim payable rateably with all other claims under s. 141 of the *BIA*.

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[132] *Orphan Fund Delegated Administration Regulation*, Alta Reg 45/2001, s 3(1)(b).
[133] *Sun Indalex Finance, LLC v United Steelworkers*, [2013] 1 SCR 271 at para 60.
[134] *Century Services Inc v Canada (AG)* [2010] 3 SCR 379 at para 45 [*Century*].

124. As discussed above, Parliament provided for a limited and specific prior ranking charge under s. 14.06(7) for remediation obligations, and expressly stated that remediation costs for Renounced Assets cannot rank as costs of administration under s. 14.06(6). The necessary implication is that except to the extent of the s. 14.06(7) charge, AR Obligations for Renounced Assets are unsecured and can only be paid in accordance with s. 141.

125. In *Husky Oil Operations Ltd. v M.N.R.* ("***Husky***"), Gonthier J. said that once there is a bankruptcy, it is the *BIA* rather than provincial legislation that governs priorities and that provinces could not create their own priorities or affect *BIA* priorities. He also said that courts examine the substance of the provincial legislation creating an obligation rather than its form because provinces are not permitted to do indirectly in relation to priorities what they cannot not do directly. [135] In the quartet of decisions of this Court reviewed in *Husky*, this Court held that provincial statutory claims preferred under s. 136 of the *BIA* cannot achieve a higher priority as a result of a provincial lien or trust, unless the lien or trust satisfies the requirements for validity contemplated by the *BIA*. Section 14.06(7) expressly provides for a limited first ranking priority, and s. 14.06(6) effectively denies a province an indirect way of gaining priority over other creditors. By analogy, any claim for AR Obligations in excess of what is secured by the s. 14.06(7) charge should be unsecured and payable ratably with unsecured creditors pursuant to s. 141 of the *BIA*.

126. Applying these principles, the AER is attempting to collect provable claims in bankruptcy for AR Obligations in contravention of the single proceeding model and the equitable treatment of creditors, thereby frustrating the purposes underlying section 14.06 and the *BIA*. It does this by requiring the Receiver to: (a) pay and perform the obligations and liabilities in respect of the Renounced Assets as deemed "licensee"; (b) abandon the Renounced Assets pursuant to the Abandonment Orders; (c) post security for the AR Obligations in respect of the Renounced Assets; (d) post security for the Abandonment Orders; and (e) post security as a condition to the AER consenting to licence transfers in respect of sales of Retained Assets.

127. In any of these circumstances, the AER is enforcing its provable claim for AR Obligations in respect of the Renounced Assets in priority to all other claims. In the case of security deposits being posted as a condition to obtaining the AER's consent to licence transfers, this payment is paid in priority to the Receiver's fees and costs because it comes out of gross proceeds. Further,

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[135] *Husky, supra* note 50 at paras 32 and 38.

because of the size of these AR Obligations, and the payment of the security deposits from gross proceeds, neither the Receiver nor the creditors will receive anything if the Appellant's argument is accepted.

128. In *Moloney*, the provincial scheme did not disrupt the equitable distribution of assets because once a debtor is discharged from bankruptcy, there are no further distributions to creditors. As a result, the distribution scheme and the amount distributed was not impacted, and the administrator was not being "preferred" to other creditors. Other creditors were unaffected by post discharge payments. Therefore, there was no chaos or inefficiencies.

129. The LMR system, as it is applied in receiverships and bankruptcies, clearly interferes with the single proceeding model and the equitable treatment of creditors.[136] In the Redwater proceedings: (a) the position of the AER reduces or eliminates any amounts payable to creditors, (b) by taking gross sale proceeds, the AER gives court officers no incentive to sell assets or even accept an appointment, (c) the AER receives a priority not supported by law and is therefore clearly being preferred, and (d) there would be a great deal of chaos and inefficiency if there were no receiverships or bankruptcies because no court officer would agree to accept a mandate and no lenders would seek the appointment of a court officer where they had little or no prospects of recovering their loans.

3.6 The extent to which the Provincial Regime is Inoperative

130. The impact of the Redwater Decisions on the Provincial Regime is appropriately limited to the extent of the operational conflict and frustration of purpose.[137] Specifically, because much of the conflict arises as a result of court officers being included in the definition of "licensee" in s. 1(1)(cc) of the *OGCA* and s. 1(1)(n) of the *PLA*, those provisions are inoperative, but only to the extent that they have the effect of requiring the Receiver to pay or perform the AR Obligations in respect of the Renounced Assets, or would result in such AR Obligations ranking as costs of administration in contravention of s. 14.06(6) of the *BIA*.

131. Further, the obligation of the Receiver to pay security deposits to the AER[138] is inoperative,

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[136] *Century*, *supra* note 134 at para 22.

[137] *Moloney*, *supra* note 49 at para 62.

[138] *Directive 006*, *supra* note 14, s 5, Appendix 2, ss 6 or 8; Appendix 5 and Appendix 6; *OGC Rules*, *supra* note 19, s 1.100(1).

but only to the extent that it has the effect of including eligible deemed assets and eligible deemed liabilities associated with Renounced Assets in the calculation of Redwater's LMR.

