S.C.C. FILE NO.: 37627

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

BETWEEN

ORPHAN WELL ASSOCIATION and ALBERTA ENERGY REGULATOR

APPELLANTS
(Appellants)

and

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

RESPONDENTS
(Respondents)

and

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1. Overview

1. This Appeal concerns whether aspects of Alberta's oil and gas regime (the "Provincial Legislation")[1] can coexist with subsections 14.06(4)-(8) and the scheme of distribution set out in section 136 of the federal Bankruptcy and Insolvency Act.[2]

2. Alberta's life-cycle based regulatory regime requires that oil and gas operators return the land on which they have operated to the *status quo ante* by imposing abandonment and reclamation obligations.[3] The obligations at issue are not an environmental condition or damage affecting the debtor's real property interests, meaning that subsections 14.06(4)-(8) of the *BIA* do not apply. Equally, the imposition of those obligations do not constitute a claim such that the *BIA* scheme of distribution could be offended. Instead, the obligations are inherent to an operator's tenure on a third party's land, which must be fulfilled at the end of the productive life of a well. They are not a separately existing debt, consistent with this Honourable Court's finding in *Daishowa*.[4] Regardless, if the actions of the Alberta Energy Regulator ("AER") are conceived of as debt claims, the consequence of that position is that the AER is a secured creditor with priority over ATB Financial ("ATB").

2. Relevant Facts

3. Ecojustice accepts the facts as stated by the Appellants.

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[1] *Oil and Gas Conservation Act* RSA 2000, c O-6 ["*OGCA*"]; *Pipeline Act*, RSA 2000, c P-15; Alberta Energy Regulator, Directive 006: Licensee Liability Rating (LLR) Program and Licence Transfer Process (17 February 2016) ["*Directive 006*"].
[2] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ["*BIA*"].
[3] *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 ["*EPEA*"]; *Conservation and Reclamation Regulation*, AR 115/1992, s 1(e) ["*Conservation Regulation*"]; *Oil and Gas Conservation Rules*, AR 151/71, s 3.013.
[4] *Daishowa-Marubeni International Ltd v Canada*, 2013 SCC 29 ["*Daishowa*"].

PART II – ECOJUSTICE'S POSITION ON THE ISSUES

4. The central issue upon which Ecojustice intervenes in this Appeal is whether the courts below erred in finding that the doctrine of paramountcy operates to render the Provincial Legislation inoperative.[5] The courts below did so err. Paramountcy does not apply to the facts of this case for the following reasons:

i) There is no conflict between subsections 14.06(4)-(8) of the *BIA* and the Provincial Legislation because those subsections apply to the real property of the debtor affected by the environmental condition or damage. Redwater Energy Corporation ("Redwater") has no such property interest. The lands affected by the environmental condition or damage are not those of the debtor but those of the surface landowner as the lands existed when Redwater arrived;

ii) There is no conflict between the Provincial Legislation and the *BIA*'s scheme of distribution because the AER is not a creditor under the *Abitibi*[6] framework; the reclamation obligations are not separate existing debts, but rather, future expenses embedded in the tenure which serve to depress the value of the tenure, as this Honourable Court held in *Daishowa*[7]*;*

iii) If the AER constitutes a creditor seeking to enforce a monetary debt, as found by the lower courts and insisted on by the trustee ("GTL") and ATB,[8] the consequence of that position is that under subsections 103(2) and (3) of the *OGCA*,[9] AER has a first-priority security interest in certain of the debtor's assets, such that the *BIA*'s scheme of distribution is not disturbed and paramountcy is not engaged.

5. In other words, either the AER's actions are regulatory in nature and must be

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[5] *Orphan Well Association* v. *Grant Thornton Limited*, 2017 ABCA 124 ["Majority Decision"]; *Redwater Energy Corporation (Re)*, 2016 ABQB 278 ["QB Decision"].
[6] *Newfoundland and Labrador v AbitibiBowater Inc.* 2012 SCC 67 ["*Abitibi*"].
[7] *Daishowa*, *supra* note 4.
[8] Majority Decision, *supra* note 5 at paras 73, 79-80; Redwater QB *supra* note 5 at para 173; GTL Factum at paras 1, 5, 31, 106-107 and 114; ATB Factum at para 126.
[9] *OGCA*, *supra* note 1, s 103(2) and (3).

adhered to or the AER's actions are monetary in nature, in which case the AER would be a secured creditor under the *OGCA*. Under either interpretation, environmental protection, a fundamental value in Canadian society,[10] is preserved.

