SCC Court File No.: 37627

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

B E T W E E N:

ORPHAN WELL ASSOCIATION and ALBERTA ENERGY REGULATOR

Appellants

- and -

GRANT THORNTON LIMITED and ATB FINANCIAL (FORMERLY KNOWN AS ALBERTA TREASURY BRANCHES)

Respondents

- and -

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PART I - STATEMENT OF FACTS

1. Greenpeace Canada ("Greenpeace") accepts the facts as set out in the parties' facta and takes no position on disputed facts.

PART II - OVERVIEW AND POSITIONS ON QUESTIONS IN ISSUE

2. When it comes to the oil and gas industry, the environment is an involuntary creditor. It bears all of the risk but enjoys none of the benefits. And unlike debtors who eventually emerge from bankruptcy, the environment never gets a "fresh start".

3. Provincial regulation can help mitigate environmental risks, but the decision below effectively guarantees that such environmental regulation will take a backseat to the interests of banks and other secured creditors whenever a polluting company files for creditor protection.[1] In addition to being contrary to the public interest, such a result is incompatible with the doctrine of co-operative federalism and this Court's jurisprudence.

4. Since this Court's decision in *AbitibiBowater Inc., Re.* ("*Abitibi*"),[2] the courts have applied the "*Abitibi* test" to determine whether a regulatory obligation is a claim provable in bankruptcy. The *Abitibi* test, as it has been applied, is out of step with the doctrine of co-operative federalism. Greenpeace therefore proposes a revised framework to address this gap.

5. Greenpeace makes the following submissions. *First*, without a robust doctrine of co-operative federalism, there can be no meaningful environmental regulation. *Second*, the *Abitibi* framework is ill-suited to assist courts with distinguishing between general environmental regulatory obligations and claims provable in bankruptcy because it fails to account for co-operative federalism. *Third*, this Court ought to reformulate the *Abitibi* test by aligning it with this Court's jurisprudence on co-operative federalism.

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[1] This problem is not unique to Alberta's oil and gas legislative regime. Many provincial environmental regimes are similar in structure to the Alberta legislation at issue here and impose rigorous environmental obligations on polluting companies. See, e.g., British Columbia's *Forest Act*, R.S.B.C. 1996, c. 157 and *Forest and Range Practices Act*, S.B.C. 2002, ch. 69; Ontario's *Environmental Protection Act*, R.S.O. 1990, c. E.19 and its *Waste Management Regulations*, R.R.O. 1990, Reg. 347. Under the approach the majority adopted in the court below, it will be increasingly likely that polluting companies and lenders will be able to avoid such environmental obligations whenever a polluter files for creditor protection.

[2] *AbitibiBowater Inc., Re.*, 2012 SCC 67 ("*Abitibi*").

PART III - LAW AND ARGUMENT

A. CO-OPERATIVE FEDERALISM IS NECESSARY TO MEANINGFUL ENVIRONMENTAL REGULATION

6. Canadians have the right to a safe environment.[3] Despite the importance of its preservation, the Constitution does not delegate exclusive jurisdiction over the environment to either the federal or provincial government.[4] Sections 91 and 92 of the *Constitution Act, 1867* create overlapping federal and provincial jurisdictions with respect to matters that affect the environment.[5] As such, a co-operative approach between all branches of government is critical to ensuring that this right is protected,[6] and should "afford both levels of government ample means to protect the environment while maintaining the general structure of the Constitution".[7]

7. As this Court has held, "[t]oday's constitutional landscape is painted with the brush of co-operative federalism".[8] The "fundamental objectives of [co-operative] federalism" are to "reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good."[9] The interpretation of the relationship between federal and provincial legislatures is a "living tree" that must "evolve and must be tailored to the changing political and cultural realities of Canadian society."[10]

8. Despite the spirit of co-operative federalism, the doctrine of federal paramountcy endures. This doctrine states that if there is a conflict between a validly enacted federal law and a validly enacted provincial law, the provincial law is inoperative to the extent of the