132. Finally, the Abandonment Orders are inoperative, but only to the extent that they require the Receiver to perform or be liable for AR Obligations in respect of the Renounced Assets.

3.7 Regulatory issues raised by the Appellants and certain interveners

133. The Redwater Decisions do not "gut" Alberta's oil and gas regulatory system. The Receiver must comply with all obligations of licensees under the Provincial Regime with respect to Retained Assets. Any purchaser of PNG Assets from the Receiver must fully comply with the LMR Program and all other obligations under the Provincial Regime. What the AER cannot do is make the Receiver liable for the AR Obligations of Renounced Assets or use its powers under the Provincial Regime to collect provable claims outside of the insolvency process and in priority to creditors who have a higher priority or rank *pari passu* with the AER.

134. The argument that the Provincial Regime's regulatory structure has been gutted is particularly absurd given the legislative and regulatory choices over the decades by Alberta and the AER. In the 1990s, following an earlier severe downturn in Alberta's oil and gas industry, the government and the regulator were concerned about the increasing numbers of inactive but unabandoned wells, because those were the most likely to become the responsibility of the public in the event of an insolvency. The Energy Resources Conservation Board (the "**ERCB**", the predecessor of the AER) began requiring transferees of licences to establish that they had the financial means to satisfy their AR Obligations,[139] and under the Long Term Inactive Well Program (the "**Abandonment Program**"),[140] licensees were required within a five year period to complete the abandonment of wells that had been inactive for more than ten years. According to the recitals to the Abandonment Program, at that time there were over 35,000 inactive unabandoned wells, of which approximately 10,000 had been inactive for ten or more years.[141]

135. Following these consultations, the basic regulatory structure underlying the Provincial

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[139] J.R. Nichol, "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 4-5 [*Nichol Presentation*].

[140] Alberta Energy and Utilities Board, "Interim Directive 10 97-8: Long Term Inactive Well Program Requirements" (Edmonton: AUEB, 17 November 1997).

[141] *Ibid* 1.

Regime was put in place, namely (a) the predecessor of the Orphan Fund was created; (b) the Abandonment Program was terminated;[142] (c) proposals to make both current and predecessor licensees and WIPs jointly and severally liable for AR Obligations were rejected and instead liability was largely limited to current WIPs, on a several basis proportionate to their percentage interest therein,[143] and to current licensees and their trustees and receivers;[144] (d) the obligation of transferees to demonstrate to the AER their financial capacity to meet their AR Obligations was replaced with the LMR Program; (e) while licensees were obliged to suspend Inactive Assets within one year of them becoming inactive, there was no time frame within which they had to abandon the inactive unabandoned wells;[145] and (f) licensees were generally only required to post security when their LMR was less than 1.0.[146]

136. The concern underlying the elimination of the Abandonment Program was to avoid imposing unnecessary costs on industry.[147] Industry also wanted the LMR Program because it was less restrictive. The ERCB agreed to this on the basis that the industry supported abandonment fund would take care of the costs of any resulting orphan wells.[148] Industry also justified not having to pay security deposits for AR Obligations on the basis of the Orphan Fund.

137. If the intent of these regulatory choices was to reduce the long term risk posed by inactive unabandoned PNG Assets, it has notably failed. From the inception of the Abandonment Program, the number of inactive, unabandoned wells increased from 35,000 to 155,000 by May of 2017, of which 88,000 had not been abandoned (as that term is defined in ss. 1(1)(a) of the *OGCA* and *PLA*,

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[142] Alberta Energy and Utilities Board, "Information Letter IL 2000-4" (AEUB, 24 October 2000).

[143] *OGCA*, *supra* note 4, s 70(1) (c)-(c.1).

[144] Nickie Vlavianos, *Liability for Well Abandonment, Reclamation, Release of Substances and contaminated Sites in Alberta: Does the Polluter or Beneficiary Pay?* (2000) LLM Thesis, University of Calgary at 55.

[145] Lucija Muehlenbachs, "80,000 Inactive Oil Wells: A Blessing or a Curse" online: (2017) 10:3 University of Calgary School of Public Policy SPP Briefing Paper <https://journalhosting.ucalgary.ca/index.php/sppp/article/view/42617> at 3 [*Muehlenbachs*].

[146] Alberta Energy and Utilities Board, "Interim Directive ID 2000-11: Amendment (Calgary: AEUB, 12 April 2000).

[147] *Nichol Presentation*, *supra* note 139 at p 3

[148] *Ibid* at 5; *Muehlenbachs*, *supra* note 144 at 5; Alberta Energy Regulator "Bulletin 2016-05 First 2016/17 Orphan Fund Levy", (AER, 18 March, 2016).

respectively) and 155,000 had not been fully reclaimed.[149] Hence, under the watch of the AER, the inactive well count either doubled or quadrupled.

138. Not requiring that inactive PNG Assets be abandoned within specified periods after they become inactive has been characterized as atypical among advanced economies. It is also atypical not to require a security deposits until a licensee's LMR is less than 1.0.[150] The ineffectiveness of the latter "protection" is illustrated by Redwater itself. Although it was hopelessly insolvent before the Receiver's appointment, it was not until after its appointment that the LMR deteriorated below 1.0 and necessitated the posting of security.