PART III – STATEMENT OF ARGUMENT

1. Subsections 14.06(4)-(8) of the *BIA* do not apply

6. Subsections 14.06(4)-(8) of the *BIA* apply to real property of the bankrupt affected by an environmental condition or damage. In this case, the bankrupt has no real property interest affected by an environmental condition or damage so these subsections of the *BIA* are not applicable.

7. Consistent with the modern rule of statutory interpretation,[11] real property affected by an environmental condition or damage refers to the impairment of interests in land. GTL's contention that an "environmental condition" is an environmental state[12] both ignores the context of the subsection, wherein the term condition is found adjacent to damage, and reduces the entire phrase "real property affected by an environmental condition or damage" to meaninglessness – as everything exists in an environmental state.

8. In the instant case, the subsurface minerals and subsurface geological formation, the reservoir, are not an environmental condition or damage but simply the environment. It is the surface lands that are affected by an environmental condition or damage and which require the abandonment, remediation (if applicable) and reclamation.[13]

9. The bankrupt's property interests consist of: (a) a mineral lease and *profit à prendre*; (b) a well licence; and (c) a negotiated surface lease with the surface owner

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[10] *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031 at para 55; *R v Hydro-Québec*, [1997] 3 SCR 213 at para 124; *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, [2001] 2 SCR 241 at para 1.
[11] *Marine Services International Ltd v Ryan Estate*, 2013 SCC 44, [2013] 3 SCR 53 at para 77.
[12] GTL Factum at para 57.
[13] *EPEA, supra* note 3; *Conservation Regulation, supra* note 3, s 1(e).

or a right of entry order. Even if all of those interests are characterized as real property interests, none is an interest affected by the environmental condition or damage.

10. First, with respect to the mineral lease and the *profit à prendre* granted thereunder, the Justices write in the Majority Decision that "…assets encumbered with environmental obligations, in this case the *profit à prendre* in the oil and gas deposits,…." and they write further at paragraph [63] (b) it "…is the physical oil and gas assets that become contaminated…."[14]

11. With respect, it is not the physical oil and gas assets that become contaminated or subject to an environmental condition or damage. The rights of the mineral lessee to explore for, work and attempt to capture and produce oil and gas from the lands of the mineral owner are real property interests but they are not the interests affected by the environmental condition or damage that are to be remediated and reclaimed to an "equivalent land capability".[15]

12. Second, the bankrupt's well licence is not real property and even if it were, it does not make sense to speak of reclamation of a permission to drill and operate a well.[16]

13. Third, whether the oil and gas company obtains a right of entry order or negotiates a surface lease, the rights thereby obtained are not the complete bundle of rights enjoyed by a fee simple owner. Some incidents of fee simple ownership remain with the surface owner[17] and the surface owner retains throughout the life of the well, a right of reversion.[18] That reversionary interest is in real property that has been affected by an environmental condition or environmental damage arising from the oil and gas operations. Abandonment, remediation and reclamation are the steps required

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[14] Majority Decision, *supra* note 5 at paras 57(c) and 63(b).
[15] *EPEA, supra* note 3; *Conservation Regulation, supra* note 3, s 1(e).
[16] Majority Decision, *supra* note 5 at para 41.
[17] *Surface Rights Act*, RSA. c S-24, s 16.
[18] *Murphy Oil Co. v. Dau,* 1969 CanLII 770 (ABCA), varied [1970] SCR 861, 1970 CanLII 136 (SCC); *Cochin Pipe Lines Ltd v Rattray,* 1980 ABCA 314 (CanLII), leave to appeal to SCC refused 27 AR 359; and *Dome Petroleum Ltd v Grekul,* 1983 CanLII 1104 (ABQB).

in order that, upon reversion and the receipt back by the surface owner, the full complement of rights of a fee simple owner to the beneficial use and enjoyment of a reclaimed property can be utilized and enjoyed once again. Abandonment, remediation and reclamation rectify the environmental condition or damage to the real property which is reverting to the freehold owner.