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[3] *Canada (Procureure générale) c. Hydro Québec*, [1997] 3 S.C.R. 213, at para. 124 ("*Hydro Québec*"); *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at para. 55.
[4] *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 63 ("*Friends of the Oldman River*").
[5] *Constitution Act, 1867* 30 & 31 Vict. C. 3. For example, s. 91 gives the federal government jurisdiction over the "Sea Coast and Inland Fisheries" as well as the "Regulation of Trade and Commerce". Section 92 gives provincial governments jurisdiction over "Local Works and Undertakings" and "Property and Civil Rights in the Province". Section 92A also gives provincial governments jurisdiction over non-renewable natural resources and forestry. As this Court stated in *Friends of the Oldman River*, *supra*, at p. 65 (S.C.C.), the solution to legislating regarding the environment is "by looking first at the catalogue of powers in the *Constitution Act, 1867* … it will be seen that in exercising their respective legislative powers, both levels of government may affect the environment, either by acting or not acting".
[6] *Hydro-Québec*, *supra*, at para. 85 (S.C.C.). See also Janis Sarra, "Of Paramount Importance: Interpreting the Landscape of Insolvency and Environmental Law" (2012), Annual Review of Insolvency Law, at pp. 1-2 ("Of Paramount Importance"), Greenpeace Canada's Book of Authorities ("GCBA"), Tab 2.
[7] *Hydro-Québec*, *supra*, at para. 116 (S.C.C.).
[8] *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, at para. 42.
[9] *Canadian Western Bank v. Alberta*, 2007 SCC 22, at para. 22 ("*Canadian Western Bank*").
[10] *Ibid*, at para. 23 (S.C.C.).

incompatibility.[11] This Court, however, has cautioned judicial restraint in applying federal paramountcy.[12] It is presumed that Parliament intends its laws to co-exist with provincial laws.[13] Therefore, where possible, courts ought to favour an interpretation of a federal law that allows for the concurrent application of both federal and provincial law, and ought to avoid an expansive interpretation of the federal legislation, which risks bringing it into needless conflict with provincial law.[14]

9. With the principles of co-operative federalism firmly in mind, this Court has held that federal paramountcy is triggered only where dual compliance with both a federal law and a provincial law is not possible because either: (1) there is an ***express operational conflict***, or (2) enforcement of the provincial law ***frustrates the purpose*** of the federal law.[15]

B. THE PROBLEM WITH THE *ABITIBI* TEST

10. All parties agree that the "*Abitibi* test" applies. Although Greenpeace does not question the correctness of this Court's decision in *Abitibi*, the application of the *Abitibi* test in subsequent cases, including the decision below, has undermined co-operative federalism and ought to be revisited.

11. In *Abitibi*, this Court applied the following test to determine whether a provincial regulatory obligation is a claim provable in bankruptcy:

i. There is a debt, liability, or obligation owed to a creditor;

ii. The debt, liability, or obligation was incurred before the debtor became bankrupt; and

iii. The debt, liability, or obligation has a monetary value, or it is "sufficiently certain" that the regulator will perform the obligation in the absence of compliance.[16]

12. The majority in the court below used the *Abitibi* test to determine that federal paramountcy was engaged (and ultimately to dispose of the appeal).[17] But *Abitibi* was not a

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[11] *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, at para. 16 ("*Moloney*").
[12] *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, at para. 21; *Moloney*, *supra*, at paras. 102, 122 (S.C.C.).
[13] *Moloney*, *supra*, at para. 27 (S.C.C.).
[14] *Moloney*, *supra*, at para. 27 (S.C.C.); *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, at paras. 20, 23 ("*Lemare Lake*"); *Newfoundland and Labrador (Workplace Health, Safety & Compensation Commission) v. Ryan Estate*, 2013 SCC 44, at para. 69 ("*Ryan Estate*").
[15] *Moloney*, *supra*, at para. 18 (S.C.C.); *Lemare Lake*, *supra*, at para. 17 (S.C.C.).
[16] *Abitibi*, *supra*, at paras. 26, 36, 46 (S.C.C.).

federal paramountcy case, and there is no suggestion that this Court intended that the *Abitibi* test be used as a substitute for the well-established "operational conflict" and "frustration of purpose" tests, which are designed to gauge federal paramountcy.