139. The Alberta AG suggests that the Redwater Decisions effectively ended the "polluter-pay" principle in Alberta's oil and gas sector.[151] However, given that predecessor licensees and WIPs are not jointly and severally liable for AR Obligations notwithstanding that they are as responsible for creating the environmental condition and damage, it is difficult to understand how the Provincial Regime could be characterized as a "polluter pay" system in the first place. Instead, the system holds the last licensee responsible for all AR Obligations, which is often a court officer. Further, in *Abitibi*, Deschamps J. pointed out that in the insolvency context, giving environmental remediation obligations absolute priority replaces the "polluter-pay" principle with a "third-party-pay" principle.[152]

140. Alberta could fundamentally improve the Provincial Regime by addressing these regulatory choices and their consequences without in any way being subject to the doctrine of paramountcy.

141. Finally, the Redwater Decisions do not have disproportionate negative effects on surface land owners, as asserted by the Alberta AG. While the Alberta AG argues such landowners bear the burden of unabandoned PNG Assets on their land on a long term basis, those burdens are a direct result of the Provincial Regime and not the Redwater Decisions. The Provincial Regime permits inactive PNG Assets to remain unabandoned for indefinite periods of time, and permits

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[149] Benjamin Dachis, Blake Schaffer & Vincent Thivierge, "All's Well that Ends Well: Addressing End-of-Life Liabilities for Oil and Gas Wells", Case Comment No 492 (2017) CD Howe Institute at 5a.

[150] *Muehlenbachs*, *supra* note 144 at p 4.

[151] Alberta Factum at para 3.

[152] *Abitibi*, *supra* note 57 at para 40.

the installation of PNG Assets on such lands over the objections of the land owners pursuant to an order granting a right of entry by the Surface Rights Board. Balancing this, the Provincial Regime affords certain protections to surface land owners. For example, the OWA remains responsible for remediating surface lands notwithstanding a licensee becoming defunct or insolvent, meaning that a surface landowner's land will be remediated at some point. Further, operators are required to pay rent to private landowners until reclamation of their property is completed, and land owners are paid from the province's general revenue fund if the operator defaults in that obligation.[153]

3.8 The Doctrine of Interjurisdictional Immunity Does Not Apply

142. The Alberta AG argues that the doctrine of interjurisdictional immunity is engaged because s. 14.06 impairs Alberta's exclusive power under s. 92A of the *Constitution Act, 1867* (the "***Constitution Act***")[154] with respect to laws in relation to the exploration for and development and management of non-renewable natural resources. This argument has no merit. The impugned provisions of the Provincial Regime have the effect of permitting the AER to obtain payment of environmental remediation obligations in priority to all other creditors, imposing liabilities on and nullifying rights given to court officers appointed pursuant to the *BIA*.

143. The *Constitution Act* does not allocate the environment to either Parliament or the provincial legislatures. Either level of government can exercise powers in relation to the environment provided that the manner in which it is done is appropriately linked to a power given to it in the *Constitution Act*.[155]

144. Processing and classifying claims, providing for their priority as against other creditors, and defining the rights and obligations of court officers with respect to those claims forms the heart of insolvency legislation[156] and forms the core of Parliament's exclusive powers under section 91(21) of the *Constitution Act*. This is exactly what s.14.06 does in relation to environmental matters.

145. The exclusive provincial power with respect to natural resources under section 92A does

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[153] *SRA*, *supra* note 84, s 36(6).

[154] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted RSC 1985, App. II, No 5.

[155] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 64 and 67.

[156] *Abitibi*, *supra* note 57 at para 18.

not create exclusivity with respect to environmental matters relating to natural resources. Alberta cannot legislatively permit a PNG Asset to interfere with federal navigable waters or airports. While it is appropriate for Alberta to require that court officers operate Retained Assets, in compliance with the Provincial Regime, it is not appropriate for Alberta's legislature to attempt to govern the priorities in bankruptcy of environmental obligations or the liability of court officers for such obligations.

146. If the Alberta AG is correct that these matters form the core of the Provincial Regime, then that core is a bankruptcy and insolvency matter and intrudes on Parliament's exclusive power under s. 91(21) of the *Constitution Act.* The Alberta AG's suggestion, however, reveals the absurdity of its argument. Courts prefer the paramountcy doctrine over interjurisdictional immunity because of the difficulties in defining the "core" of exclusive powers, particularly where the matter (such as environmental issues) is legitimately subject to legislation at both the federal and provincial levels. Further, the application of that doctrine to s. 14.06 would leave a vacuum in Canadian law with respect to the treatment of environmental liabilities in bankruptcies and insolvencies. [157]

3.9 Conclusion

147. Accordingly, GTL 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

148. GTL respectfully requests its costs of this appeal.

PART V - ORDER SOUGHT

149. GTL respectfully requests that the appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 1st day of February, 2018.

[157] *Canadian Western Bank, supra* note 50 at paras 42 to 44.

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