14. The reversionary interest and the fee simple estate are not property of the debtor and do not form part of the bankrupt's estate. As the reversionary and fee simple interests in the land subject to the environmental condition or damage do not form part of the bankrupt's estate, the trustee cannot renounce those real property interests pursuant to subsections 14.06(4)(a)(ii) and 14.06(4)(c) of the *BIA* because the lessee has never held those interests.

15. The AER imposes abandonment and reclamation obligations on oil and gas operators as a function of their tenure. Nevertheless, GTL contends that the AER's issuance of abandonment orders affects the bankrupt's rights of tenure.[19] This is impossible. None of the bankrupt's rights of tenure - its exploratory rights, licence or occupation and access rights – can be affected by abandonment and reclamation obligations that are already incidents of that tenure. The bankrupt's tenure was premised on and encapsulates those exact obligations. Its real property interests are unaffected. Parliament remains able to expressly legislate the result the Respondents seek but their strained interpretation is an inefficient route to such an undesirable end.

16. In summary, it is the landowner's right to receive surface lands back in the state they were in or an equivalent state prior to the arrival of the debtor so that the landowner may once again have full use and enjoyment of the lands. It is the land of the freehold owner, that returns to the landowner on reversion, that is affected by the environmental condition or damage. It is not the mineral interest, licence, surface lease or right of entry order - the only property interests held by the debtor – which are affected by the environmental condition or damage. Therefore, there is no real property interest of the debtor affected by an environmental condition or damage which the trustee can

[19] GTL Factum at paras. 56-64.

renounce pursuant to subsections 14.06(4)-(8) of the *BIA*.

2. There is no debt owed for reclamation obligations by the debtor

17. Under the Provincial Legislation, oil and gas operators are granted tenure to exploit oil and gas deposits on third parties' land. The temporary tenure rights consist of certain privileges to access and occupy the surface of third parties' land, associated licenses, and mineral rights and related *profit à prendres*. Alberta's approach to the grant of tenure is life-cycle based as the tenure is conditional on the restoration of the surface land to the *status quo ante* or an equivalent land capability through the imposition of abandonment and reclamation obligations at the end of the productive life of a well.[20] The abandonment and reclamation obligations are not separately existing debts owed by the oil and gas operator but are incidents of the tenure.

18. By contrast, the lower courts inaccurately held that compliance with the abandonment and reclamation obligations at issue here would conflict with the *BIA*'s scheme of distribution by elevating the debt claim of the AER and disturbing the scheme of distribution.[21] There is no such conflict as the abandonment and reclamation obligations are not a debt but a future expense embedded in the tenure.

19. This reasoning is consistent with this Honourable Court's decision in *Daishowa.* In that case at issue was whether certain reforestation obligations, contingent or otherwise, imposed by Alberta legislation, in the forestry setting, constituted a debt.[22] *Daishowa* was decided after the amendments to the *BIA* under consideration here and after this Court's decision in *Abitibi*[23] and the result was more in alignment with the Alberta Court of Appeal decision in *Northern Badge*r.[24]

20. *Daishowa* arose in the income tax setting. Daishowa sold two of its logging

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[20] *EPEA, supra* note 3; *Conservation Regulation, supra* note 3, s 1(e).
[21] Majority Decision, *supra* note 5 at paras 73, 79-80; and Redwater QB *supra* note 5 at para 173.
[22] *Daishowa, supra* note 4.
[23] *Abitibi, supra* note 6.
[24] *PanAmericana de Bienes y Servicios* v. *Northern Badger Oil & Gas Limited*, 1991 ABCA 181 ["Northern Badger"].

tenures granted to it by the Alberta Government pursuant to the *Forests Act*.[25] The disposition to it included reforestation obligations. Upon a transfer of a forestry tenure, the responsible provincial Minister could decline to accept the transfer to the purchaser if the transaction did not include the legislated obligation to reforest harvested areas. The Federal Minister of National Revenue argued that the reforestation obligations constituted a debt hence Daishowa was obligated to report the proceeds of purchase and sale as cash and the assumption of debt, the latter being the projected cost of reforestation.