13. In the federal paramountcy context, the question is not simply whether the provincial regulator has a claim provable in bankruptcy. Rather, the question is whether the exercise of a provincial power by a regulatory body either (i) causes an operational conflict with the federal insolvency legislation, or (ii) frustrates or displaces the purpose of the federal insolvency legislation.[18] If the answer to both of these questions is "no", the proposed restructuring does not engage paramountcy concerns. Even if the provincial regulation impacts the proposed restructuring or liquidation — by, for example, reducing the amount of funds available to secured creditors — federal paramountcy is not engaged *unless* there is also an operational conflict or frustration of purpose.[19]

14. The first stage of the *Abitibi* test — establishing whether a regulator is a creditor — is where federal paramountcy ought to be expressly considered. This Court in *Abitibi* stated that determining whether a regulatory body is a creditor turns on whether it has "exercised its enforcement power against a debtor".[20] On its face, this first prong casts the net widely in a manner that captures virtually every regulatory action as forming a debtor-creditor relationship: there is a regulatory body, a debtor, and the regulatory body seeks to enforce an obligation.[21] As Professor Stewart suggests, the creditor requirement in the *Abitibi* test becomes a "presumption of fact".[22] Such a result surely could not have been this Court's intention,[23] and is an approach that invites, rather than avoids, jurisdictional conflict.

15. The presumptive characterization of a regulator as a creditor is contrary both to the spirit of co-operative federalism and the letter of the law.

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[17] *Orphan Well Association v. Grant Thornton Limited*, 2017 ABCA 124, at paras. 58-91.
[18] Fenner L. Stewart, "How to Deal with a Fickle Friend? Alberta's Troubles with the Doctrine of Federal Paramountcy" (2018), Annual Review of Insolvency Law, at p. 10 ("Fickle Friend"), GCBA, Tab 1.
[19] "Of Paramount Importance", *supra*, at p. 13. See also *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 ("*Husky Oil*"), at paras. 89, 149, GCBA, Tab 2.
[20] *Abitibi*, *supra*, at para. 27 (S.C.C.).
[21] Fickle Friend, *supra*, at pp. 10-11, GCBA, Tab 1.
[22] *Ibid*, at pp. 10-11.
[23] *Ibid*, at p. 11.

16. First, the burden of proving federal paramountcy is on the party raising it.[24] In *Québec (Attorney General) v. Canadian Owners and Pilots Association*, this Court held that "[t]he standard for invalidating provincial legislation on the basis of frustration of federal purpose is high; permissive federal legislation, without more, will not establish that a federal purpose is frustrated when provincial legislation restricts the scope of the federal permission."[25] A reverse-onus approach that effectively deems all regulators to be creditors violates this well-established principle.[26] It bears repeating that meaningful co-operative federalism mandates judicial restraint. An approach in which regulatory activities are presumed encroachments on federal powers militates in favour of judicial intervention — not restraint.[27]

17. Second, the express language of the *Bankruptcy and Insolvency Act* (the "BIA")[28] carves out space for regulatory activities continuing in a bankruptcy. Section 72(1) provides that the provisions of the BIA "shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act". Further, s. 69.6(2) excludes regulatory activities from any stay ordered under ss. 69 or 69.1. Indeed, the default position of a regulator under the latter section is that of a non-creditor, and a court order is required to displace this presumption.[29]

18. Leaving consideration of monetary issues to the third stage of the *Abitibi* test also erroneously contributes to the presumption in favour of creditor status. At the first stage, the *Abitibi* test asks whether the regulator is seeking to enforce an obligation (of any kind). But the nature of the obligation — i.e., whether the obligation is monetary or an order to respect the general law — bears directly on the question of whether the regulator is acting like a creditor.

19. This distinction mattered less in *Abitibi*: the Province clearly sought to enforce a monetary obligation.[30] But many cases are not like *Abitibi*. Regulators typically do not stand to gain a direct pecuniary benefit from the general enforcement of the law, and their role is often

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[24] *Canadian Western Bank*, *supra*, at para. 75 (S.C.C.); *Québec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, at para. 66 ("*COPA*").
[25] *COPA*, *supra*, at para. 66 (S.C.C.).
[26] Fickle Friend, *supra*, at p. 23, GCBA, Tab 1.
[27] *Ibid.*
[28] *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA").
[29] BIA, s. 69.6(4).
[30] *AbitibiBowater Inc., Re*, 2010 QCCS 1261, at paras. 252-257 ("*Abitibi* Superior Court Reasons").

merely that of a "detached regulator or public enforcer issuing [an] order for the public good".[31] They do not wear "the hat of a creditor" in such cases.[32] They regulate and oversee environmental obligations as a duty "owed as a public duty by all the citizens of the community to their fellow citizens".[33] Failure to consider the pecuniary nature of a regulatory obligation at the first stage therefore further skews the test in favour of finding that the regulator is a creditor.

C. REFRAMING THE *ABITIBI* TEST: MAKING ROOM FOR CO-OPERATIVE FEDERALISM

20. The Court's approach in this case, and cases like it, ought to "facilitate, not undermine" the goals of co-operative federalism.[34] The proper analysis requires a test that more directly engages the two federal paramountcy questions ("operational conflict" and "frustration of purpose") at the first stage of the *Abitibi* analysis (i.e., in determining whether the regulator is a creditor).

21. Greenpeace therefore endorses a reformulation of the *Abitibi* test by expressly incorporating the operational conflict and frustration of purpose tests. Accordingly, at the first stage of the *Abitibi* test, the Court ought to ask whether the party claiming a conflict has proven that:

i. There is a ***true operational conflict*** between the federal statute and the provincial law in that complying with ***mandatory provisions*** of both is impossible; or

ii. The provincial law ***frustrates the purpose*** of the federal insolvency legislation and does not merely ***incidentally affect a particular insolvency***.

22. Where the answer to these questions is "no", federal paramountcy is not engaged and the regulatory obligation continues outside of bankruptcy. Where the answer to one of the above questions is "yes", the Court must move to the next two stages of the *Abitibi* test to determine whether the regulatory obligation is a claim provable in bankruptcy.

23. The question of whether the regulator is a creditor is part-and-parcel of whether federal paramountcy is engaged. Simply put, if a regulator has not stepped into the shoes of a creditor, there can be no operational conflict or frustration of the BIA's purpose. But rather than simply

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[31] *Ibid*, at para. 175, cited with approval in *Abitibi*, *supra*, at para. 57 (S.C.C.).
[32] *Abitibi* Superior Court Reasons, *supra*, at para. 176, cited with approval in *Abitibi*, *supra*, at para. 57 (S.C.C.).
[33] *PanAmericana de Bienes y Servicios SA v. Northern Badger Oil & Gas Ltd.*, 1991 ABCA 181, at para. 33.
[34] *Canadian Western Bank*, *supra*, at para. 24 (S.C.C.).

asking whether the regulator is acting as a creditor in the abstract, we respectfully submit that the Court ought to address this question by directly incorporating the well-established tests for federal paramountcy.

D. INCORPORATING THE OPERATIONAL CONFLICT AND FRUSTRATION OF PURPOSE TESTS IN THE *ABITIBI* FRAMEWORK

i. The Operational Conflict Test Requires a True Conflict

24. As Dickson J. stated in *Multiple Access Ltd. v. McCutcheon*, an operational conflict is triggered only "where one enactment says 'yes' and the other says 'no'; 'the same citizens are being told to do inconsistent things'; compliance with one is defiance of the other."[35]

25. This Court's jurisprudence looks to both the substance and effect of the federal and provincial legislation at issue.[36] Where there is no "true incompatibility" between them,[37] co-operative federalism demands the concurrent application of both laws.