21. This Honourable Court unanimously rejected the position of the Federal Minister of National Revenue holding:

> [3] The obligation to reforest areas harvested in accordance with a forest tenure in Alberta is a future expense that is embedded in the tenure. As such, the obligation serves to depress the value of the forest tenure. It is not a separate existing debt of the vendor that is assumed by the purchaser as part of the sale price of the forest tenure. [Emphasis added]
>
> …
>
> [31] The effect of Alberta's scheme is to embed the reforestation obligations into the forest tenure, such that the obligations cannot be severed from the property itself. As such, the reforestation obligations are simply a future cost tied to the tenure that depresses the value of the tenure…
>
> …
>
> [40] …the cost of reforestation is not a distinct existing liability of the vendor. The assumption of the cost of reforestation would thus be excluded from proceeds of disposition independent of whether the cost is absolute or contingent. Using the example of the sale of a building in need of repair, the purchaser's assumption of the future cost of repairing the building is not part of the sale price…the cost of repairs may, of course, affect the sale price by affecting the amount the purchaser is willing to pay for the building. It does not, however, affect whether the cost of repairs is part of the proceeds of disposition. The same is true of the reforestation obligations embedded in a forest tenure.[26]

22. In contrast to provable claims in bankruptcy, which are debt claims by creditors

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[25] *Forests Act*, RSA 1980, c. F-16 (now the *Forests Act* RSA 2000, c. F-22).
[26] *Daishowa, supra* note 4 at paras 3, 31 and 40.

against debtors, the obligations at issue in this case, much like obligations imposed by provincial building codes or occupational health and safety legislation, are not claims against debtors but features of assets. The reforestation obligations at issue in *Daishowa,* like the abandonment and reclamation obligations in the instant matter, are incidents of tenure, not debts owed to a creditor so the *Abitibi* test cannot be satisfied.

23. Even if the effect of these incidents of tenure is functionally to depress recovery for secured creditors below that which they would obtain if these provincial obligations did not exist, that is of no moment as the purpose of the *BIA* is not to enhance the value of secured creditors' security by invalidating inconvenient provincial legislation.[27] In fact, as this Court held in *Re Giffen,* while the *BIA* determines priorities between creditors, it depends on provincial law to determine what rights creditors have in the property in the first place.[28]

24. Properly considered as incidents of tenure, obligations to abandon and reclaim do not depress recovery for secured creditors as the obligations are features of the property itself, to which secured creditors would have no greater entitlement outside of bankruptcy. Therefore, no conflict with the *BIA*'s scheme of distribution arises.

3. If a debt is due and owing to the AER, it is a secured creditor

25. The courts below and the Respondents maintain that the AER's pre-bankruptcy requirement to post security or abandon wells are quantified but unpaid monetary debts.[29] Either the AER is enforcing regulatory requirements or it is enforcing a debt. If the latter, it is a secured creditor and paramountcy is not engaged.

26. The AER meets the *BIA*'s definition of a secured creditor[30] by virtue of

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[27] *GMAC Commercial Credit Corporation – Canada v T.C.T. Logistics,* 2006 SCC 35 at para 51.
[28] *Re Giffen*, [1998] 1 SCR 91 at para 64; *BIA*, *supra* note 2, s 72.
[29] Majority Decision, *supra* note 5 at paras 73 and 79-80; Redwater QB *supra* note 5 at para 173; ATB Factum para 126; GTL Factum, at paras 1, 5, 31, 106-107 and 114.
[30] BIA, *supra* note 2, s 2:

> ***secured creditor*** means a person holding a mortgage, hypothec, pledge, charge or lien on or against the property of the debtor or any part of that

subsections 103(2) and (3) of the *OGCA*.[31] The AER is a corporation, which at law is "a person".[32] It is "holding a lien" as subsection 103(2) of the *OGCA* provides that "the Regulator has a lien." The lien is "on or against the property of the debtor or any part of that property" as subsection 103(2) specifies the assets that are the subject of the lien. Further, the lien is held "as security for a debt due or accruing due to the person from the debtor" because under subsection 103(3) of the *OGCA*, the lien arises when the debtor fails to satisfy a debt when due or accruing due, [33] which occurred here when neither security was posted nor abandonment completed by the September 18, 2015 deadline established by the AER.[34] Ultimately, it is irrelevant whether the AER sufficiently demanded payment pre-bankruptcy as what is at issue in this case is whether the grant of GTL's *declaratory* relief[35] - that a requirement to post security offends the *BIA* scheme of distribution - was correct. It was not. An *OGCA* lien constitutes the AER as a secured creditor.

27. There is no conflict between the *OGCA* which grants the AER security, and the *BIA*, which respects the rights of secured creditors,[36] given that section 14.06 of the

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> property as security for a debt due or accruing due to the person from the debtor… [Emphasis added.]

[31] *OGCA*, *supra* note 1, s103(2) and (3):

> (2) The Regulator has a lien in respect of a debtor's debt on the debtor's interest in any wells, facilities and pipelines, land or interests in land, including mines and minerals, equipment and petroleum substances, and when it arises, the lien has priority over all other liens, charges, rights of set-off, mortgages and other security interests.
>
> (3) The Regulator's lien arises when the debtor fails to satisfy the debt when due, and expires on full satisfaction of the debt.

[32] *Responsible Energy Development Act*, SA, 2012, c R-17.3 ["*REDA*"], s 3.

[33] *OGCA*, *supra* note 1, s 103(3). While subsections 30(4) and (5) of the *OGCA* specify how certain costs and penalties in respect of abandonment may become debts, that section is not exhaustive of all possible debts that can be due to the AER. Indeed, subsection 103(1)(a) of the *OGCA* recognizes "other amounts" explicitly.

[34] GTL Factum at para 31.

[35] QB Decision *supra* note 5 at paras 182-183; *Alberta Energy Regulator v Grant Thornton Limited*, 2017 ABCA 278 at paras 99-103.

[36] *BIA*, *supra* note 2, s 69.3(2), 71, 136; *Tucker v Aero Inventory (UK) Limited*, 2011 ONSC 4223 at paras 141 and 146.

BIA does not apply and section 86 does not subordinate the AER's claims because the AER is not an agent of the Crown.[37] Just as ATB derives its secured status from provincial law,[38] so too does the AER. The difference is that the PPSA does not govern the priority of statutory liens.[39] Instead, section 103(2) of the *OGCA* expressly provides that the *OGCA* lien has priority, in respect of certain assets, over all other secured creditors.[40] The Respondents' contention that secured creditors would not commence insolvency proceedings if the benefit accrued to AER[41] is a red herring; if AER is the first-ranking secured creditor, the AER would commence proceedings.

4. A Nuanced Approach to the Polluter Pays Principle In Insolvency

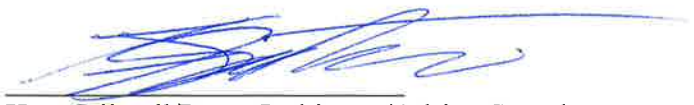
28. An insolvent polluter, by definition, cannot pay. Third parties will pay for the polluter's conduct. Creditors, such as ATB, who participated in the externalization of the polluter's costs are more appropriate parties to bear the burden of the internalization of those costs through the consequent reduction of their claims than, in the worst case scenario, complete strangers to the polluter, the general public.

PARTS IV AND V – COSTS AND ORDER SOUGHT

29. Ecojustice requests that there be no costs awarded to or against it in relation to the Appeal. It takes no position on the disposition of the Appeal but respectfully requests that the Court take into consideration the foregoing submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of Ottawa, Ontario, this 5th day of February, 2018.