26. For example, in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*,[38] this Court recently held that the BIA receiver appointment notice requirements do not conflict with the Saskatchewan *Farm Security Act*. The federal legislation allowed a secured creditor to appoint a receiver ten days after notice was given to a debtor. The provincial legislation required 150 days' notice. Justice Abella held that the language of the BIA was discretionary, and a narrow reading of its purpose showed that it did not operate as a remedy exclusive of the provincial law.[39] Importantly, she reiterated that Parliament legislating regarding a certain matter "does not lead to the presumption that in so doing it intended to rule out any possible provincial action in respect of that subject".[40]

27. This case is in part about a bankruptcy trustee's ability to renounce or disclaim worthless assets without paying the costs of environmental obligations associated with those assets. But

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[35] *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191; *Moloney*, at para. 19 (S.C.C.); *Lemare Lake*, at para. 18 (S.C.C.).
[36] *Abitibi*, *supra*, at para. 19 (S.C.C.); *Husky Oil*, *supra*, para. 40 (S.C.C.).
[37] *Moloney*, *supra*, at para. 63 (S.C.C.).
[38] *Lemare Lake*, *supra* (S.C.C.).
[39] *Ibid*, at para. 47 (S.C.C.). See also *Ryan Estate*, *supra*, at paras. 75-76, 84 (S.C.C.) and *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, at para. 35, where this Court also considered permissive federal legislation and held federal paramountcy was not engaged.
[40] *Lake Lemare*, *supra*, at para. 20 (S.C.C.), citing *Canadian Western Bank*, *supra*, at para. 74 (S.C.C.).

that ability is permissive — not mandatory. Although the parties disagree on whether s. 14.06 permits trustees to renounce assets,[41] that issue is not dispositive. Even if this Court finds that the trustee *may* renounce environmental liabilities, the trustee is never *required* to renounce or disclaim the debtor's property. The BIA does not demand that trustees renounce assets, nor does it provide that a trustee's ability to disclaim assets is unfettered. The permissive nature of the BIA suggests that there will be situations in which a trustee will be precluded from renouncing certain assets. Indeed, it is not contested that the provincial and federal legislation at issue has operated in harmony for over 25 years — a fact suggesting the BIA allows the provinces to operate in a non-disruptive way.[42]

ii. "Frustration of Purpose" Requires More Than an Incidental Impact

28. Frustration of purpose is found where a provincial law is "incompatible with the *purpose* of a federal law".[43] The first step in determining whether the purpose of federal legislation is frustrated in a paramountcy analysis is establishing its purpose.[44]

29. This Court has articulated the purpose of the BIA as twofold. First, the BIA seeks to provide for the orderly liquidation of insolvent debtors through a single proceeding, which strives to ensure maximum recovery for all creditors in accordance with a legislated priority. Second, the BIA provides a bankrupt with a "fresh start" by discharging individual bankrupts.[45] The first goal is at issue in this case.

30. The question is whether the provincial legislation subverts the BIA's purpose by effectively reordering the BIA's priority distribution scheme and ordering that provincial debts be paid in priority to other claims.[46] This goal, though important, is not without limits. The BIA's priority distribution scheme recognizes that this goal does not come at an unreasonable

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[41] Joint Factum of the Appellants, at paras. 45-79; Factum of the Respondent, ATB Financial, at paras. 64-91; Factum of the Respondent, Grant Thornton Limited, at paras. 38-68.
[42] This Court has considered that federal and provincial legislative schemes have in fact operated harmoniously in determining whether federal paramountcy is engaged. In *Canadian Western Bank*, *supra*, at para. 99 (S.C.C.), which involved an inquiry into whether federal banks promoting the sale of insurance were required to comply with provincial insurance legislation, the banks had been complying with both the federal and provincial legislation for several years.
[43] *Canadian Western Bank*, *supra*, at para. 73 (S.C.C.) (emphasis added).
[44] *Lemare Lake*, *supra*, at para. 26 (S.C.C.); *COPA*, *supra*, at para. 66 (S.C.C.). See also "Of Paramount Importance", *supra*, at pp. 2-3, GCBA, Tab 2.
[45] *Moloney*, *supra*, at paras. 32-36 (S.C.C.).
[46] *Husky Oil*, *supra*, at paras. 36-37 (S.C.C.); *Sun Indalex Finance, LLC. v. United Steelworkers*, 2013 SCC 6, at paras. 56, 60 (S.C.C.); *Abitibi*, *supra*, at para. 19 (S.C.C.).

cost to other public interests.[47] As discussed above at paragraph 17, the BIA includes a number of checks and balances to ensure debtors cannot avoid their obligations to the public, and expressly preserves the rights of regulators.

31. Provincial laws do not frustrate the purpose of federal insolvency legislation merely because they have an incidental impact on a particular insolvency,[48] nor do they subvert the federal bankruptcy and insolvency scheme merely because they require the expenditure of funds that have the effect of reducing the size of a debtor's estate.[49] This Court explicitly rejected such a "bottom line" approach in *Husky Oil Operations Ltd. v. Minister of National Revenue*.[50] Despite finding that the Saskatchewan *Workers' Compensation Act* effectively reordered the BIA's priority distribution scheme by ordering workers' compensation debts to be paid in priority to other claims, this Court held:

> It is trite to observe that the *Bankruptcy Act* is contingent on the provincial law of property for its operation. The Act is superimposed on those provincial schemes when a debtor declares bankruptcy. As a result, provincial law necessarily affects the "bottom line", but this is contemplated by the *Bankruptcy Act* itself. Indeed, it is no exaggeration to say that there is no "bottom line" without provincial law.[51]

32. To determine whether a regulatory action is that of a creditor such that the BIA priority scheme is frustrated, courts must therefore focus on whether the provincial law seeks to recoup a monetary obligation, as opposed to whether the amount of assets available to creditors as a whole is merely incidentally diminished as a result of complying with a regulatory scheme.

33. The role of a regulator will differ in every case. In *Abitibi*, it was clear that the Province was using its powers to recoup costs and jump the queue of creditors. But a measured approach to the first prong of the *Abitibi* test weighs in favour of not *presuming* regulators to be creditors. That presumption undermines, rather than promotes, co-operative federalism. Our proposed

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[47] "Of Paramount Importance", *supra*, at p. 23, GCBA, Tab 2.
[48] *Canadian Western Bank*, *supra*, at para. 28 (S.C.C.). See also "Of Paramount Importance", *supra*, at pp. 4, 13, GCBA, Tab 2.
[49] *Husky Oil*, *supra*, at para. 31 (S.C.C.). Martin J.A. summarized this approach in her dissenting reasons in the court below: "A mere effect on bankruptcy generally, such as an effect on the value of a bankrupt's estate or the amount that is available for distribution under the bankruptcy regime, does not frustrate the purpose of the *BIA*, and does not render a provincial law inapplicable in bankruptcy": at para. 156.
[50] *Husky Oil*, *supra*, at para. 31 (S.C.C.).
[51] *Ibid*.

approach leaves room for the provinces to continue to protect the environment in bankruptcy and insolvency cases except in clear cases where environmental regulation is merely a pretext for asserting a monetary claim. Such an approach is consistent with the principles of co-operative federalism and reflects the reality that environmental regulation must not cease as a going concern when insolvency proceedings are triggered.

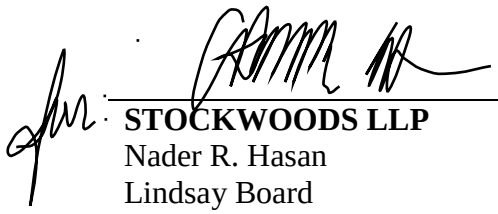
PART IV - COSTS

34. Greenpeace does not seek costs and asks that none be awarded against it.

PART V - ORDER REQUESTED

35. Greenpeace does not request any orders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5 day of February, 2018.



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PART VI - TABLE OF AUTHORITIES

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