Kurt Stilwell/Barry Robinson/Adrian Scotchmer
Lawyers for the Intervener: Ecojustice Canada Society

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[37] *REDA*, *supra* note 32, s 4.
[38] *Personal Property Security Act*, RSA c P-7 ("PPSA").
[39] Ibid, s 4.
[40] *OGCA*, *supra* note 1, s 103(2). As with all secured interests, section 81 BIA super-priority interests retain priority.
[41] GTL Factum at para 28, ATB Factum at para 83.

PART VI – TABLE OF AUTHORITIES

CASES	Paragraph of Authority Referenced in Factum	Paragraph of Factum where authority cited
Alberta Energy Regulator v Grant Thornton Limited, 2017 ABCA 278	99-103	26
114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 SCR 241	1	5
Cochin Pipe Lines Ltd. v. Rattray, [1981] 1 W.W.R. 732, 22 L.C.R. 198, 117 D.L.R. (3d) 242, 27 A.R. 32 (ABCA), leave to appeal to S.C.C. refused 27 A.R. 359	Generally	13
Daishowa-Marubeni International Ltd v. Canada, [2013] 2 SCR 336	3, 31, 40	2, 4, 19-22
Dome Petroleum Ltd. v. Grekul, 1983 CanLII 1104 (AB QB)	Generally	13
Giffen (Re), 1998 1 SCR 91	64	23
GMAC Commercial Credit Corporation – Canada v. T.C.T. Logistics Inc., [2006] 2 SCR 123, 2006 SCC 35 (CanLII)	51	23
Marine Services International Ltd v Ryan Estate, 2013 SCC 44	77	7
Murphy Oil Co. v. Dau, 70 W.W.R. 339 at 359, 7 D.L.R. (3d) 512 (ABCA), varied [1970] S.C.R. 861	Generally	13
Newfoundland and Labrador v. AbitibiBowater Inc., 2012 SCC 67	Generally	4, 19, 22
Ontario v Canadian Pacific Ltd., [1995] 2 SCR 1031	55	5
Orphan Well Association v. Grant Thornton Limited, 2017 ABCA 124	41, 57(c) and 63(b), 73, 79-80	4, 10, 12, 18, 25

PanAmericana de Bienes y Servicios v. *Northern Badger Oil & Gas Limited*, 1991 ABCA 181	Generally	19
R. v. Hydro-Québec, [1997] 3 SCR 213	124	5
Redwater Energy Corporation (Re), 2016 ABQB 278	173, 182-183	4, 26
Tucker v Aero Inventory (UK) Limited, 2011 ONSC 4223	141, 146	27

LEGISLATION	**Section of Legislation Referenced in Factum**	**Paragraph of Factum where authority cited**
Alberta Energy Regulator, Directive 006: Licencee Liability Rating (LLR) Program and Licence Transfer Process (17 February 2016)	Generally	1
Bankruptcy and Insolvency Act, RSC 1985, c B-3 / *Loi sur la faillite et l'insolvabilité*, LRC 985, c B-3	English text: 2, 14.06(4)(a)(ii), 14.06(4)(c), (5)-(8), 69(2), 71, 72 and 136 / French text: 2, 14.06(4)-(8), 69(2), 71, 72, and 136	2, 4, 6, 14, 18-19, 23-24, 26-27
Conservation and Reclamation Regulation, AR 115/1993	1 (e)	2, 8, 11, 17
Environmental Protection and Enhancement Act, RSA 2000, c E-12	144	2, 8, 11, 17

Forests Act, R.S.A. 1980, c. F-16 (now the Forests Act R.S.A. 2000, c. F-22)	Generally	20
Oil and Gas Conservation Act, RSA 200, c O-6	103(2) and (3)	4-5, 26-27
Oil and Gas Conservation Rules, AR 151/71	3.013	2
Personal Property Security Act, RSA c P-7	4	27
Pipeline Act, RSA 2000 c.P-15	Generally	1
Responsible Energy Development Act, SA 2012, c R-17.3	3	26-27
Surface Rights Act, R.S.A. 2000 Ch. S-24	16	13